Human Rights Law Centre

Modern Slavery Act 2018 (Cth) Review

Draft Submission by the Human Rights Law Centre

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Human Rights Law Centre

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Executive Summary & Recommendations

The Human Rights Law Centre is a national not-for-profit legal centre which promotes and protects human rights in Australia and in Australian business and government operations overseas. We have a strong focus on legal and policy reforms to prevent and address forced labour and other human rights abuses in the operations and supply chains of Australian companies.

Since the enactment of the *Modern Slavery Act 2018* (Cth) (***MSA***), we have supported Australian Government efforts to ensure the successful implementation of the Act, contributing to the development of the Commonwealth Guidance for Reporting Entities. Working with academic and civil society partners, we have also published two reports evaluating company reporting under the legislation by approximately 100 companies operating in sectors with high risks of modern slavery: *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (February 2022) and the recently released *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (November 2022).

We now welcome the opportunity to provide a submission to the statutory review of the MSA being conducted by the Attorney-General's Department. We have responded to those questions in the Issues Paper that relate directly to our institutional expertise or are based the research we have undertaken.

In summary, it is our view that while the MSA has led to increased awareness, policies, procedures and internal training on modern slavery over the past three years, the legislation does not currently appear to be driving a 'race to the top' to address modern slavery as it was intended to do.

Compliance with the mandatory reporting criteria remains patchy and, with a few notable exceptions, the quality of reporting in many companies' statements remains poor. Even after two years of reporting, many companies are still not identifying obvious modern slavery risks in their supply chains or taking meaningful action to address them. Of particular concern to us is the fact that the legislation does not appear to be driving changes in the areas that matter most for tackling modern slavery, such as efforts to address recruitment fees or undertake due diligence on suppliers, improve purchasing practices or lift supply chain working conditions.

This review provides a critical opportunity to consider how the MSA can be strengthened so it makes a greater difference to the lives of workers. The Human Rights Law Centre supports the Government's proposal to introduce penalties and an independent Anti-Slavery Commissioner (***Commissioner***) to improve compliance with the MSA. However, our research indicates that reporting in and of itself, even if properly enforced, is unlikely to result in the transformative changes to corporate practices needed to help eliminate modern slavery.

We believe that more fundamental reforms to the legislation are needed. In particular, the MSA should be reoriented to require action by companies to address modern slavery rather than simply reporting on their current practices. We recommend the introduction of a 'duty to prevent' modern slavery which would impose a legal obligation on companies to undertake human rights due diligence to identify, prevent and address modern slavery risks in their operations and supply chains, with penalties and potential civil liability where they fail to do so. This would provide a mechanism for workers to seek direct remedy from companies that fail to take action to address modern slavery in their operations and supply chains, and a more level playing field for companies that are already taking meaningful action to try to improve labour standards within their supply chains.

Recommendations

1. **Amend the MSA to introduce a 'duty to prevent' modern slavery that requires reporting entities to undertake human rights due diligence to identify, prevent and address modern slavery risks in their operations and supply chains.**

   A due diligence requirement should be imposed on all entities who meet the current reporting threshold under the MSA of $100 million. After a one-year phase-in period, failure to undertake due diligence should attract penalties and other administrative consequences, including being listed on the MSA Register as a non-compliant entity and being prohibited from public tenders. Where a failure to undertake due diligence results in modern slavery occurring, workers should also have a direct civil cause of action to pursue companies for compensation. Companies should have a defence against legal liability where they can demonstrate they have undertaken all reasonable steps to implement appropriate due diligence.

   The Human Rights Law Centre has developed a model amendment (provided at **Annexure A,** and further outlined at section 2.3.3) which demonstrates how this obligation could be incorporated into the MSA.

2. **Introduce financial penalties and other administrative consequences for non-compliance with reporting obligations.**

   Companies that fail to report, repeatedly submit incomplete reports which fail to address the mandatory reporting criteria, or provide false or misleading information, should also face consequences including financial penalties, being listed on the MSA Register as a non-compliant entity, and being prohibited from public tenders. Public procurement should also be used as an incentive to reward effective action on modern slavery and human rights by companies.

3. **Ensure appropriate oversight and enforcement of the MSA, including through the appointment of an independent Anti-Slavery Commissioner.**

   Key functions and powers of the Commissioner should include the ability to monitor compliance; investigative & enforcement powers; the ability to handle complaints; preparing guidance on high-risk sectors; and reviewing the effectiveness of the MSA. Appropriate resourcing must be given to the Commissioner to ensure that it is able to discharge its functions effectively.

4. **Conduct a further 3-year statutory review of the MSA's effectiveness.**

   This should consider:

   (a) The extent to which further amendments to the MSA have been effective in improving compliance and prompting effective action by companies to tackle modern slavery;

   (b) Whether there should be further lowering of the threshold and staged phasing in of reporting and due diligence obligations on companies; and

   (c) Whether the 'duty to prevent' modern slavery should be extended to impose an obligation to prevent a broader range of human rights abuses.

5. **Ban imported goods produced with forced labour as a complementary measure to strengthen the MSA.**

   While we recognise that this measure is out of scope for this review, we recommend that the Australian Government introduces a ban on imports produced with forced labour as an additional

complementary measure to drive corporate action on modern slavery. Amending the *Customs Act 1901* (Cth) to include a ban on goods produced with modern slavery, as has been done in the United States, has the potential to greatly enhance the effectiveness of the MSA and further encourage businesses to take action to address modern slavery risks in their overseas supply chains.

2. Impact of the Modern Slavery Act

2.1 Has the Modern Slavery Act had a positive impact in the first three years?

Issues Paper Q1

The MSA has had some positive impacts in its first three years of operation. Over 5,000 statements have been lodged on the Modern Slavery Register indicating a high level of awareness of and engagement with the legislation. Discussions on modern slavery and human rights risks have taken place, many for the first time, at the highest levels of governance across thousands of Australian-based companies. Risks to people, not just to the bottom line, have begun to be taken more seriously by investors and boards.

We note that reviews undertaken by the Modern Slavery Business Engagement Unit (***MSBEU***) suggest compliance with the mandatory reporting criteria has also improved over time, with 72% of second-year statements by companies 'likely to be compliant' versus 59% of statements published in year one.

Our detailed review of corporate reporting by 100 companies, as detailed in our *Broken Promises* report, paints a less rosy picture of rates of compliance rates. We found that of the second-year statements we reviewed, 66% still had not adequately addressed the mandatory reporting criteria. While this was an improvement of 11% on the same companies' first-year statements, these figures are still unacceptably low.

We also found that up to seven companies of the 102 companies we had reviewed in our first report appeared not to have published second-round statements at all – or at least that were missing from the MSA Register without an apparent legitimate reason. There is a notable absence of information available with regard to entities that do not submit timely reports, together with a lack of enforcement activity. Without a list of reporting entities available or any transparency around non-reporters, there is very little downside for entities that fail to report.

Even more concerning to us was the fact that, despite sourcing from sectors which have been repeatedly identified in public reports and the media as involving systemic abuses (horticulture, garments, rubber gloves and seafood), nearly one in two companies we reviewed (43%) failed to identify obvious modern slavery risks in their second-round reports. 72% of garment companies sourcing from China, for instance, failed to mention risks for Uyghur forced labour in their supply chains and only one in two food companies identified horticultural produce from Australia as a high-risk area.

Our research did find evidence of improvement with regard to disclosing internal policies (85%, up from 75%), policies setting out expectations of suppliers and business partners to address modern slavery (65%, up from 52%) and training being provided to staff and management (83%, up from 58%). Reporting on these measures was more detailed in the second year, including communicating how relevant policies were communicated to suppliers (46%, up from 27%). There was also an increase in transparency around the disclosure of allegations or instances of modern slavery (14%, up from 8%).

However, on other measures of addressing modern slavery, progress was far more limited with the average company improving its overall score by just 7%. We found that only 33% of companies (up from 27% in first-round reporting) operating in high-risk sectors demonstrated any evidence of taking effective action to address their salient risks. For example:

- Approximately one in four (26%) companies reported that they undertake human rights due diligence on new suppliers at the selection stage (up from 25% in first-round reporting).

- One fifth of companies (20%) disclosed procedures to ensure responsible purchasing practices (eg: adequate pricing, prompt payment, managing workload changes) (up from 19% in first-round reporting).
- Just 21% of companies expressed a commitment to ensuring workers in their supply chains are paid a living wage (up from 14% in first-round reporting).
- Only 18% of companies described processes for ensuring that workers are not being charged recruitment fees (up from 13% in first-round reporting).
- Only 35% of companies disclosed collaboration with key stakeholders such as trade unions, migrant worker groups, or civil society organisations (up from 34% in first-round reporting), with just 17% demonstrating evidence of stakeholder consultation in developing or reviewing relevant policies (up from 13% in first-round reporting).
- Only 19% of companies reflected on the effectiveness of their modern slavery response over the past year.

Further, 56% of the commitments made by companies in their first round statements to improve their modern slavery responses remained unfulfilled in the second round of reporting – demonstrating that a majority of these commitments existed only on paper. Concerningly, we also found that approximately 8% of statements appeared to be substantially recycled or 'rolled over' from first round statements without any qualitative improvements.

Other research reports which have analysed corporate reporting under the MSA have reached similar conclusions about the quality of statements published. Walk Free's 2022 review of 50 garment company statements across the UK and Australia, for instance, found that 77% of statements failed to meet minimum reporting requirements,[1] and that 35% failed to identify any modern slavery risks. A report by the Australian Council of Superannuation Industries and Pillar Two found that over 60% of ASX200 statements failed to identify any general modern slavery risk areas relating to company operations, and just 5% of ASX200 companies were able to clearly articulate how their company might be involved in modern slavery risks.[2]

To summarise, while the MSA has had some positive impacts in its first three years of operation, it does not appear to be achieving its core objective of driving a 'race to the top' by companies to address modern slavery. Progress has been painfully slow and there is little indication that the MSA is driving action in the areas that matter most for addressing modern slavery, such as changes to wages and purchasing practices, tackling recruitment fees, due diligence and consultation with workers and their representatives.

2.2 Is the 'transparency framework' approach of the Modern Slavery Act an effective strategy for confronting and addressing modern slavery threats, including the drivers for modern slavery?

Issues Paper Q2

The current transparency framework approach of the MSA, without requirements for companies to take action and without any proper means of enforcement is a limited and inadequate strategy for confronting and addressing modern slavery threats.

2.2.1 Problems with the transparency framework

The transparency framework is predicated on several (in our view, flawed) assumptions: first, that the mere fact of reporting under the legislation will prompt businesses to improve their practices; second, that larger businesses reporting and change their practices will prompt other smaller businesses to follow due to market forces, thereby driving a 'race to the top' to tackle modern slavery; third, that consumers and

[1] Walk Free Foundation, 'Beyond Compliance in the Garment Industry' (Report, 2022) 7.
[2] Australian Council of Superannuation Investors (ACSI) and Pillar Two, 'Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act' (Report, July 2021) 6 and 11.

investors will be aware of what companies are reporting and motivated to reward companies that are taking action and 'expose' poorly performing companies; and finally, that companies' reports accurately reflect what they are actually doing about addressing modern slavery in their supply chains.

