

Submission to the Parliamentary Inquiry
of the Senate Foreign Affairs, Defence and
Trade Legislation Committee on the
Customs Amendment (Banning Goods
Produced By Uyghur Forced Labour) Bill
2020

11 February 2021

Human Rights Law Centre

Contact

Keren Adams
Legal Director
Human Rights Law Centre
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4433
F: + 61 3 8636 4455
E: keren.adams@hrlc.org.au
W: www.hrlc.org.au

Freya Dinshaw
Senior Lawyer
Human Rights Law Centre
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4483
F: + 61 3 8636 4455
E: freya.dinshaw@hrlc.org.au
W: www.hrlc.org.au

Human Rights Law Centre

The Human Rights Law Centre uses a strategic combination of legal action, advocacy, research, education and UN engagement to protect and promote human rights in Australia and in Australian activities overseas. It is an independent and not-for-profit organisation and donations are tax-deductible.

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 and demand justice for First Nations peoples.

Contents

1. Executive summary	4
2. Recommendations	5
3. The situation in Xinjiang	6
4. The proposed bill	8
5. A global ban on goods produced with forced labour	9
6. Additional measures to prevent forced labour	12
6.1 Strengthen the Modern Slavery Act	12
6.2 Introduce mandatory human rights due diligence obligations for Australian companies.....	13
6.3 Publish an annual list of high-risk goods and countries.....	13
6.4 Ratify the Protocol to the Forced Labour Convention.....	14

1. Executive summary

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 overseas operations and supply chains of Australian companies and have long advocated for an Australian ban on the importation of goods produced with forced labour.

We therefore welcome the opportunity to provide input to this Inquiry on the Customs Amendment (Banning Goods Produced with Uyghur Forced Labour) Bill 2020 (*Bill*). The credible evidence that continues to emerge regarding the mass internment, forced labour and other widespread abuses against Uyghurs and Turkic Muslims¹ in Xinjiang is horrifying and provides a compelling case for additional action by the Australian Government to help ensure that no Australian business, whether deliberately or inadvertently, is profiting from or contributing to these egregious human rights violations.

Notwithstanding the gravity of the situation in Xinjiang, we have concerns about the current Bill's *exclusive* focus on goods imported from Xinjiang and China. Such a narrow ban fails to acknowledge that forced labour is a pervasive global problem which impacts numerous products and services linked to Australian supply chains. It would also, in our view, be open to challenge by China under the WTO rules or Australia's trade agreements with China.

A preferable response consistent with Australia's human rights obligations would be the imposition of a *global* ban on the importation of goods made with forced labour, irrespective of their geographical origin, following the approach taken in the United States. Such legislation could then form the basis for more specific, targeted action by the Australian Border Force (*ABF*) to detain imported goods thought to be made with forced labour in Xinjiang or elsewhere.

If enforced effectively, and particularly in combination with other measures to address forced labour described below, we believe such a ban would place significant additional pressure on suppliers and source countries including China to end slavery-like practices, well as ensuring that Australian businesses are not complicit in or benefiting from these human rights violations.

¹ For consistency, referred to collectively as 'Uyghur' throughout this submission.

2. Recommendations

1. Amend the Bill to prohibit the importation into Australia of all goods manufactured or produced using forced labour, regardless of geographical origin.
2. Establish a clear mechanism to ensure the effective enforcement of the prohibition, modelled on the US approach, and which includes:
 - (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.
3. Introduce further complementary measures to help tackle forced labour in Australian supply chains:
 - (a) Strengthen the current *Modern Slavery Act 2018* (Cth) (**MSA**) through the addition of penalties for non-compliance and an independent anti-slavery commissioner;
 - (b) Introduce mandatory human rights due diligence obligations for large Australian companies and those operating in high-risk sectors or locations (like Xinjiang);
 - (c) Publish an annual list of products and source countries which the Australian Government considers to be at high risk of association with forced labour; and
 - (d) Ratify the ILO Protocol of 2014 to the Forced Labour Convention, 1930 (PO29).