The way the transparency framework operates in practice is very different. As noted above, our research found that although a large number of companies published statements, reporting was patchy, incomplete and often failed to identify obvious risks. The information provided about supply chains in many reports was so vague and high-level that it was difficult to use the statements as any proper basis for understanding where companies' key risk areas might be (eg. companies simply reporting that they source from 'South-East Asia' without describing which countries they source from, let alone providing factory locations).

Actions reported by companies to address modern slavery risks were generally restricted to measures such as developing policies, undertaking questionnaires and audits, inserting clauses into contracts with suppliers, requiring suppliers to sign up to codes of conduct, and providing internal training on modern slavery risks. There was far less evidence of actions addressing the drivers of modern slavery. In particular, we found that actions to address sector-specific risks across the four high-risk sectors we investigated remained almost unchanged between the first and second years of reporting.

Even if companies had reported more effective actions to address modern slavery, however, the fundamental problem remains that without an independent investigatory function to accompany the transparency regime, it is very difficult to verify the claims made in statements, or to know what key information may be being left out.

The statement of rubber-glove manufacturer Ansell is a good case in point. Ansell has consistently performed strongly on modern slavery reporting benchmarks. However, at the same time, the company continues to face persistent allegations of forced labour in its Malaysian supply chain, and was the subject of a forced labour import ban imposed on its suppliers by US Customs and Border Protection.[3] Former workers engaged by one of the company's Malaysian suppliers, Brightway Holdings, have brought legal proceedings in the US courts alleging they were subjected to forced labour, including the payment of high recruitment fees, working 12+ hour days often with restricted access to food, water & restrooms; being subjected to physical and verbal abuse and receiving delayed or incomplete compensation.[4] As described in further detail on page 17 of *Broken Promises*, this case is illustrative of some of the weaknesses inherent in the transparency approach.

2.2.2 No track record of success

Studies on the effectiveness of other transparency frameworks in addressing modern slavery, such as in the UK and California, have also indicated that this model has largely failed to meaningfully drive corporate efforts to tackle labour exploitation and modern slavery in supply chains.

The UK *Modern Slavery Act 2015* (***UK MSA***), on which Australia's MSA is based, has now been in operation for seven years. Since that time, it has been widely criticised for its poor track record of corporate compliance. An independent UK Government review of the legislation estimated that the likely rate of non-compliance with the reporting requirement is around 40%.[5]

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3 See, eg, US Customs and Border Protection, 'Withhold Release Orders and Findings List' (Web Page, 3 November 2022) <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings>; See also Zsombor Peter, 'Forced labour claims at Malaysian firms spur spate of US import bans,' VOA (online, 10 February 2022) < https://www.voanews.com/a/forced-labor-claims-at-malaysian-firms-spur-spate-of-us-importbans-/6433838.html>.

4 *Mohammed Forhad Mia and others v Kimberly-Clark Corporation and Ansell Corporation and Ansell Healthcare Products LLC* Case No. 22-2353, US District Court for the District of Columbia. This case was brought on the 9th of August 2022 under the *Trafficking Victims Protection Reauthorization Act*.

5 *Independent review of the Modern Slavery Act: final report* (Final Report, May 2019, updated December 2021) <https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report/independent-review-of-the-modern-slavery-act-final-report-accessible-version#volume-ii-transparency-in-supply-chains-section-54-of-the-act> at [15].

Studies of the UK MSA, and the earlier enacted Californian Transparency in Supply Chains Act, have found that overall compliance with transparency laws has been inadequate and superficial to date.[6] According to the International Corporate Accountability Roundtable and Focus on Labour Exploitation's 2019 report 'Full Disclosure: Towards Better Modern Slavery Reporting', which examined reporting under both regimes:

> *[E]xisting reporting requirements have failed to achieve their core aim: to induce businesses to meaningfully address and adequately report on their efforts to tackle forced labor and human trafficking in their supply chains. Our research has shown that compliance with these laws has been inconsistent, and that the breadth and quality of information companies disclose is insufficient and does not reflect serious efforts to tackle the problem.*[7]

In its final 2021 report, after having reviewed over 16,000 reports over five years of reporting under the UK MSA, the Business and Human Rights Resource Centre likewise concluded:

> *The provisions of the UK Act itself, based on a requirement to submit a trifling level of reporting which has not been monitored or enforced, has failed to drive systemic corporate action to expunge forced labour, even in high-risk sectors. The Act has raised awareness of the prevalence of modern slavery and encouraged a cluster of leading companies and investors to do more. But ultimately, our analysis of five years' worth of statements in the Modern Slavery Registry has revealed no significant improvements in the vast majority of companies' policies, practice or performance.*[8]

Recognising the deficiencies in the UK MSA, there have been several proposals in the UK to amend the legislation.[9] In 2020, the UK Government proposed the introduction of financial penalties for companies that fail to meet their statutory obligations under the UK MSA and public procurement exclusions for companies with human rights violations in their supply chains.[10]

Australia could likewise seek to strengthen the MSA through more stringent enforcement measures, and we have set out further below our recommendations as to how this could be done. In our view, however, there are some fundamental weaknesses to the transparency framework that cannot be addressed merely through improving compliance. A focus only on reporting, rather than the underlying actions companies should be taking, will inevitably result in many companies taking a superficial approach to compliance. Further, without an effective means or resources to independently investigate the veracity of the claims made in statements, there is a real risk that transparency regimes create an illusion of transparency while masking actual cases of abuse.

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[6] See, eg, British Institute of International and Comparative Law et al, 'European Commission - Study on due diligence requirements through the supply chain' (Report, 20 February 2020) 218-219 https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en; Rachel Birkey et al, 'Mandated social disclosure: An analysis of the response to the California Transparency in Supply Chains Act of 2010' (2018) 152(3) *Journal of Business Ethics* 827–841. https://eprints.qut.edu.au/222960/1/100045.pdf; *Independent review of the Modern Slavery Act: final report* (Final Report, May 2019, updated December 2021) <https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report/independent-review-of-the-modern-slavery-act-final-report-accessible-version#volume-ii-transparency-in-supply-chains-section-54-of-the-act>.

[7] International Corporate Accountability Roundtable and Focus on Labour Exploitation, 'Full Disclosure: Towards Better Modern Slavery Reporting' (Report, March 2019) 7 <https://www.labourexploitation.org/publications/full-disclosure-towards-better-modern-slavery-reporting>.

[8] Business & Human Rights Resource Centre, 'UK Modern Slavery Act: Missed opportunities and urgent lessons' (Briefing, 25 February 2021) 2 <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/>.

[9] See *Modern Slavery (Amendment) Bill 2021 [HL],* which has been introduced in the House of Lords as a private members bill; see also *Modern Slavery (Transparency in Supply Chains) Bill 2017 [HL], Modern Slavery (Victim Support) Bill 2021 [HL], Public Contracts (Modern Slavery) Bill 2020 [HL].*

[10] Home Office and Victoria Atkins MP, 'New tough measures to tackle modern slavery in supply chains', GOV.UK (News story, 22 September 2020) ; Foreign, Commonwealth & Development Office, Cabinet Office, Home Office, Department for International Trade, and The Rt Hon Dominic Raab MP, 'Human rights violations in Xinjiang and the government's response: Foreign Secretary's statement,' GOV.UK (Oral Statement to Parliament, 12 January 2021).

2.3 Should the Modern Slavery Act spell out more explicitly the due diligence steps required of entities to identify and address modern slavery risks?

Issues Paper Q4

The MSA should not only spell out more explicitly the due diligence steps required of entities, it should establish an enforceable legal obligation for companies to undertake due diligence to identify and address modern slavery risks. Since the *Hidden in Plain Sight* report in 2017, there have been repeated calls for moving towards establishing human rights due diligence requirements on companies in order to strengthen Australia's modern slavery response.[11]

2.3.1 Why require due diligence?

Whereas transparency regimes are intended to leverage consumer sentiment to encourage behavioural change, due diligence approaches require concrete actions that more directly change behaviours. A due-diligence based approach is therefore much more likely to be effective in achieving the MSA's policy objective of driving changes in corporate behaviour to prevent and address modern slavery.

A due diligence approach is also consistent with Australia's international obligations to protect against human rights abuses by business enterprises within its territory or jurisdiction[12] and to suppress all forms of forced labour.[13] The Protocol to the Forced Labour Convention, ratified by Australia in March 2022, requires states to take effective measures to prevent and eliminate forced labour, including by providing workers with effective remedies, sanctioning perpetrators, addressing root causes of forced labour and supporting due diligence by public and private actors.[14]

2.3.2 Comparative models

Due diligence laws to prevent modern slavery, child labour or broader human rights violations in corporate supply chains have already been introduced in France, Germany, the Netherlands, Switzerland and Norway, and are currently under active consideration in the European Union, Belgium, Austria, Finland, Luxemburg, Denmark, Italy, Spain, Sweden, Canada and New Zealand (see **Annexure B** for further details on some of these international developments).[15] The models proposed by New Zealand and the European Union are particularly instructive for how Australia might approach incorporating such obligations into the MSA.

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[11] See, eg, Australian Law Reform Commission, 'Corporate Criminal Responsibility (31 August 2020) <https://www.alrc.gov.au/publication/corporate-criminal-responsibility/> (***ALRC Report***) 473-486; Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017) ('CESCR Report') [14]; Senate Foreign Affairs, *Defence and Trade Legislation Committee, Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020,* Parliament of Australia (June 2021) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024618/toc_pdf/CustomsAmendment (BanningGoodsProducedByUyghurForcedLabour)Bill2020.pdf;fileType=application%2Fpdf>. Note that in the *Hidden in Plain Sight Report* 116 [5.92], the Committee considered that including a requirement for entities to report on their due diligence processes is an appropriate first step.

[12] *UN Guiding Principles on Business & Human Rights* ('*UNGPs*').

[13] See *International Covenant on Civil and Political Rights*, 16 December 1966 (entered into force 23 March 1976) art 8 ('ICCPR'); *Protocol of 2014 to the Forced Labour Convention*, 1930, art 1.

[14] *Protocol of 2014 to the Forced Labour Convention*, 1930, arts 1, 2 and 4.

[15] See, eg, Business & Human Rights Resources Centre, 'National & regional movements for mandatory human rights & environmental due diligence in Europe' (Web Page, 22 April 2022) <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/>; BHR in Law, 'Key developments' (Web Page) <http://www.bhrinlaw.org/key-developments>.

(1) New Zealand

In April 2022, the New Zealand Government announced its intention to introduce a disclosure and due diligence-based legislative framework for combatting modern slavery.[16] Under its proposal, all organisations would be subject to new responsibilities across their operations and supply chains, with more responsibilities for larger organisations:

- All entities would be required to take reasonable and proportionate action if they become aware of modern slavery in their international operations and supply chains and/or modern slavery or worker exploitation in their domestic operations and supply chains;
- All entities would be required to undertake due diligence to prevent, mitigate and remedy modern slavery and worker exploitation by New Zealand entities where they are the parent or holding company or have significant contractual control;
- Medium and large entities (exceeding an annual revenue level of NZ$20m) would be required to report annually on the due diligence they are undertaking to address modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains; and
- Large entities (exceeding an annual revenue level of NZ $50m) would be required to meet due diligence obligations to prevent and mitigate modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains.

This model has received strong public support, following a recent consultation undertaken by the New Zealand Government.[17]

(2) European Union

The EU model, set out in the draft *Directive on Corporate Sustainability Due Diligence* (***Directive***) published by the European Commission in February 2022, would require EU companies and companies operating in the EU, to conduct both human rights and environmental due diligence.[18] The Directive would apply, in the first instance, to companies with 500 or more employees and net sales of at least €150m worldwide, which would be broadened two years after its entry into force.[19]

Articles 5 to 11 broadly outline the due diligence procedures that would be required of companies by the Directive, including:

- Integrating due diligence into company policies;
- Identifying actual or potential adverse impacts;
- Preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent;
- Establishing and maintaining a complaints procedure;
- Monitoring the effectiveness of their due diligence policies and measures; and
- Publicly communicating on due diligence.

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16 See New Zealand Government, Ministry of Business, Innovation and Employment, *A Legislative Response to Modern Slavery and Worker Exploitation* (Discussion Document, 8 April 2022) <https://www.mbie.govt.nz/have-your-say/modern-slavery/> (‘*NZ Discussion Document*’).

17 New Zealand Government, Ministry of Business, Innovation and Employment, *Consultation on Legislation to Address Modern Slavery and Worker Exploitation* (Summary of Feedback, September 2022) <https://www.mbie. govt .nz/assets/consultation-on-legislation-to-addressmodern-slavery-and-worker-exploitation-summary-of-feedback.pdf> (‘*NZ Summary of Feedback Document*’).
18 European Commission, *Proposal for a Directive on corporate sustainability due diligence* 2022/0051, 23 February 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> (‘*Draft Directive*’).
19 European Commission, *Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains* (Press Release, 23 February 2022), <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145>.

The Directive also includes an enforcement mechanism to ensure companies undertake these obligations. EU member states would need to ensure that companies can be held liable for damages if '*an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised…occurred and led to damage*'.[20] If adopted, which appears very likely, EU member countries will have two years to transpose the Directive into national laws.

(3) Other Australian legislation

Due diligence requirements are also embedded in many other existing Australian laws (either as positive obligations or as a defence to liability), and are therefore familiar to most Australian businesses. We have set out at **Annexure C** several examples of due diligence requirements in various domestic laws, ranging from anti-money laundering to OHS laws.

As a recent example, the Government's newly introduced 'Respect at Work' bill[21] establishes a positive duty on companies to take 'all reasonable and proportionate measures' to eliminate sex discrimination and sexual harassment. The meaning of 'all reasonable and proportionate measures' will vary between employers and the Bill provides that the matters to be considered when determining whether the duty holder is complying with the positive duty include the size, nature and circumstances of the business or undertaking; the duty holder's resources, whether financial or otherwise; the practicability and costs associated with the steps; and any other relevant matter.

Likewise, under the *Illegal Logging Prohibition Act 2012* (Cth), companies are required to undertake due diligence on to prevent the import of illegally logged timber. The Act requires a structured risk assessment and mitigation process ("due diligence") before importing a 'regulated timber product' into Australia or before processing domestically grown raw logs.[22] The specifics of what due diligence is required are set out in the accompanying regulations. Importers must also declare that they have complied with due diligence requirements before importing a regulated timber product.[23]

2.3.3 Proposed model for Australia

Based on international and domestic due diligence frameworks, the Human Rights Law Centre has developed a model of due diligence that we believe would be practical and effective if introduced within the MSA.

We recommend that the MSA be amended to include a legal 'duty to prevent' modern slavery on reporting entities, which requires companies to develop and implement effective human rights due diligence procedures to identify and address modern slavery risks, and provides for enforcement of this requirement through a regulator and civil liability provisions. At **Annexure A**, we have set out a draft amendment to the MSA which demonstrates how this obligation could work in practice.

(1) 'Duty to prevent' modern slavery and due diligence requirements

The due diligence requirements are set out as a new Part 3A to the MSA, which introduces two complementary requirements on reporting entities in sections 20A and 20B:

- Section 20A establishes requirements for reporting entities to develop and implement human rights due diligence procedures to identify, assess and control risks of modern slavery, and mitigate and remedy those risks that materialise.
- Section 20B establishes a duty on reporting entities to prevent modern slavery practices in their operations and supply chains.

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[20] Draft Directive (n 18) art 22.

[21] Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth)

[22] *Illegal Logging Prohibition Act 2012* (Cth), ss 14 and 18.

[23] Ibid s 13.

The first of these provisions crystallises the ongoing requirement on reporting entities to establish and implement due diligence measures, and mandates what due diligence involves. The second establishes the overarching duty to prevent modern slavery. This is intended to provide reporting entities with an incentive to be outcome-focused and to target their due diligence according to real and pressing risks. Importantly, section 20B(5) also provides a direct cause of action for workers who have been subjected to modern slavery practices to seek compensation for loss or damage. This provision ensures that the due diligence provisions can be enforced and don't become simply another 'tick-box' exercise.

These requirements are consistent with the widely accepted standards contained in the *United Nations Guiding Principles on Business and Human Rights* (***UNGPs***) and the OECD Guidelines for Multinational Enterprises, codifying a 'do no harm' standard of care on reporting entities. [24] What is effective and reasonable 'due diligence' to prevent modern slavery must be determined according to each entity's operations, size and risk profile.[25] It is anticipated that entities which already fully meet the current expectations of the MSA requirements and official guidance, would likely also meet the proposed due diligence obligations.[26]

As further outlined at section 4, we recommend that the obligations in sections 20A and 20B are phased in after a one-year period, so that entities have adequate time to prepare for the introduction of the new requirements.

(2) Establishment of a 'due diligence' defence

An important aspect of the proposed new duty to prevent modern slavery is the inclusion of a defence (under s 20B(8)) from liability for reporting entities that can show they have undertaken 'all reasonable steps' to comply with their due diligence obligations.

The defence means that reporting entities would not be held liable for remote harms in their supply chains that could not have been mitigated by prudent due diligence. At the same time, it shifts the evidentiary burden onto the reporting entity to provide proof of the steps it has taken, rather than imposing this burden on the regulator or the worker bringing the proceedings.

Whether or not 'all reasonable steps' have been undertaken would be determined objectively by the Court, having regard to applicable international human rights due diligence standards set out in the UNGPs and the facts of each case in determining whether or not the required standard of care has been met.

In the model law, we have suggested an optional section 20B(9) which would set out a list of factors that could be taken into account by the Court in determining the scope of the defence. This may not be strictly necessary (given it is common in Australian law for the notion of 'reasonable steps' to be determined by the courts), however it could give greater certainty and guidance to companies as well as impacted workers.

By way of example, the list could potentially include considerations such as: compliance with the steps outlined in s 20A(1)(a)-(d); the size and resources of the reporting entity; the practicability and cost associated with the steps; the likelihood and severity of the risks; whether the reporting entity sought to exercise appropriate leverage to mitigate the risks; the extent of consultation with workers or their representatives, the degree of harm, etc.

There is already published guidance on fulfilling the mandatory criteria in the MSA issued by the Australian Border Force. This could also be adapted to the extent required, including through multi-stakeholder feedback, to ensure that reporting entities understand the nature and extent of their due diligence obligations.[27]

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[24] Business & Human Rights Resource Centre, 'Towards EU Mandatory Due Diligence Legislation: Perspectives from Business, Public Sector, Academia and Civil Society' (Compendium, November 2020), 51 <https://media.business-humanrights.org/media/documents/BHRRC_EUPresidency_mHREDD_Compendium_11-2020.pdf> ('*BHRRC Compendium*').
[25] Ibid 40.
[26] This is consistent with the NZ proposal; see NZ Discussion Document (n 16) 61.
27 Gabrielle Holly and Claire Methven O'Brien, 'Human Rights Due Diligence Laws: Key Considerations' (Briefing, The Danish Institute for Human Rights, October 2021) 23.

(1) Enforcement of due diligence obligations and redress for workers

The model amendments provide for two methods of enforcement: through a regulator (such as an Anti-Slavery Commissioner or alternatively an agency within Government); and through civil liability. Enforcement of the due diligence requirements and appropriately calibrated civil penalties are critical for ensuring the effectiveness of the legal obligation, as some companies may elect not to comply if it is perceived that the likely cost of non-compliance is lower than undertaking effective due diligence on their modern slavery risks.[28] Details of the enforcement regime should be set out in additional amendments to the MSA.

Sections 20A(4) and 20B(4) provide that the Commissioner (or regulator) could bring proceedings for non-compliance with the due diligence requirements and/or a breach of the duty to prevent modern slavery within a period of six years of the contravention. The Commissioner would also have the ability to issue infringement notices prior to bringing proceedings.

As noted above, section 20B(5) also establishes a specific cause of action for any person who has suffered loss or damage because of a reporting entity's failure to comply with its due diligence obligations to seek redress. There is a proposed six-year limitation period within which proceedings should be brought, however noting the vulnerability of people who have been subject to modern slavery and the practical barriers they may face bringing legal action, there is a possibility to apply to the courts for an extension of the limitation period.

(2) Benefits of proposed model

This due diligence model would, we believe, be highly effective in driving meaningful action by companies to prevent and address modern slavery risks.

The 'outcome-focused' nature of the duty to prevent modern slavery, coupled with specific due diligence requirements, would protect against a superficial approach being taken to compliance, as well as giving businesses flexibility to undertake appropriate due diligence that is tailored and commensurate with the risks they face. It reorients the focus of the Act away from paper and process alone, to the impact on the workers at risk of modern slavery. And it 'levels the playing field' by lifting standards for companies that are not currently complying with the MSA while supporting leading companies to continue to invest in efforts to identify, prevent and address modern slavery.

Other factors we considered in the development of the model included: business familiarity with the underlying concepts; simplicity and the need to ensure the regulatory burden on business and any regulator is proportionate and manageable; the existence of similar regulatory frameworks in Australia and overseas; the importance of harmonisation with overseas developments and international guidance; and the ability for victim-survivors of modern slavery to have direct recourse to remedy.