3. The situation in Xinjiang

The treatment of Uyghurs in far western China, officially known as the Xinjiang Uyghur Autonomous Region, has been a matter of international concern for a number of years. Numerous reports emerged in 2018 of mass detention, surveillance, and cultural and religious repression of ethnic minorities.² It is now estimated that since April 2017, between 800,000 and two million Uyghurs have been detained by the Chinese government,³ the largest interment of an ethnic and religious minority since World War II.⁴ Since this time, other grave human rights abuses against the Uyghurs have been alleged, including that they are subjected to torture, rape,⁵ compulsory sterilisation,⁶ and organ harvesting.⁷

The latest evidence suggests that one component of this program of oppression is modern slavery: Uyghurs are working in farming and manufacturing in Xinjiang and other parts of China in conditions indicative of forced labour. Researchers have identified three streams in which forced Uyghur labour is coerced: internment camp 'workshops', large industrial parks, and village-based satellite factories throughout China.⁸ The Australian Strategic Policy Institute has estimated that from 2017 to 2019, more than 80,000 Uyghurs were transported from Xinjiang to work in at least 27 factories across China, some directly from detention camps.⁹

Implicated suppliers have been linked to numerous global brands sold in Australia, including the likes of Apple, BMW and Nike. Many big Australian clothing retailers also source products or cotton from China, and though some, like Target and Cotton On, have recently stopped buying from suppliers in Xinjiang, others such as Just Group and Mosaic Group have refused to confirm which regions they source from.¹⁰ The range of goods potentially affected is broad: evidence suggests that as many as one

² Tom Phillips, 'China "holding at least 120,000 Uighurs in re-education camps"', *The Guardian* (online, 25 January 2018) <<https://www.theguardian.com/world/2018/jan/25/at-least-120000-muslim-uyghurs-held-in-chinese-re-education-camps-report>>; Chris Buckley, 'China Is Detaining Muslims in Vast Numbers. The Goal: "Transformation"', *New York Times* (online, 8 September 2018) <<https://www.nytimes.com/2018/09/08/world/asia/china-uyghur-muslim-detention-camp.html>>; Human Rights Watch, 'China: Massive Crackdown in Muslim Region' (New York, 9 September 2018) <<https://www.hrw.org/news/2018/09/09/china-massive-crackdown-muslim-region>>.

³ Alison Macdonald QC, Jackie McArthur, Naomi Hart and Lorraine Aboagye, 'International Criminal Responsibility For Crimes Against Humanity And Genocide Against The Uyghur Population In The Xinjiang Uyghur Autonomous Region' (London, 26 January 2021) 28 <https://14ee1ae3-14ee-4012-91cf-a6a3b7dc3d8b.usrfiles.com/ugd/14ee1a_3f31c56ca64a461592ffc2690c9bb737.pdf>.

⁴ End Uyghur Forced Labour, 'Press Release: 180+ Orgs Demand Apparel Brands End Complicity in Uyghur Forced Labour' (Press Release, 23 July 2020) <<https://enduyghurforcedlabour.org/news/402-2/>>.

⁵ Stephen Dziedzic, 'Uyghur advocates speak out after horrifying accounts of rape and torture in Xinjiang camps in China' *ABC News* (online, 4 February 2021) <<https://www.abc.net.au/news/2021-02-03/uyghur-renew-calls-for-action-report-rape-abuse-xinjiang-camp/13118190>>.

⁶ Adrian Zenz, 'China's Own Documents Show Potentially Genocidal Sterilization Plans in Xinjiang' *Foreign Policy* (online, 1 July 2020) <<https://foreignpolicy.com/2020/07/01/china-documents-uyghur-genocidal-sterilization-xinjiang/>>.

⁷ Will Martin, 'China is harvesting thousands of human organs from its Uighur Muslim minority, UN human-rights body hears' *Business Insider Australia* (Briefing, online, 25 September 2019) <<https://www.businessinsider.com.au/china-harvesting-organs-of-uyghur-muslims-china-tribunal-tells-un-2019-9?r=US&IR=T>>.