2.4 Has the Modern Slavery Act been adequately supported and promoted by government, business and civil society?

Issues Paper Q5

In order to be effective, the MSA needs much more support from government in particular through substantially increased resourcing for overseeing compliance, enforcement, investigations and capacity-building efforts.

Currently, there is a small team within the Modern Slavery Business Engagement Unit (***MSBEU***) which is charged with responsibility for administering the Act. Given the large number of statements that are required to be submitted, it is simply not possible for the MSBEU to be effective in supporting

[28] See, for example, critiques of weak enforcement of illegal logging laws at Australian Government, 'Statutory review of the *Illegal Logging Prohibition Act 2012*', https://www.agriculture.gov.au/forestry/policies/illegal-logging/review-and-consultation#statutory-review-of-the-illegal-logging-prohibition-act-2012, 23.

implementation of the Act or ensuring companies are complying with reporting requirements. By contrast, the United States invested substantial funding towards ensuring a more effective response to tackling forced labour in corporate supply chains (including through forced labour bans and the issuing of an annual list of high-risk goods).

While many civil society organisations and academics have engaged deeply with the MSA since its enactment, they have done so largely on a pro bono basis with minimal resourcing. For example, in order to develop the *Paper Promises* report, experts from nine civil society, academic and church groups worked together for a period of 18 months to undertake the required research, with a group of approximately 20 reviewers conducting over 330 reviews of statements (resulting in an estimated 700 hours of review, plus validation and analysis). Even with dedicated government funding, this level of support from civil society is wholly unsustainable year on year. It is also an inefficient way in which to drive compliance with the MSA (given only a small proportion of statements have been subject to rigorous review), and places a significant burden on under-resourced organisations to undertake work that should properly be carried out by a regulator.

3. Strengthening enforcement of the MSA

3.1 Has there been an adequate – or inadequate – business compliance ethic as regards the Modern Slavery Act reporting requirements?

Issues Paper Q14

As set out in detail above at section 2.1, our research has found business compliance with MSA reporting requirements to be unacceptably low, with large numbers of companies failing to address one or more of the mandatory reporting criteria and some companies failing to submit reports at all. Other reports published by Walk Free and the International Justice Mission have made similar findings.[29]

The Issues Paper provides helpful information on the MSBEU's analysis of statement compliance with the mandatory criteria. While compliance levels appear to have improved across statements reviewed by the MSBEU in the second round, there is still a concerning number of companies that are failing to meet basic reporting requirements.

We note that no data has been collated by the MSBEU on the number of companies that failed to report in the first and second rounds. This is a significant gap. Without any public reporting or ability for consumers or the public to be able to understand which entities are required to report under the Act or whether they have in fact done so, it is difficult to fully assess how effective the legislation has been.

3.2 Has government administrative action been effective in fostering a positive compliance ethic? What other administrative steps could be taken to improve compliance?

Issues Paper Q15

Much more can and should be done by way of administrative action to improve corporate compliance with the MSA reporting requirements (and any additional requirements that are established, such as due diligence obligations). While it is positive that the MSBEU has engaged with several businesses on meeting basic requirements, there is a clear need for stronger incentives and enforcement measures to improve compliance.

We recommend the following additional administrative measures be implemented to improve compliance:

[29] See Walk Free Foundation, 'Beyond Compliance in the Garment Industry' (Report, 2021); International Justice Mission, 'Spot Fires in Supply Chains' (Report, April 2022).

- **Publication of a list:** An annual list of entities required to report under the legislation should be published, together with a subsequent list of entities that have failed to submit statements by the reporting deadline, or that have provided non-compliant statements. This would ensure that there are reputational consequences for companies that fail to comply. There should be specified parameters around the timing of updates to the list so that other businesses, civil society organisations and members of the public can rely on the accuracy of the information.
- **Public procurement:**
    - Non-compliant entities should be barred from public procurement opportunities until they rectify their actions. This has already been done in Western Australia, where a procurement debarment regime has recently been introduced as part of the *Procurement Act 2020* (WA). The objective of the regime is to 'protect the integrity of the procurement system and to minimise the State's risk of procuring from a supplier who engages in unlawful or unethical behaviour to the detriment of the State.' The regime includes non-compliance with the MSA, which can attract debarment for a period of up to two years.
    - The Government should also ensure that companies that do comply with the MSA and can demonstrate meaningful measures to address human rights and modern slavery risks are prioritised during government tender processes, in order to incentivise and reward good corporate performance.[30]

These options should be part of a suite of measures to incentivise compliance. For some companies, reputational consequences will be a stronger deterrent than financial penalties (particularly where the cost of compliance outweighs the cost of an infringement). For others (particularly smaller companies that do not have a strong public presence), financial and commercial consequences may prove a stronger deterrent. For this reason, applying a 'smart mix' of consequences for non-compliance has the potential to prompt stronger and more effective responses to modern slavery for companies that contract with the Government.

3.3 Should the Modern Slavery Act impose civil penalties or sanctions for failure to comply with the reporting requirements? If so, when should a penalty or sanction apply?

Issues Paper Q17

Penalties should be introduced as part of a suite of measures designed to improve compliance. This includes penalties for failing to submit a statement, repeatedly issuing incomplete statements and/or for statements that include materially false information. If the MSA is amended to include due diligence, there should also be penalties in the event of non-compliance with those requirements.

3.3.1 When penalties should apply

For reporting to be a useful tool in helping to combat modern slavery, the Government must, at a minimum, ensure that companies submit accurate reports which address all the mandatory reporting criteria.

In particular, there should be penalties for reporting entities that:

(i) fail to submit a statement;
(ii) repeatedly issue incomplete statements that do not fulfil the mandatory criteria; and/or
(iii) include misleading or deceptive information in a statement.

In the event due diligence obligations are established, there should also be civil penalties for:

(iv) failing to comply with due diligence requirements; and
(v) failing to comply with a corporate duty to prevent modern slavery.

From a policy perspective, it is important that there are hard consequences that follow non-compliance with the legal requirements of the MSA. Given the egregious nature of modern slavery, it is incongruous for the

30 Fiona McGaughey et al, 'Public Procurement for Protecting Human Rights' (2022) 0(0) *Alternative Law Journal* 1.

law to provide for no meaningful consequences where companies fail to engage with obligations under the MSA. This sends the wrong message to companies on the need to take action against modern slavery seriously, and also unfairly places compliant companies at a potential commercial disadvantage.

Australia is increasingly alone in failing to establish penalties for non-compliance with modern slavery or human rights related legislation. Labour and human rights due diligence laws in the Netherlands,[31] Germany[32] and Switzerland[33] currently include penalty provisions, expressed either as a certain amount or a proportion of global revenue. The New Zealand Modern Slavery Consultation Paper also proposes the use of penalties, and refers to its workplace and employment laws as a reference point for penalties,[34] as does proposed Canadian legislation.[35] As flagged above at 2.2.2, the UK has also committed to introducing penalties.

3.3.2 Types of penalties

For process-related failures (eg, not submitting a statement), penalties should be administered by way of financial infringements issued by the Commissioner (alternatively, a government agency). Infringements should be issued promptly within a specified timeframe in order to maximise the deterrent effect of the penalty. For failures to sufficiently engage with requirements (eg, reporting against all mandatory criteria), companies should have an opportunity to rectify any aspects of their statement that are non-compliant before infringements are issued.

Civil penalties should be awarded (through application to the court) in cases of more substantive breaches of MSA requirements, for example if a statement contains misleading or deceptive information,[36] or for a failure to implement due diligence processes,[37] or a breach of a corporate duty to prevent modern slavery.[38] With the goal of improving compliance and driving change to corporate behaviour to shift exploitative conditions for workers, the regulator should also have the opportunity to issue improvement notices or enforceable undertakings so as to be able to influence behaviour prior to needing to take enforcement action.

3.3.3 Quantum

The quantum of financial infringements should ideally strike a balance so as not to be so low as to be viewed by some entities as the cost of doing business, and being so high as to never be issued by the regulator in practice.[39] Infringements could also be structured so that quantum substantially increases for repeated non-compliance.

By way of comparison, the *Corporations Act 2001* (Cth) contains several provisions related to financial disclosure and reporting. Under s 319 disclosing entities are required to lodge complete financial reports within three months after the end of the financial year. Disclosing entities that fail to lodge financial reports face penalties of up to 120 penalty units (equivalent to approximately $22,200). A failure to lodge an annual report is treated as a strict liability criminal offence, enforceable by ASIC, and subject to civil penalties in

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[31] *Due Diligence on Child Labour Law* (2019); Note the *Proposed Responsible and Sustainable International Business Conduct Act* (currently before Dutch Parliament) also includes proposed penalties.

[32] See *Act on Corporate Due Diligence Obligations in Supply Chains (2021).*

[33] See *Articles 964a-964c, 964j-964l of the CO, and Article 325ter of the Criminal Code.*

[34] NZ Discussion Document (n 16).

[35] See *Bill S-211 (an Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff).*

[36] See, for example, *Corporations Act 2001* (Cth) s 728(4).

[37] See, for example, *Illegal Logging Prohibition Act 2012* (Cth) and *Illegal Logging Prohibition Regulation 2012*. The legislation imposes due diligence requirements for importing regulated timber products (s 14) and processing raw logs (s 18). Part 2, Division 2 of the regulations outline the due diligence requirements for importing timber products and Part 3, Division 1 outlines the due diligence requirements for processing raw logs – there are a number of civil penalty provisions under these divisions which each attract a civil penalty of up to 100 penalty units (equivalent to approximately $22,200).

[38] See, for example, the *Environment Protection Amendment Act 2018 (Vic).* A breach of the general environmental duty in s 25 attracts a civil penalty of up to 2000 penalty units (contravention by a natural person) or 10 000 penalty units (contravention by a body corporate)(the 2022/23 penalty unit rate is $184.92, amounting to approximately $370,000 and $1,850,000 respectively).

[39] See Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement' (2021) 37(1-2) *Industrial Law Journal* 133.

certain circumstances.[40] There are also penalties and civil liability attached to offering securities under a disclosure document that has a misleading or deceptive statement, or omits required material.[41]

The NSW Modern Slavery Act previously provided for penalties of up to $1.1m (the equivalent of 10,000 penalty units at the time) for non-compliance with reporting requirements, including for the failure to publish a statement or for the provision of false or misleading information.[42]

A summary of international penalty levels for comparable laws is contained in **Annexure B**.

3.3.4 Enforceable undertakings and other options

In addition to penalties for non-compliance with more substantive obligations, enforceable undertakings and/or improvement notices may also be useful tools in terms of improving corporate culture and compliance.[43] For example, under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), in addition to civil penalty orders, AUSTRAC can undertake other enforcement actions, such as enforceable undertakings and remedial directions.

However, civil penalties and civil liability for a failure to prevent modern slavery should remain available so as to ensure meaningful and prompt compliance with requirements, as well as access to remedy for those impacted by a failure to undertake exercise appropriate due diligence on modern slavery risks.

3.3.5 Administration of penalties

Issuing penalties under the MSA, in particular for non-compliance with reporting requirements, could be similar to the approach taken by the Australian Securities & Investments Commission (**ASIC**). When it comes to enforcement, there are three broad actions ASIC can pursue, including, criminal proceedings; civil proceedings, including civil penalty proceedings and other civil proceedings; and administrative and other enforcement action.[44] ASIC can issue an infringement notice as an alternative to a court-based action and, if the recipients pay the infringement notice, no further regulatory action can be taken against them for the alleged contravention.[45] ASIC is more likely to issue an infringement notice if:

- the alleged misconduct is relatively minor or less serious, and does not indicate a broader pattern of misconduct by the entity or within an industry;
- ASIC is not required to make a complex assessment of facts to evaluate whether the alleged misconduct contravened the law; and
- to do so would be a proportionate enforcement response, considering the nature and size of the entity and the need for general and specific deterrence.[46]

Likewise, the Australian Competition and Consumer Commission (**ACCC**) can issue infringement notices under the *Competition and Consumer Act 2010* for a number of consumer protection provisions.[47] When deciding what enforcement mechanism is most appropriate, the ACCC will ordinarily include an evaluation of all options available, including court enforceable undertakings, civil proceedings, including proceedings to recover a civil pecuniary penalty, and criminal proceedings.[48] As with ASIC, the ACCC is more likely to

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[40] See *Corporations Act 2001* (Cth), s 1317E.
[41] See *Corporations Act 2001* (Cth), s 728. Under s 729, a person who suffers loss or damage due to a contravention of subsection 728(1) may recover the amount of loss or damage.
[42] See *Modern Slavery Act 2018* (NSW) (Historical version for 27 June 2018 to 7 January 2019), when the Act was initially passed (assented to 27 June 2018) s 24 included a number of penalty provisions, including for failure to publish a modern slavery statement (s 24(2)); failure to make the statement public (s 24(6); and providing false or misleading material (s 24(7)).
[43] Hannah Harris and Justine Nolan: Learning from experience: Comparing legal approaches to foreign bribery and modern slavery, *Cardozo International and Comparative law Review,* (2021) 4(2).
[44] The latter includes a number of infringement notice regimes under the *Corporations Act 2001*, *Australian Securities and Investments Commission Act 2001*, *National Consumer Credit Protection Act 2009* and *Insurance Contracts Act 1984*.
[45] Australian Securities & Investments Commission, 'ASIC's approach to enforcement' (Information Sheet 151) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/#Infringement_notices>.
[46] Ibid.
[47] See generally Australian Competition and Consumer Commission, 'Fines and penalties' <https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties>.
[48] See, Australian Competition and Consumer Commission, 'Infringement notices: Guidelines on the use of infringement

issue an infringement notice where it forms the view that the contravening conduct is relatively minor or less serious. The ACCC will also consider the use of an infringement notice:

- where there have been isolated or non-systemic instances of non-compliance;
- where there have been lower levels of consumer harm or detriment;
- where the facts are not in dispute or where the ACCC considers the circumstances giving rise to the allegations are not controversial; and
- where infringement notices form part of a broader industry or sectoral compliance and enforcement program following the ACCC raising concerns about industry wide conduct.[49]

The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) provides a framework for the use of infringement notices where an infringement officer reasonably believes that a provision, which may include a civil penalty provision, has been contravened.

4. Reporting requirements

4.1 Is AU$100m consolidated annual revenue an appropriate threshold to determine which entities are required to submit an annual statement under the Modern Slavery Act? Does the Act impose an appropriate revenue test for ascertaining the $100m threshold?

Issues Paper Q6

In principle, all companies should be required to undertake human rights due diligence and report on modern slavery risks, regardless of size or sector. Decreasing the threshold for reporting entities must, however, take into account resourcing implications for effective enforcement of the MSA. Given inadequate compliance with reporting requirements to date, it may not be advisable to reduce the threshold further until it is clear that the MSA is working effectively to shift corporate practices to address modern slavery.

As a first step, we recommend prioritising improvements to the overall framework for addressing modern slavery in supply chains over extending obligations to a greater number of companies. Assuming any amendments made following the current review result in improved compliance and drive more effective action by companies, it may then be appropriate to consider further lowering the threshold and gradually phasing in increased obligations based on entity size, as has been proposed in New Zealand.

For example, after one year, current reporting entities with an annual turnover of over $100m might be subject to due diligence obligations, and medium-large sized entities (~70m+) could commence reporting obligations. After three years, all medium-large and large entities would then become subject to due diligence obligations, and medium sized entities (~$50m+) will need to begin to report (see Table 1 below).

The gradual phasing-in of obligations could promote awareness raising and socialise companies to modern slavery and human rights considerations in their business,[50] in advance of introducing more substantive due diligence requirements.

notices by the Australian Competition and Consumer Commission (July 2020) < https://www.accc.gov.au/system /files/Infringement%20notices%20-%20Guidelines%20on%20the%20use%20of%20infringement%20notices%20-%20July%202020.pdf>.

[49] Ibid.

[50] ALRC Report (n11) 485.

Date from which amended MSA comes into effect:	**Medium Entity Obligations (~$50m)**	**Medium-Large Entity Obligations (~$70m)**	**Large Entity Obligations (~$100m)**
1 year	-	Modern slavery reporting	Modern slavery reporting + due diligence
3 years	Modern slavery reporting	Modern slavery reporting + due diligence	Modern slavery reporting + due diligence

***Table 1** – Table of obligations on different sized entities*

5. Enforcement and Oversight

5.1 What role should an Anti-Slavery Commissioner play in administering and enforcing the reporting requirements in the Modern Slavery Act? What functions and powers should the Commissioner have for that role?

Issues Paper Q23

The Commissioner should play a central role in enforcing the MSA. Currently, enforcement is a critical missing element of the framework and should be prioritised in order to improve the effectiveness of the MSA. The Commissioner's functions and powers should include enforcement powers (including the imposition of penalties), complaint handling, investigatory powers, the ability to issue guidance and monitoring powers. Appropriate resources should be dedicated to this office in order to ensure that enforcement is able to be carried out in a meaningful and effective manner. Oversight and capacity building functions may stay with the MSBEU or be brought within the Commissioner's remit.

In the next section we set out some of the key powers that should be exercised in order to increase oversight and enforcement of the MSA.

5.1.1 Functions and powers of the Commissioner

In our view, the functions and powers of the Commissioner should be broader in remit than those of the UK and NSW Anti-Slavery Commissioners:

- As noted in the Issues Paper, the UK Commissioner's primary responsibilities include encouraging good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences and the identification of victims.[51] However, the UK government has recognised that there is a lack of compliance with the Modern Slavery Act reporting requirements[52] and has committed to strengthening enforcement by, amongst other matters, establishing a single enforcement body for employment rights (broadly)[53] which goes substantially beyond the functions of the Commissioner. The

[51] Australian Government, *Review of Australia's Modern Slavery Act 2018* (Issues Paper, 2022) ('*Issues Paper*') 48.

[52] In July 2018, the Home Secretary commissioned the *Independent Review of the Modern Slavery Act,* with the final report presented to Parliament in May 2019 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf>. In response, the UK Government committed to strengthening the Act, see, UK Government, Home Office, *Transparency in supply chains consultation* (Government Response, 22 December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf>.

[53] See UK Home Office, *Transparency in supply chains consultation* (Government Response, 22 December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/

single enforcement body will have an extensive remit to protect vulnerable workers in the UK, including having the power to enforce transparency in supply chains / modern slavery statement reporting and labour exploitation and modern slavery related to worker exploitation.[54]

- In the NSW, the Anti-Slavery Commissioner is tasked broadly with monitoring the effectiveness of legislation and governmental policies and action in combating modern slavery, as well as monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies, however, it lacks any investigatory or compliance powers. In fact, the Commissioner is expressly restricted from investigating or dealing directly with the complaints or concerns of individual cases.[17]

We recommend that the following powers should be given to a Commonwealth Anti-Slavery Commissioner:

(1) Enforcement powers

There should be enforcement powers, and appropriate resources to ensure that enforcement action can be adequately and effectively undertaken. This could include administration of, or recommendations as to the administration of, penalties and other administrative action following non-compliance with MSA requirements (as per the recommendations set out in sections 3.2 and 3.3 above).

Criminal enforcement of any modern slavery-related offences should be expressly excluded, as those fall under the exclusive remit of the Commonwealth Department of Public Prosecutions and Australian Federal Police, although the Commissioner should be empowered to make appropriate referrals to either agency.

(2) Complaint handling

The Commissioner should have the ability to receive and investigate complaints, such as other regulatory bodies in Australia, including the Office of the Australian Information Commissioner, Australian Human Rights Commission (***AHRC***) and the ACCC. This includes complaints made by any person who suspects an entity has failed to comply with requirements under the MSA.

Complaints handling should form a core aspect of the Commissioner's duties. This would provide an additional avenue for assistance to and the identification of victim-survivors of modern slavery practices, as well as their representatives and other concerned members of the public. It would also assist the Commissioner to be able to identify sectors or companies of key concern.

(3) Investigatory powers

The Commissioner should have the ability to conduct investigations on its own initiative or upon receipt of a complaint relating to non-compliance with the MSA or suspected instances of modern slavery, similar to the ACCC's investigation powers. There would also be merit in giving the Commissioner broader investigatory power to conduct appropriate investigations, similar to the AHRC. This would, for example, enable to Commissioner to focus on industry investigations in high-risk sectors.

(4) Guidance for companies operating in high-risk sectors

The Commissioner should be tasked with publishing an annual list of countries, regions, industries and product with a high risk of modern slavery, and should also provide develop further guidance for companies operating or sourcing goods from high-risk sectors or jurisdictions. Issuing sector-specific or country

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attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf>; UK Department for Business, Energy & Industrial Strategy, *Establishing a new single enforcement body for employment right* (Government Response, June 2021) <https://assets.publishing.service.gov.uk /government/ uploads/system/uploads/attachment_data/file/991751/single-enforcement-body-consultation-govt-response.pdf>.

[54] UK Department for Business, Energy & Industrial Strategy, *Establishing a new single enforcement body for employment right* (Government Response, June 2021) 15 <https://assets.publishing.service.gov.uk /government/ uploads/system/uploads/attachment_data/file/991751/single-enforcement-body-consultation-govt-response.pdf>.

specific guidance, as has been done in the UK, Canada and the US, will assist businesses to more accurately pinpoint and respond to modern slavery risks.