⁸ Adrian Zenz, 'Beyond the Camps: Beijing's Grand Scheme of Forced Labor, Poverty Alleviation and Social Control in Xinjiang', *SocArXiv Papers*, (12 July 2019) 1 <<https://osf.io/preprints/socarxiv/8tsk2/>>.

⁹ Vicky Xiuzhong Xu with Danielle Cave, Dr James Leibold, Kelsey Munro and Nathan Ruser, 'Uyghurs for sale: "Re-education", forced labour and surveillance beyond Xinjiang', *Australian Strategic Policy Institute* (Policy Brief, 1 March 2020) Report No. 26/2020 03 <<https://www.aspi.org.au/report/uyghurs-sale>>.

¹⁰ Sophie McNeill, Jeanavive McGregor, Michael Walsh, Meredith Griffiths and Echo Hui, 'Cotton On and Target Australia stop buying cotton from Xinjiang over human rights concerns', *ABC News (Four Corners)* (online, 17 October 2019) <<https://www.abc.net.au/news/2019-10-17/target-cotton-on-drop-suppliers-after-four-corners-investigation/11607518?pfmredir=sm>>; Sophie McNeill, Jeanavive McGregor, Michael Walsh, Meredith Griffiths, Echo Hui and Bang Xiao, 'Cotton On and Target investigate suppliers after forced labour of Uyghurs exposed in China's Xinjiang', *ABC News (Four Corners)* (online, 17 July 2019) <https://www.abc.net.au/news/2019-07-15/uyghur-forced-labour-xinjiang-china/11298750?nw=0>; Xiuzhong Xu et al., 'Uyghurs for sale' (n9) 03.

in five cotton products sold globally may be produced with Uyghur forced labour,¹¹ as well as goods such as tomatoes¹² and solar panels.¹³

The United States, Canada and the United Kingdom have all recently taken steps to mitigate against businesses operating in their jurisdictions becoming complicit in or profiting from such abuses.

The US, which already has legislation in place prohibiting the importation of goods produced with forced labour,¹⁴ in January imposed import bans on all cotton and tomato products produced in Xinjiang province, citing credible allegations of debt bondage, restriction of movement, withheld wages, and abusive living and working conditions.¹⁵ A bill is now before Congress which would establish a rebuttable presumption that all goods produced in Xinjiang are caught by the general ban.¹⁶

Canada, which last year enacted a broad customs ban on goods produced with forced labour,¹⁷ recently introduced an additional requirement that Canadian companies sourcing from Xinjiang sign an 'integrity declaration' prior to receiving support from the Trade Commissioner Service.¹⁸

The UK has recently announced that it will provide guidance for companies on operating in Xinjiang, and specifically review export controls on goods entering the UK from Xinjiang.¹⁹ The UK Government has also proposed the introduction of financial penalties for companies that fail to meet their statutory obligations under its reporting regime (the *Modern Slavery Act 2015* (UK) (*UK MSA*)) and public procurement exclusions for companies with human rights violations in their supply chains.²⁰

¹¹ End Uyghur Forced Labour, 'Press Release' (n 4).

¹² US Customs and Border Protection, 'CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang', (National Media Release, 13 January 2021) <<https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>>.

¹³ Ana Swanson and Chris Buckley, 'Chinese Solar Companies Tied to Use of Forced Labor' *New York Times* (online, 8 January 2021) <<https://www.nytimes.com/2021/01/08/business/economy/china-solar-companies-forced-labor-xinjiang.html>>.

¹⁴ *Trade Facilitation and Enforcement Act* 19 USC (2015), amending *Tariff Act 1930* 19 USC § 307 (2010).

¹⁵ US Customs and Border Protection, 'CBP Issues Region-Wide WRO' (n 12).

¹⁶ *Uyghur Forced Labor Prevention Act*, H.R.6210, 117th Congress (2021).

¹⁷ Canada Border Services Agency, 'Customs Notice 20-23, Import prohibition on goods produced wholly or in part by forced labour' (Ottawa, 30 June 2020) <<https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-23-eng.html>>.