(5) Monitoring

In the event that due diligence obligations are established, there should be appropriate monitoring powers permitting the Commissioner to regularly assess compliance with the MSA. Supervisory powers serve both preventative and remedial objectives, including uncovering non-compliant processes and preventing further escalation of harm.[55] The Commissioner should have the ability to coordinate with other government agencies to ensure a coherent response to matters which may overlap across agencies.

5.1.2 Oversight and capacity building

Currently, the MSBEU is tasked with administrative, support and educative and compliance functions including, for example, managing the Modern Slavery Statements Register, conversing with the business community about reporting obligations and modern slavery risks, arranging and presenting workshops and information sessions for business and civil society, managing an online helpdesk, publishing administrative guidance documents, convening formal consultation groupings and convening the Modern Slavery Expert Advisory Group.

These functions could either be brought within the Commissioner's remit, or alternatively the MSBEU could maintain its current role aimed primarily at supporting business to comply with MSA requirements, and the Commissioner takes on broader oversight and enforcement responsibilities as described above.

6. Other matters

6.1 Is a further statutory review (or reviews) of the Modern Slavery Act desirable? If so, when? And by whom?

Issues Paper Q26

A further 3-year review of the MSA is desirable. The next review should assess:

(a) The extent to which any further amendments to the MSA have been effective in improving compliance and prompting effective action by companies to tackle modern slavery;

(b) Whether there should be further lowering of the threshold and staged phasing in of reporting and due diligence obligations on companies (as discussed above); and

(c) Whether the 'duty to prevent' modern slavery should be extended to impose an obligation to prevent a broader range of human rights abuses.

It is our strong recommendation that at the point of the next 3-year review, the Australian Government considers introducing broader human rights due diligence obligations on companies. Modern slavery doesn't occur in a vacuum; it exists on a continuum of human and labour rights abuses. Requiring companies to just focus on addressing such a narrow sub-set of human rights abuses is ultimately undesirable and not compliant with Australia's obligations under the UNGPs to protect against all human rights abuses by businesses operating in its territory or jurisdiction. While we believe it is logical to focus legislative efforts on implementing due diligence to tackle modern slavery as a first step, given companies should already be familiar with their obligations in this area, in the medium-term Australia should be

[55] Dr Rachel Chambers, Sophie Kemp and Katherine Tyler, 'Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence law' (August 2020) 28 <https://static1.squarespace.com/static/59242ebc03596e804886c7f4/t/5fb548df5fd88c0dffc8d2ec/1605716195556/Research%2Breport%2B1.pdf>.

moving towards the more holistic approach to human rights due diligence being taken in Europe and elsewhere.

6.2 Is there any other issue falling within the Terms of Reference for this review that you would like to raise?

In *Paper Promises*, we recommended several complementary measures to strengthen Australia's modern slavery framework. In particular, while it has expressly been carved out of the terms of reference for this review, we recommend that a forced labour import ban, established through amendments to the *Customs Act 1901* (Cth) (***Customs Act***), should be introduced as an additional complementary measure to enhance the effectiveness of the MSA in driving corporate action on modern slavery.

An import ban, modelled on the US *Tariff Act*, if backed by targeted interventions, has the potential to lead to improved conditions for exploited workers overseas and would encourage business to undertake effective due diligence over their supply chain, and to focus on salient risks.

Over recent years, the US approach has proved effective in generating behavioural change by companies to address forced labour in their supply chains. Under the US regime,[56] anyone may petition the regulator to investigate allegations of forced labour,[57] who will detain imports under a 'Withhold Release Order' where evidence reasonably, but not conclusively, indicates that they are produced or manufactured in whole or in part by forced labour.[58] Goods will be released where the importer provides evidence that the goods were not produced with forced labour within three months (or re-exports its products).[59] Where the importer fails to produce such evidence, or where the regulator conclusively makes a 'finding' that the imports were made with forced labour,[60] the goods will be destroyed or subject to seizure and summary forfeiture proceedings.[61]

The Human Rights Law Centre has previously made detailed submissions with regard to how an import ban should be established in relation to the Senate inquiry into the *Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020*.[62] In summary, we recommend that the Customs Act should be amended to prohibit the importation into Australia of all goods manufactured or produced using forced labour, regardless of geographical origin. The amendments should establish a clear mechanism to ensure the effective enforcement of the prohibition, which includes the following:

(a) A **special investigations unit** within the ABF, to identify and investigate suspected cases of imports produced with forced labour, with an open referral system and clear guidance on the evidence standards for imposing an import ban;

(b) A **presumption of detention** where the evidence reasonably, but not conclusively, indicates that the imports were produced or manufactured by forced labour, and which can be challenged by importers upon provision of appropriate evidence (akin to the US 'Withhold Release Order' system); and

(c) **Publication of customs data** from the Australian Government's Integrated Cargo System (***ICS***) to enable the identification of Australian importers that are sourcing goods from businesses overseas that may be involved in forced labour.

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[56] *Tariff Act 1930* 19 USC § 307 (2010).
[57] 19 C.F.R. § 12.42(b) and (d), <https://www.law.cornell.edu/cfr/text/19/12.42>.
[58] Ibid § 12.42(e).
[59] Ibid § 12.43.
[60] Ibid § 12.42(f).
[61] Unless the importer avails themselves of further appeals processes. See Ibid § 12.44(a) and (b).
[62] Human Rights Law Centre, *Submission to the Parliamentary Inquiry of the Senate Foreign Affairs and Trade Committee into the Customs Amendment (Banning Goods Produced By Uyghur Forced Labour)* Bill 2020 (11 February 2021) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6025f496976ccb614564e4a2/1613100185045/Human+Rights+Law+Centre+-+Submission+on+Customs+Amendment+%28Uyghur+Forced+Labour%29+Bill.pdf>.

Annexure A: Model amendment

Modern Slavery Amendment (Duty to Prevent Modern Slavery) Bill 2022

No. , 2022

A Bill for an Act to require some entities to prevent modern slavery in their operations and supply chains, and for related purposes

A Bill for an Act to require some entities to prevent modern slavery in their operations and supply chains, and for related purposes

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act is the *Modern Slavery Amendment (Duty to Prevent Modern Slavery) Act 2022*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions	**Commencement**	**Date/Details**
1. The whole of this Act	The day after this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Modern Slavery Act 2018 (Cth)

1 Section 4

After the definition of "***carries on business in Australia***", insert:

"***civil penalty provision***" has the same meaning as in the Regulatory Powers Act.

"***Commissioner***" means the Anti-Slavery Commissioner.

After the definition of "***control***", insert:

"***Court***" means:

(a) the Federal Court of Australia;

(b) the Federal Circuit and Family Court of Australia (Division 2).

7 After section 20

Insert:

Part 3A—Duty to prevent modern slavery

20A Duty to develop and implement human rights due diligence procedures

(1) Every reporting entity must develop, implement, document and monitor the implementation of, due diligence procedures that enable the reporting entity to:

(a) identify and assess 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;

(b) take action to mitigate those risks;

(c) identify, and be notified 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) take action to address those modern slavery practices, including any remediation processes.

Civil penalty: ##

(2) If a reporting entity is covered by a joint modern slavery statement under section 14, the reporting entity may comply with subsection (1) in co-operation with other reporting entities that are covered by that joint modern slavery statement.

(3) A Court may order a reporting entity to pay to the Commonwealth a pecuniary penalty in relation to the contravention of subsection (1) and may make such other orders in relation to the contravention as it thinks fit.

(4) The Commissioner may commence a proceeding seeking orders under subsection (3) within 6 years of the alleged contravention.

Note: The term 'Commissioner' is used throughout, however enforcement could also be carried out by an authority housed in a government department or agency, such as the Attorney-General's Department.

20B Duty to prevent modern slavery

(1) A reporting entity contravenes this subsection if modern slavery practices occur in the operations or supply chains of the reporting entity, or any entities that the reporting entity owns or controls.

Civil penalty: ##

(2) A Court may order a reporting entity to pay to the Commonwealth a pecuniary penalty in relation to the contravention of subsection (1) and may make such other orders in relation to the contravention as it thinks fit.

(3) A Court may order a reporting entity to pay compensation to a person who suffers loss or damage because of a contravention of subsection (1) and may make such other orders in relation to the contravention as it thinks fit.

(4) The Commissioner may commence a proceeding seeking orders under subsection (2) or subsection (3), or under both subsection (2) and subsection (3), within 6 years of the alleged contravention.

(5) A person who suffers loss or damage because of a contravention of subsection (1) may commence a proceeding seeking orders under subsection (3) within 6 years of the alleged contravention.

(6) A person claiming to have a cause of action under subsection (5) may apply to the Court for an extension of the limitation period in subsection (5) and the Court may, if it decides that it is just and reasonable to do so, order the extension of the period of limitation applicable to the cause of action for such period as the court determines.

(7) In the case of a reporting entity that is an unincorporated body, an order under subsection (2) or subsection (3) may be made, and a proceeding under subsection (4) or subsection (5) may be commenced, against any responsible member of the reporting entity.

(8) In a proceeding under subsection (4) or subsection (5), it is a defence if the reporting entity or responsible member (as the case may be) proves that the reporting entity exercised all reasonable steps to avoid the contravention in respect of which the proceeding was instituted.

[Option:

(9) In determining whether a reporting entity exercised all reasonable steps for the purpose of subsection (8), the Court may have regard to: ##

Note: *This section could include a list of factors that may be taken into account (to be developed through further consultation).*]

Annexure B: Table of comparative international developments

Jurisdiction	Legislation / Proposal	Summary	Penalties
New Zealand	*Modern Slavery Consultation Paper*	In April 2022, the New Zealand Government announced its intention to introduce a disclosure and due diligence-based legislative framework for combatting modern slavery.[63] Under the proposal, all organisations would be subject to new responsibilities across their operations and supply chains, with more responsibilities for larger organisation: • All entities would be required to take reasonable and proportionate action if they become aware of modern slavery in their international operations and supply chains and/or modern slavery or worker exploitation in their domestic operations and supply chains; • All entities would be required to undertake due diligence to prevent, mitigate and remedy modern slavery and worker exploitation by New Zealand entities where they are the parent or holding company or have significant contractual control;	The New Zealand Government is considering penalties to apply for failing to comply with obligations at each company size threshold. It is also considering other tools including infringements, improvement notices, enforceable undertakings and publication of good/bad practices. Examples of penalties provided as a reference include employment legislation providing for minimum wage standards: • Penalties for seeking payment in return for a job, failing to pay/underpaying wages, and failing to provide holiday and annual leave or entitlements are up to NZD **$10,000** (approx AUD $8,966) **for an individual and NZD $20,000** (approx AUD $17,930.46) **for a corporation**. In the case of a pecuniary penalty for serious breaches of minimum entitlement provisions, up to NZD $50,000 (approx AUD $44,826.16) for an individual and up to the greater of NZD $100,000 (approx AUD $89,652.32) or 3 times the financial gain for a body corporate.

[63] New Zealand Government, Ministry of Business, Innovation and Employment, *Discussion Documents: A Legislative Response to Modern Slavery and Worker Exploitation*, 8 April 2022 <https://www.mbie.govt.nz/dmsdocument/19734-discussion-document-a-legislative-response-to-modern-slavery-and-worker-exploitation>

		• Medium and large entities would be required to report annually on the due diligence they are undertaking to address modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains; • Large entities would be required to meet due diligence obligations to prevent and mitigate modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains.	• Penalties for requiring excessive working hours are up to **$10,000 for an individual and $20,000 for a corporation**. In the case of failing to comply with a duty under the Health and Safety at Work Act, it is up to $50,000 for an individual who is not a person conducting a business or undertaking (PCBU) or PCBU officer, up to $100,000 for an individual who is a PCBU or a PCBU officer; and up to NZD $500,000 (approx AUD $448,230) for any other person. • Penalties for failing to maintain employment records are **up to $10,000 for an individual and $20,000 for a corporation.**
UK	*Modern Slavery Act 2015 (UK)* *Modern Slavery Amendment Bill 2021* *Proposed mandatory human rights and environmental due diligence laws*	In the UK there have been bills and proposals to amend existing legislation. In 2020, the UK Government committed to strengthening the *Modern Slavery Act* as outlined at 2.2.2. In 2021, the *Modern Slavery Amendment Bill 2021* was introduced by a private member in the House of Lords. The proposed legislation makes it an offence to supply a false slavery and human trafficking statement, punishable by a term of imprisonment and/or a fine amounting to 4% of global turnover of the relevant commercial organisation, to a maximum of £20 million. The proposed legislation also establishes minimum standards of transparency in supply chains in relation to modern slavery and human trafficking, including: • a requirement that the commercial organisation publish and verify information about the country of origin of sourcing inputs in its supply chain;	• No current provision for monetary penalties with a breach of the Act, or available details of UK Government proposal. • The *Modern Slavery Amendment Bill 2021* purports to introduce proposed sanctions, including a term of imprisonment and/or a fine amounting to **4% of global turnover** of the relevant commercial organisation, to a **maximum of £20 million.**

		• arrange for credible external inspections, external audits, and unannounced external spot-checks; and • report on the use of employment agents acting on behalf of an overseas government. More broadly, a coalition of 63 UK businesses, investors and civil society organisations have also called for the UK government to adopt mandatory human rights and environmental due diligence laws to identify, assess and mitigate the risks to all human rights and the environment posed by corporate activities.[64] The proposed legislation is modelled on recommendations issued by the UK's Joint Committee on Human Rights in its report on 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability'.[65]	
US	*California - Transparency in Supply Chains Act* *New York – Proposed Sustainability and Social Accountability Act* *Federal –*	The Californian *Transparency in Supply Chains Act* provides for a disclosure-based regime for retailers and manufacturers doing business in California, with annual worldwide gross receipts of $100 million or more. Companies must report on their efforts to eradicate slavery and human trafficking from the supply chain. Companies must make disclosures, on their website, relating to verification, audits, certification, internal accountability, and training.	• In California, there are no penalties for non-compliance with the Act. • In New York, failure to comply with specific reporting requirements may lead to penalties (such as injunctions or damages) or fines of **up to 2%** of their annual revenues over **$450 million**. Further, the Attorney General and private citizens will have the ability to enforce the law against non-compliant companies.

[64] Letter from the 63 businesses, investors and civil society organisations to the House of Commons, 30 September 2022, <https://media.business-humanrights.org/media/documents/2022_Joint_business_investor_CSO_letter_on_human_rights_due_diligence_legislat_XFDmyAJ.pdf>

[65] House of Lords, House of Commons, *Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, 6th Report of Session 2016-17, 29 March 2017, <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>

	Tariff Act 1930 *Uyghur Forced Labor Prevention Act* *Proposed* Fashioning Accountability and Building Real Institutional Change	In New York, there are also efforts to introduce a stronger disclosure and action standard in New York through the Sustainability and Social Accountability Act (A8352/S7428), which would impose social and environmental disclosure requirements on global fashion brands operating in New York. At a federal level, section 307 of the US *Tariff Act 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.[66] Anyone may petition the regulator to investigate allegations of forced labour,[67] who will detain imports under a 'Withhold Release Order' where evidence reasonably, but not conclusively, indicates that they are produced or manufactured in whole or in part by forced labour.[68] Under the US regime, goods will be released where the importer provides evidence that the goods were not produced with forced labour within three months (or re-exports its products).[69] Where the importer fails to produce such evidence, or where the regulator conclusively makes a 'finding' that the imports were made with forced labour,[70] the goods will be destroyed or subject to seizure and summary forfeiture proceedings.[71]

[66] *Tariff Act 1930* 19 USC § 307 (2010).
[67] 19 C.F.R. § 12.42(b) and (d), <https://www.law.cornell.edu/cfr/text/19/12.42>.
[68] 19 C.F.R. § 12.42(e), <https://www.law.cornell.edu/cfr/text/19/12.42>.
[69] 19 C.F.R. § 12.43, <https://www.law.cornell.edu/cfr/text/19/12.43>.
[70] 19 C.F.R. § 12.42(f), <https://www.law.cornell.edu/cfr/text/19/12.42>.
[71] Unless the importer avails themselves of further appeals processes. See 19 C.F.R. § 12.44(a) and (b), <https://www.law.cornell.edu/cfr/text/19/12.44>.

Further, the *Uyghur Forced Labor Prevention Act* (**UFLPA**) was signed into law on 23 December 2021 and came into effect in June 2022. The UFLPA creates a rebuttable presumption that all goods manufactured in Xinjiang are made with forced labour, unless the Commissioner of Customs and Border Protection (**CBP**) determines the importer has complied with specific conditions and provided evidence demonstrating the goods were not produced with forced labour. This has been accompanied by the US Department of Homeland Security's Strategy to Prevent the Importation of Goods Mined, Produced or Manufactured with Forced Labor in the People's Republic of China and CBP importer guidance to assist the business community.

The *Fashioning Accountability and Building Real Institutional Change* (FABRIC) Act (S4213) has been introduced in the US Senate. If passed, the Bill would:

- establish joint and several liability requirements for brands that hold them and their manufacturing partners accountable for their labour practices, this provision enables workers to pursue legal remedy from the brands and retailers whose business practices lead to labour abuses;
- establish a nationwide garment industry registry through the Department of Labor to promote transparency;
- set hourly pay in the garment industry and eliminate "piece rate" pay until the minimum wage is met; and
- encourage domestic manufacturing through the introduction of grants and reshore tax credits.

Canada	*Bill S-211* *Bill C-262* *Bill C-263* *Integrity Declaration on Doing Business with Xinjiang Entities*	In Canada, several bills in relation to modern slavery and/or human rights due diligence measures have been introduced into Parliament. Bill S-211 (an Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*)* (currently being scrutinised by the Canadian Parliament's foreign affairs committee) imposes similar reporting obligations to the current MSA, but includes additional measures including penalties, liability for directors and officers of companies, and additional powers of enforcement. Bill C-262 proposes to establish a duty on businesses to prevent adverse human rights impacts, and to develop and implement due diligence procedures. This Bill also provides for access to remedy by people whose human rights are adversely impacted. Accompanying this Bill is Bill C-263, which establishes a Commissioner for Responsible Business Conduct Abroad for the purpose of enforcing the proposed laws. Canada also has introduced an import ban on goods made with forced labour, and has issued an *Integrity Declaration on Doing Business with Xinjiang Entities* which is required to be completed by Canadian companies that are (1) sourcing directly or indirectly from Xinjiang or from entities relying on Uyghur labour; (2) established in Xinjiang; or (3) seeking to engage in the Xinjiang market, before receiving services and support from the Trade Commissioner Service (***TCS***). By signing the declaration, the representative attests that the company is aware of the human rights situation in Xinjiang and the elevated risk this poses, and that it understands that the TCS expects Canadian companies to operate in a manner that respects human rights,	Under Bill S-211: • Minister may require entity to take any measures the Minister considers to be necessary to ensure compliance with reporting obligations (Section 18). • Every person or entity that fails to comply with the reporting obligations, a ministerial order under section 18 or obstructs a Minister's investigation, is guilty of an offence punishable on summary conviction and liable to a fine of **not more than $250,000** (approx AUD $276,812) (Section 19(1)). • Knowingly making any false or misleading statement / providing false or misleading information to a Minister or a delegate is guilty of an offence punishable on summary conviction and liable to a fine of **not more than $250,000** (see above) (Section 19(2)). • Directors/Officers/Agents/Mandataries of the person/entity who directed, authorised, assented to, acquiesced in, or participated in the commission of an offence is a party to and guilty of the offence and liable on conviction to the punishment provided for the offence, whether or not the person/entity has been prosecuted or convicted (Section 20).

		including with respect to forced labour, all applicable laws, as well as to operate transparently and in a manner that seeks to meet or exceed international standards such as the OECD Guidelines for Multinational Enterprises and the UNGPs. It also affirms that the company is not directly or indirectly sourcing products from Chinese entities implicated in forced labour or other human rights violations related to Xinjiang.	
EU	*Proposed Directive on Corporate Sustainability Due Diligence*	In February 2022, the European Commission published a draft *Directive on Corporate Sustainability Due Diligence,* which would require certain companies to conduct human rights and environmental due diligence.[72] If adopted, EU member countries will have two years to transpose the Directive into national laws. The proposed Directive applies to EU companies and non-EU companies operating in the EU, subject to certain employee and turnover thresholds. Articles 5 to 11 broadly outline due diligence procedures imposed on companies as required by the directive, including: • Integrating due diligence into company policies; • Identifying actual or potential adverse impacts; • Preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent; • Establishing and maintaining a complaints procedure; • Monitoring the effectiveness of their due diligence policies and measures;	• **Member states are required to impose sanctions applicable to infringements of national provisions** adopted pursuant to the Directive that are 'effective, proportionate and dissuasive' (Article 20(1)). • Due account to be taken of company's efforts to comply with any remedial action required, investments made, targeted support and collaboration with other entities to address adverse impacts in value chains (Article 20(2)). • Sanctions should be related to company turnover, and sanction decisions by authorities should be published (Article 20(3)). • Member States also to ensure that companies are liable for damages (Article 22). They must ensure their laws, regulations and administrative provisions (regarding infringements of directors' duties) also apply to the provisions of the proposal.