¹⁸ Global Affairs Canada, 'Canada announces new measures to address human rights abuses in Xinjiang, China', Government of Canada (News release, 12 January 2021), <<https://www.canada.ca/en/global-affairs/news/2021/01/canada-announces-new-measures-to-address-human-rights-abuses-in-xinjiang-china.html>>.

¹⁹ Home Office and Victoria Atkins MP, 'New tough measures to tackle modern slavery in supply chains', GOV.UK (News story, 22 September 2020) <<https://www.gov.uk/government/news/new-tough-measures-to-tackle-modern-slavery-in-supply-chains>>; 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) <<https://www.gov.uk/government/speeches/foreign-secretary-on-the-situation-in-xinjiang-and-the-governments-response>>.

²⁰ Ibid.

4. The proposed bill

The Australian Government should likewise take proactive steps to ensure Australian businesses are not contributing, whether deliberately or inadvertently, to these very serious human rights violations and we commend Senator Rex Patrick for proposing legislation directed towards this aim.

The Human Rights Law Centre supports a ban on imports and sanctions against businesses that fail to prevent or remedy human rights abuses, including forced labour, in their global operations and supply chains. We have concerns, however, regarding the current wording of the Bill, which prohibits the importation of goods from two categories only: those produced or manufactured in the Xinjiang Uyghur Autonomous Region of the People's Republic of China; and those produced or manufactured in the People's Republic of China through the use of forced labour.²¹

This is an extremely narrow focus which fails to acknowledge the pervasive nature of forced labour that features in developed and emerging economies around the globe.

While the situation in Xinjiang is undoubtedly extremely serious, unfortunately it is by no means unique. Globally, 24.9 million people worldwide are estimated to be working in conditions of forced labour, of whom 4 million are thought to be in situations of state-sanctioned forced labour.²² Sectors identified as having higher risks of forced labour include domestic work, agriculture, forestry, fishing, mining, construction, transportation, manufacturing, garment and textile work, hospitality and catering and sex work and prostitution.²³ Goods commonly associated with forced labour include bricks, cotton, garments, gold, sugarcane, cattle and fish.²⁴ Nearly US\$12 billion (AUD \$15.5 billion) worth of these 'high risk' goods end up each year on Australian retail shelves.²⁵

It is difficult to justify a legislative approach that targets one example of modern slavery while ignoring other serious cases elsewhere. No Australian business should be permitted to participate in or profit from forced labour, wherever it occurs.

We are also concerned that, as currently drafted, the Bill would risk breaching Australia's international trade obligations.²⁶ Australia owes various obligations, including non-discrimination, national treatment, most-favoured nation treatment, and fair and equitable treatment, under WTO rules and its two trade agreements with China.²⁷ There is a real risk that enacting the Bill in its current form has the potential to expose the Australian Government to legal challenge by China, including through investor-state arbitration or the WTO Appellate Body, which would be onerous and expensive.

²¹ Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020 sch 1 item 2.

²² International Labour Organization and Walk Free Foundation, 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' (Geneva, 2017)

<https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf>

²³ International Labour Organization, 'Forced labour, modern slavery and human trafficking'

<<https://www.ilo.org/global/topics/forced-labour/lang-en/index.htm>>.

²⁴ Walk Free Foundation, *Global Slavery Index 2018* (2018) 103

<<https://www.globallslaveryindex.org/resources/downloads/>>.

²⁵ *Ibid*, 121.

²⁶ See *Free Trade Agreement Between The Government Of Australia And The Government Of The People's Republic Of China*, Australia-China, signed 17 June 2015 [2015] ATS 15 (entered into force 20 December 2015); *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, Australia-China, signed 11 July 1988 [1988] No. 14 (entered into force 11 July 1988); *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

²⁷ *Ibid*.

5. A global ban on goods produced with forced labour

Other jurisdictions such as the US and Canada, which have taken targeted action in relation to particular products produced in Xinjiang, have done so within an underlying, non-discriminatory legislative framework that seeks to address forced labour practices regardless of where they occur. We respectfully submit that this would be a preferable approach for Australia to follow, consistent with its obligations under the United Nations Guiding Principles on Business and Human Rights to protect against human rights abuses by companies.²⁸

The US approach in particular provides a useful model and has proved effective in generating behavioural change by companies to address forced labour in their supply chains.

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.²⁹ Anyone may petition the regulator to investigate allegations of forced labour,³⁰ who will detain imports under a 'Withhold Release Order' (**WRO**) where evidence reasonably, but not conclusively, indicates that they are produced or manufactured in whole or in part by forced labour.³¹

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).³² Where the importer fails to produce such evidence, or where the regulator conclusively makes a 'finding' that the imports were made with forced labour,³³ the goods will be destroyed or subject to seizure and summary forfeiture proceedings.³⁴

At the time of writing, there were 47 active WROs and 7 active findings against products from 10 different countries listed on the US CBP register, including the WRO relating to cotton and tomatoes produced in Xinjiang referenced above.³⁵ A number of companies targeted by WROs have reduced the presence of forced labour indicators to the satisfaction of the CBP.³⁶ Where bans are targeted at a sector or region, the CBP grants exemptions for companies which have adequate due diligence processes to ensure that forced labour is not occurring in their supply chains.³⁷

²⁸ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights' (New York and Geneva, 2011) 3-13 <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

²⁹ *Tariff Act 1930* 19 USC § 307 (2010).

³⁰ 19 C.F.R. § 12.42(b) and (d), <<https://www.law.cornell.edu/cfr/text/19/12.42>>.

³¹ *Ibid* § 12.42(e).

³² *Ibid* § 12.43.

³³ *Ibid* § 12.42(f).

³⁴ Unless the importer avails themselves of further appeals processes. See *Ibid* § 12.44(a) and (b).

³⁵ Excluding inactive WROs and findings: US Customs and Border Protection, 'Withhold Release Orders and Findings', <<https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings>>.

³⁶ US Customs and Border Protection, 'CBP Revokes Withhold Release Order on Disposable Rubber Gloves' (24 March 2020), <<https://www.cbp.gov/newsroom/national-media-release/cbp-revokes-withhold-release-order-disposable-rubber-gloves>>; US Customs and Border Protection, 'CBP Modifies Withhold Release Order on Imports of Bone Black from Bonechar Carvão Ativado do Brasil Ltd' (7 December 2020), <<https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-withhold-release-order-imports-bone-black-bonechar-carv>>; US Customs and Border Protection, 'CBP Revokes Withhold Release Order on Imports of Tuna Harvested by the Tunago No. 61 Vessel' (1 April 2020), <<https://www.cbp.gov/newsroom/national-media-release/cbp-revokes-withhold-release-order-imports-tuna-harvested-tunago-no>>.

³⁷ US Customs and Border Protection, 'CBP Modifies Withhold Release Order on Gold Imports from the Democratic Republic of the Congo' (28 May 2020), <<https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-withhold-release-order-gold-imports-democratic-republic>>. See also, US Customs and Border Protection, 'Release Order on Tobacco Imports from Limbe Leaf Tobacco Company Ltd. in Malawi' (1 August 2020), <<https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-withhold-release-order-tobacco-imports-limbe-leaf>>.

WROs have the capacity to reverberate through industries, given that they are published on a public register.³⁸ For example, in 2020 during the height of the COVID-19 pandemic, a WRO was placed on imports of disposable gloves from Top Glove,³⁹ the world's biggest rubber glove manufacturer.⁴⁰ Faced with an inability to ship certain products to the US, Top Glove reportedly made improvements to its practices, including commencing a program of remediating workers that were subject to excessive recruitment fees.⁴¹ Following the imposition of the WROs against Top Glove and another glove manufacturer, WRP Asia Pacific, a number of Malaysian glove manufacturers also proactively commenced remediation programs and introduced policies to combat debt bondage, even though they were not directly affected by the orders.⁴²

The Human Rights Law Centre supports US-style legislation banning the importation goods into Australia which have been produced or manufactured with forced labour. Such legislation could then form the basis for more specific, targeted orders relating to any imported goods thought to be made with forced labour in China or elsewhere.

To ensure effective enforcement of such legislation, we recommend that the Australian Government take the following additional steps:

1. *Establish a specialist unit to investigate cases of suspected forced labour*

A special investigations unit should be established within the ABF to identify and investigate suspected cases of imports produced with forced labour. Given the complexity involved in detecting forced labour in the supply chains of Australian companies, appropriate resources and powers would be required in order for the unit to function effectively.⁴³ We would recommend that the unit be modelled on the Forced Labour Division in the US CBP within the Department of Homeland Security. Clear guidance should be published on the evidential standards for imposing an import ban. As in the US, an open referral mechanism should also be established for anyone (including business, civil society organisations or journalists) to apply to the ABF to investigate allegations that certain imports have been produced or manufactured with forced labour.

2. *Introduce a presumption of detention where evidence reasonably indicates forced labour*

Where the evidence reasonably, but not conclusively, indicates that the imports were produced or manufactured by forced labour, a presumption of detention should apply. This would offset the information asymmetry faced by the ABF when investigating complex forced labour issues and global supply chains.

³⁸ 19 C.F.R. § 12.42(f), <<https://www.law.cornell.edu/cfr/text/19/12.42>>.

³⁹ US Customs and Border Protection, 'Withhold Release Orders and Findings' (n 35).

⁴⁰ Top Glove, 'Corporate Profile', <<https://www.topglove.com/corporate-profile/#:~:text=Established%20in%201991%20and%20headquartered,market%20share%20for%20rubber%20gloves>>.

⁴¹ Malaysia's Top Glove 'making improvements' in effort to reverse import ban: US. customs" *Thomson Reuters Foundation News* (online, 24 October 2020) <<https://www.reuters.com/article/us-top-glove-corp-ban/malaysias-top-glove-making-improvements-in-effort-to-reverse-import-ban-u-s-customs-idUSKBN2782B9>>; "Malaysia's Top Glove compensates migrant workers after US. Customs ban", *Thomson Reuters Foundation News* (online, 10 August 2020) <<https://www.reuters.com/article/us-top-glove-labour/malaysias-top-glove-compensates-migrant-workers-after-u-s-customs-ban-idUSKCN25617P>>.

⁴² See, eg Julie Zaugg, 'The world's top suppliers of disposable gloves are thriving because of the pandemic. Their workers aren't', *CNN Business* (online, 12 September 2020) <<https://edition.cnn.com/2020/09/11/business/malaysia-top-glove-forced-labor-dst-intl-hnk/index.html>>, Zsombor Peter, 'After US Sanctions, Malaysia Migrant Workers Get Millions in Restitution from Glove Makers', *VOA* (online, 19 November 2020) <<https://www.voanews.com/east-asia-pacific/after-us-sanctions-malaysia-migrant-workers-get-millions-restitution-glove-makers#:~:text=KUALA%20LUMPUR%2C%20MALAYSIA%20%2D%20Malaysian%20rubber,year%20over%20for%20ced%20labor%20claims>>.

⁴³ There have also been further calls for increased resourcing to enhance the CBP's enforcement of the legislation in the US: see Congressional Research Service, 'Section 307 and Imports Produced by Forced Labor' (1 February 2021) 2 <<https://crsreports.congress.gov/product/pdf/IF/IF11360>>.

As under the US 'Withhold Release Order' system, importers should then have the ability to challenge the detention of withheld goods by producing evidence that the goods were not produced with forced labour. Withheld imports should be released where the ABF is satisfied that the importer has taken every reasonable effort to verify the source and the type of labour used, and has provided sufficient evidence that the shipped goods were not produced with forced labour.

The ABF's ability to drive meaningful change would be enhanced by the commercial imperative on importers and exporters to secure swift release of the goods. Through this process, in practice, the ABF would have the ability to require importers to demonstrate that tangible improvements have been made to mitigate against forced labour risks in the supply chain prior to releasing goods.

In the event that the importer cannot satisfy the ABF that the goods are free of forced labour, there should be provision for seizure or re-exportation of the goods.

3. Publish customs data on Australian imports

Greater transparency and open access over the customs data of imported goods into Australia would also enable businesses and civil society to more accurately identify modern slavery risks in Australian supply chains, and incentivise companies to more closely scrutinise their potential links to forced labour. In other jurisdictions including the US and EU, customs data is made publicly available,⁴⁴ but in Australia, data on imports captured through the ICS is only currently available to entities directly involved in the importation of the specific product.

⁴⁴ United States International Trade Commission, *Dataweb*, <<https://dataweb.usitc.gov/>>; European Commission, 'International Trade in Goods', *Eurostat* <<https://ec.europa.eu/eurostat/web/international-trade-in-goods/data>>.

6. Additional measures to prevent forced labour

6.1 Strengthen the Modern Slavery Act

The MSA currently requires large Australian entities with an annual turnover of over \$100m to annually report on the steps taken to identify, prevent and address modern slavery in their operations and supply chains.⁴⁵ It is premised on the assumption that reporting on these matters publicly alone will drive a 'race to the top' by businesses to take proactive and effective actions to address modern slavery.

However, the MSA does not impose any obligations on companies to undertake due diligence to identify, prevent and address forced labour risks. There is no independent oversight and no financial penalties for non-compliance with MSA requirements. There is also no clear avenue for exploited or trafficked workers to seek remedy from companies. In other words, while companies are encouraged to report and take steps to address forced labour risks, there are few consequences for those that fail to do so.

Without further reforms or complementary legislation targeting forced labour practices overseas, some Australian companies will inevitably continue to import products that are at high-risk of having been produced with modern slavery, such as cotton from Xinjiang. As the Australian Law Reform Commission recently stated in its Final Report on *Corporate Criminal Responsibility*:⁴⁶

While soft regulatory mechanisms such as voluntary guidelines and disclosure regimes may be effective at raising awareness among the business sector, these measures are not sufficient to generate meaningful behaviour change in the long run.

Research on mandatory disclosure regimes overseas such as the UK MSA and the *California Transparency in Supply Chains Act of 2010* (SB 657), have found that overall compliance with reporting requirements has been superficial to date.⁴⁷

We recommend that the MSA be strengthened including by:

1. Introducing penalties for non-compliance with the MSA's reporting requirements; and
2. Establishing an independent anti-slavery commissioner to ensure compliance and oversee anti-slavery and trafficking initiatives.

⁴⁵ *Modern Slavery Act 2018* (Cth) s 16(1).

⁴⁶ Australian Law Reform Commission, *Corporate Criminal Responsibility (ALRC Report 136)* (31 August 2020) 492 <<https://www.alrc.gov.au/publication/corporate-criminal-responsibility/>>.

⁴⁷ International Corporate Accountability Roundtable and Focus on Labour Exploitation, 'Full Disclosure: Towards Better Modern Slavery Reporting' (March 2019) 7 <<https://www.labourexploitation.org/publications/full-disclosure-towards-better-modern-slavery-reporting/>>; British Institute of International and Comparative Law et al, 'European Commission - Study on due diligence requirements through the supply chain: Final report' (20 February 2020) 218-219: <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>; Business and Human Rights Resource Centre, 'FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action' (November 2018) <<https://www.business-humanrights.org/en/ftse-100-the-uk-modern-slavery-act-from-disclosure-to-action>>; Amy Sinclair and Justine Nolan, 'Modern Slavery Laws in Australia: Steps in the Right Direction?', (2020) 5 *Business and Human Rights Journal*, 164, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3612549>; Adam S. Chilton & Galit Sarfaty, "The Limitations of Supply Chain Disclosure Regimes," Coase-Sandor Working Paper Series in Law and Economics, No. 766 (2016) 21 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2087&context=public_law_and_legal_theory>.

6.2 Introduce mandatory human rights due diligence obligations for Australian companies

Australia should also ensure that companies take greater responsibility for preventing forced labour and other human rights abuses linked to their overseas operations by introducing a mandatory human rights due diligence regime for large Australian companies and those operating in high-risk sectors or locations like Xinjiang.

Pursuant to the MSA's corporate reporting requirements, large companies are already encouraged to undertake due diligence on modern slavery risks in their operations and supply chains. However, while some companies take due diligence on modern slavery and human rights risk seriously, others may take only superficial steps or none at all (due to the lack of consequences for failing to take action under the legislation).

Enacting a mandatory human rights due diligence regime would level the playing field for business, by requiring the development of an ongoing process for identifying actual and potential human rights risks like modern slavery arising from their activities and business arrangements and to take action to prevent or mitigate those risks. To ensure accountability, individuals or communities harmed as a result of a company's operations would have a direct civil remedy against the company unless the company can show they have taken appropriate steps to try to prevent such harm.

Such a regime is complementary to the imposition of a customs ban on goods produced with forced labour. It would alleviate pressure on the ABF to single-handedly identify imports at risk of having been produced by forced labour by requiring companies to take responsibility for the human rights risks of their own operations and supply chains. By broadening due diligence obligations beyond modern slavery, business would also be required to take action where they cause, contribute or are directly linked to serious human rights abuses such as those reported against Uyghurs in Xinjiang.

Laws requiring companies to undertake human rights due diligence have already been introduced in France⁴⁸ and are now being advanced by the European Union,⁴⁹ Switzerland, Germany, the Netherlands, Norway and other countries.⁵⁰ Australia should follow suit, in line with its obligations under the United Nations Guiding Principles on Business and Human rights to prevent human rights abuses by business.

6.3 Publish an annual list of high-risk goods and countries

The ABF should also compile an annual list of high-risk goods and their source countries which it has reason to believe are produced by forced labour in violation of international standards. Currently, Australian business and civil society are guided by the annual list published by the US Department of Labor to inform consideration of potential links to modern slavery in international supply chains.⁵¹

⁴⁸ French Commercial Code, art. L. 225-102-4, resulting from LAW No. 2017-399 of 27 March 2017 on the Duty of Vigilance <<https://www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20FAQ.pdf>>.

⁴⁹ See progress of EU Legislative Initiative Procedure 2020/2129 on Corporate Due Diligence and Corporate Accountability: European Parliament, '2020/2129(INL)', *Legislative Observatory* <[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/2129\(INL\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/2129(INL)&l=en)>.

⁵⁰ For a summary of recent developments, see European Coalition for Corporate Justice, Evidence for mandatory Human Rights and Environmental Due Diligence legislation (January 2021) <<https://corporatejustice.org/evidence-for-mhredd-january-2021-.pdf>>; Business and Human Rights Resource Centre, National Regional Movements for Mandatory Human Rights and Environmental Due Diligence, <<https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/>>.

⁵¹ See, US Department of Labor, *List of Goods Produced by Child Labor or Forced Labor* (September 2020) <<https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>>.

The publication of a list that is targeted towards Australian imports would create greater awareness of specific modern slavery risks for Australian businesses and would enhance company reporting under the MSA. It would also provide the Australian Government with greater opportunity to strategically engage and collaborate with foreign governments on combatting modern slavery issues.

6.4 Ratify the Protocol to the Forced Labour Convention

Australia should also ratify the Protocol to the ILO Forced Labour Convention No. 29 (1930), which was adopted in 2014 to give practical effect to the Forced Labour Convention by requiring states to take additional measures to prevent and combat forced labour, such as strengthening labour inspection and other services responsible for the implementation of these laws, protecting victims of forced labour from punishment for unlawful activities they were compelled to commit and ensuring they have access to appropriate remedies like compensation, addressing factors that heighten the risks of forced labour and cooperating with other states to prevent it.⁵² To date 49 states, including the UK, have ratified the Protocol.⁵³

⁵² See, International Trade Union Confederation, 'Closing the Loopholes - How legislators can build on the UK Modern Slavery Act' (2017) 9-10 <<https://www.ituc-csi.org/closing-the-loopholes-how>>.

⁵³ For list of ratifications, see ILO, 'Ratifications of PO29-Protocol of 2014 to the Forced Labour Convention 1930' <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672>.