[72] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>

		• Publicly communicating on due diligence. EU members would need to ensure that companies can be held liable for damages if '*an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised…occurred and led to damage*'.[73]	• Civil liability without prejudice to the civil liability of a company's subsidiaries or of any direct and indirect business partners in the value chain. • Member States to ensure that the liability is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.
France	*Duty of Vigilance Law*	The French *Duty of Vigilance* law remains one of the seminal European laws requiring large companies to establish, effectively implement and publish vigilance measures to identify risks and prevent severe impacts on human rights and the environment. It also provides for civil liability in the event of breach.	• 3 Tiered System: (1) Formal Notice; (2) Possibility of seeking an injunction from a judge; (3) Judge has ability to impose fine. • A person having a legal interest in bringing proceedings may, after a formal notice has remained unsuccessful after 3 months, ask the judge (ruling in summary proceedings where necessary), to order the establishment, disclosure and effective implementation of vigilance measures, including under penalty payment. • In the event of damage, any person having an interest in bringing proceedings may bring an action before the court, seeking compensation, including if the damage takes place abroad. The onus is on the plaintiff to demonstrate breach of duty of vigilance, the harm, and causal link.
Germany	*Act on Corporate Due Diligence*	Germany's *Law on Supply Chains* was adopted on 11 June 2021, entering into force on 1 January 2023. The law places due diligence measures on companies, who	• Where a company fails to comply with due diligence obligations, the Act provides for sanctions in the form of periodic penalty

[73] Ibid Article 22.

	Obligations in Supply Chains	must make reasonable efforts to ensure there are no violations of human rights in their own business operations and in the supply chain. Notably, the law contains a staggered application and financial penalties.	payments of up to **EUR 50,000** (approx AUD 74,525) in administrative enforcement proceedings and/or fines, which can amount up to **EUR 8 million** (approx AUD 11.9 million). • If the company has an annual revenue of above EUR 400 million (approx AUD 596 million), a regulatory offence may even be punished with an administrative fine of up to **2% of a company's global revenue**. • Amount of fine determined by significance of the violation, economic circumstances of the company and the circumstances that militate in favour of and against the company.
Netherlands	*Due Diligence on Child Labour Law* *Proposed Responsible and Sustainable International Business Conduct Act*	The Dutch *Child Labour Due Diligence Act* was introduced in 2019, imposing obligations on companies operating in the Netherlands to conduct due diligence related to child labour, and submit statements to a public authority. This legislation was intended to come into force in 2022. In an announcement on 6 December 2021, the Foreign Trade and Develop Minister also announced a government decision to develop and introduce a national law on human rights and environmental due diligence given the delays with the European Commission proposal. In November 2022, the proposed *Responsible and Sustainable International Business Conduct Act* was re-submitted to the Dutch parliament following a review of the first draft. The proposal imposes a duty of care to prevent adverse impacts on human rights or the environment for companies offering goods and services to the Dutch market to prevent. Under the proposal there will be general duty of care for all companies offering goods and services to the Dutch market; and due	Under the *Due Diligence on Child Labour Law* • Complaint is filed with the offending company by the complainant (victims, consumers, other stakeholders), asking for a response and instructing the company to resolve the issue. Where the company does not resolve the matter within 6 months, the regulator will act as a mediator, and will provide the company with a legally binding course of action. • Failure to follow the instructions or complete them within an allotted timeline may result in fines or additional penalties. • Fines for failing to file a declaration start at **€4,350** (approximately AUD 6,483.56) and penalties increase exponentially for companies found to have inadequate due diligence or lack of an appropriate plan of action to detect and prevent the use of child labour. • Companies that fail to comply can be subject to fines of **up to €870,000** (approximately AUD

		diligence obligation for companies with 250+ employees, and/or 50 million revenues, and/or 43 million assets (2 out of 3). After 6 years the due diligence obligation will also apply to companies with 50+ employees after an evaluation of the law.	1,29 million), or 10% of total worldwide revenue, if the fine is not deemed an appropriate penalty. • If a company receives two fines for breaching the Law within five years, the responsible company director is liable for up to **two years of imprisonment** under the Economic Offences Act. Under the proposed *Responsible and Sustainable International Business Conduct Act* • Companies have a duty to remediate or enable remediation of harms they cause or to which they contribute. If they fail to so, they are subject to an administrative penalty of no more than **10% of net turnover.**
Norway	*Transparency Act 2021*	Norway's *Transparency Act* was passed on 10 June 2021, and effective 2 July 2022. The *Transparency Act* requires companies to perform human rights due diligence assessments, with reports on those assessments to be made available digitally on the companies' website. Individuals have the right to request information from a company on their due diligence management, which must be provided to them within 2 months.	• Where the Norwegian Consumer Authority finds an enterprise is in breach of the Act, they will obtain a written confirmation (from the enterprise) that the illegal conduct will cease, or issue a decision (Section 9). • The Norwegian Consumer Authority can make a prohibition order, enforcement penalty order or an infringement penalty order (Section 11). • Enforcement penalty may be established as a running charge or lump sum. Emphasis shall be given to the consideration it must not be profitable to breach the decision. The Minister may issue regulations regarding the imposition of enforcement penalties. • An infringement penalty may be imposed when the infringement has been committed by someone acting on behalf of the enterprise.

			Infringement penalties for wilful/negligent infringements may be imposed on natural persons. The penalty is determined by considering the severity, scope and effects of the infringement. The infringement is due for payment 4 weeks after the decision is made. A final decision concerning an infringement penalty constitutes a ground for enforcement of the amount due.
Switzerland	*Articles 964a-964c, 964j-964l of the CO, and Article 325ter of the Criminal Code*	Switzerland enacted new legislation, in effect from 1 January 2022. Articles 964a-964c CO provide for reporting obligations covering companies' policies on carbon emissions, social issues, labour issues, human rights, corruption, and due diligence procedures. 964j-964l CO and the Federal Council Ordinance create due diligence obligations in relation to child labour in minerals and metals from conflict zones in supply chains of Swiss companies. This is supplemented by Article 325ter of the Criminal Code, which covers penalties in relation to reporting obligations.	• **Fines of 100,000 CHF** (approximately AUD $142,118) for intentionally providing a 'false indication' in the reports above, or failing to maintain the reports. • Where failures are negligent rather than intentional, a **fine of 50,000 CHT** (approximately AUD $71,059) may be imposed.
United Nations	*Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*	There have been several rounds of treaty negotiations at the United Nations on a "*Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*". The latest draft was released in August 2021, and mandates corporate due diligence across all internationally recognised human rights, including the right to a clean, healthy and sustainable environment. Further, it would require States to impose administrative, civil and criminal penalties on actors failing to satisfy due diligence duties of care.	• The treaty would require States to impose administrative, civil and criminal penalties on actors failing to satisfy due diligence duties of care.

Annexure C: Table of comparable Australian laws

	Legislation	Brief description
1.	*Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth)	The Act requires regulated businesses to establish and maintain an AML/CTF program to identify, mitigate and manage money laundering risks, and to conduct ongoing customer due diligence and reporting under s 36.
2.	*Autonomous Sanctions Act 2011* (Cth)	Australia's sanctions laws serve, among other things, to prevent business from providing or receiving financial or other benefits to or from those that may be involved in breaches of human rights.[74] Under the *Autonomous Sanctions Act 2011*, a body corporate commits a strict liability offence if it engages in conduct and contravenes a sanctions law, or a condition of an authorisation under a sanctions law. However, under section (16)(7), it is a complete defence if the body corporate can prove that 'it took reasonable precautions, and exercised due diligence, to avoid contravening' the law.
3.	*Corporations Act 2001* (Cth)	Section 728 of *Corporations Act* places a prohibition on the offering of securities under a disclosure document if there is a misleading or deceptive statement, or a material omission, from that document. Breaching this prohibition is a regulatory offence[75] and gives rise to civil liability[76] where the misleading or deceptive statement or the omission or new circumstance '*is materially adverse from the point of view of an investor*'. Section 731 sets out the 'due diligence defence' to strict liability for misleading statements and omissions in prospectuses. It provides that a person is not liable for a contravention if they '*made all inquiries (if any) that were reasonable in the*

[74] Allens Linklaters, Stocktake on Business and Human Rights in Australia (2017), 33.
[75] *Corporations Act 2001* (Cth), s 728(3).
[76] Ibid s 728(4).

		circumstances' and, after doing so, believed on reasonable grounds that the statement or omission was not misleading or deceptive.
4.	*Criminal Code Act 2001* (Cth)	A corporation can only rely on the 'mistake of fact' defence under s 12.5, in strict liability contraventions if it proves it exercise due diligence to prevent the conduct.
5.	*Environment Protection Amendment Act 2018* (Vic)	Section 25 creates a 'general environmental duty' (GED) on businesses to reduce the risk of harm from business activities to human health and the environment and from pollution or waste. The expectation is that business will manage activities to avoid the risk of environmental damage, and will respond if pollution does occur. The GED requires businesses, to 'eliminate risks of harm to human health and the environment for far as reasonably practicable' and 'if it is not reasonably practicable to eliminate risks of harm to human health and the environment, to reduce those risks so far as reasonably practicable'.[77] The legislation sets out various indicia that should be taken into account in carrying out this duty, including the likelihood of risks eventuating, the degree of harm, availability and suitability of ways to eliminate or reduce risks, and the costs involved.[78] It also sets out 'principles of environment protection', including proportionality, primacy of prevention, shared responsibility, polluter pays and the precautionary principle.[79] There are a number of deemed contraventions under ss 25(4) and (5). For example, under s 25(4), a person who is conducting a business contravenes the duty if they fail to, so far as reasonably practicable, use and maintain plant, equipment, processes and systems in a manner that minimises risks of harm to human health and the environment from pollution and waste. Under s 350, if a body corporate commits an offence, an officer also commits an offence. However, under s 350(3) it is a defence for an officer to prove that the officer exercised due diligence to prevent the commission of the offence by the body corporate.
6.	*Illegal Logging Prohibition Act 2012* (Cth)	This Act prescribes due diligence requirements for importing regulated timber products in s 14. The purpose of this is to reduce the risk that imported regulated timber products are, are made from, or

[77] *Environment Protection Amendment Act 2018* (Vic), s 6.
[78] Ibid s 6(2).
[79] Ibid Part 2.3.

		include, illegally logged timber. Section 18 prescribes due diligence requirements for processing raw logs. A corporation commits an offence if it fails to comply with due diligence requirements. The specific due diligence requirements are prescribed in the *Illegal Logging Prohibition Regulation 2012*.
7.	*National Parks and Wildlife Act 1974* (NSW)	Under s 86 of the Act, it is an offence to damage an Aboriginal object or place, unless a permit has been granted. However, s 87 provides that it is a defence to prosecution if a person can prove that they exercised due diligence in determining whether an act or omission would harm an Aboriginal object and reasonably determined that no Aboriginal object would be harmed.
8.	*Work Health and Safety Act 2011* (Cth)	Under s 27, an officer of a business must exercise due diligence to ensure that the business complies with duties under the Act. Section 27(5) defines due diligence. This includes, for example, taking reasonable steps to: acquire and keep up-to-date knowledge of work health and safety matters; to gain an understanding of the nature of the operations of the business and generally of the hazards and risks associated with those operations; to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation.