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Submission to the Legal and Constitutional Affairs Legislation Committee on the Modern Slavery Bill 2018

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1. Introduction

The authors of this submission are academics from University of Western Australia (UWA)'s Faculty of Arts, Business, Law and Education and members of the UWA Modern Slavery Research Network. The UWA Modern Slavery Research Network is an interdisciplinary group with members from across the Faculty, and the University, who share an interest in research on Modern Slavery. This brief submission draws on the expertise of some of our members to inform discussions on the Modern Slavery Bill ('MSB'), drawing on business and legislative developments in Australia and internationally. It identifies positive aspects of the MSB, discusses gaps and makes recommendations.

2. Positive aspects of Modern Slavery Bill

We welcome the MSB and see it as a positive development. A Modern Slavery Act ('MSA'), if enacted, would contribute to meeting Australia's international obligations in this area. It has been noted that the introduction of supply chain reporting requirements and other business and human rights initiatives is part of a global trend.[1] Introducing supply chain reporting requirements to respond to modern slavery would place Australia alongside a number of other jurisdictions. This is important as modern slavery is a transnational issue and so international and domestic responses are required. Comparable laws have been introduced in the UK,[2] at European Union level,[3] in California,[4] the United States' in relation to conflict minerals,[5] and Corporate Social Responsibility reporting requirements in Denmark.[6] Eligible Australian companies operating in these jurisdictions are already reporting, most notably under the UK MSA. In Brazil, there is a 'Dirty List' enabling public shaming of businesses using forced labour, and in France a new due diligence law on human rights and the environment for businesses has been introduced.[7] Other European countries are also in the process of developing comparable laws such as the due diligence law on child labour in the Netherlands,[8] and the proposed responsible business law in Switzerland.[9]

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[1] Fiona McGaughey, 'Australia's Proposed Modern Slavery Act for Business Reporting - Part of an International Trend in Business and Human Rights' (2018) 36(3) *Australian Resources and Energy Law Journal*.
[2] *Modern Slavery Act 2015 (United Kingdom).*
[3] European Union Non-financial Reporting Directive (Directive 2014/95/EU).
[4] *California Transparency in Supply Chains Act of 2010*, Senate Bill No. 657, Steinberg.
[5] *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.*
[6] *Act amending the Danish Financial Statement Act (Accounting for CSR in large businesses),* adopted by the Danish Parliament on 16 December 2008.
[7] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[8] https://www.enact.se/due-diligence-on-child-labour-new-law-in-the-netherlands/
[9] http://www.bhrinlaw.org/key-developments/64-switzerland#Parlamentary%20in%20for%20mHRDD

The MSB has addressed some of the shortcomings from the UK MSA by including reporting obligations for Commonwealth entities, and a legislated and government-funded repository for the modern slavery statements. These developments are welcomed. The lack of a central government repository for statements was felt to be a weakness of the UK legislation, although one is now managed by an NGO.[10] The MSB proposes that statements will be kept in an online repository that may be accessed by the public. Given the current lack of enforcement mechanisms in the MSB, discussed further below, the ability of civil society, consumers, investors and others to access this information is essential in attempting to hold companies to account. A repository will also facilitate research into modern slavery reporting and could be used to drive improvements and information sharing.

3. Gaps and recommendations

As well as the positive aspects of the MSB, noted above, there remain a number of shortcomings.

(a) Enforcement

A key shortcoming is the general lack of enforcement mechanisms in the MSB. For example, there are currently no penalties for companies that fail to report. Furthermore, unlike the UK, there is no provision for an anti-slavery commissioner who might otherwise help enforce the law. This raises questions about the efficacy of the "mandatory" scheme, which has no consequences for a failure to report. By contrast, the NSW Modern Slavery Act includes both provision for financial penalties for a failure to report and for the appointment of an Anti-Slavery Commissioner.[11]

Although business reporting can be an important part of the solution, it is a relatively minor part of the responses required to such a multifaceted issue. The UK Commissioner plays a broad role, beyond enforcement and engagement with businesses, and cognisant of the complex nature of the issue. The Commissioner's five priorities are:

- Victim identification and care;
- Law enforcement and criminal justice;
- Private sector engagement;
- Partnerships; and
- International collaboration.

Therefore, it is clear that although there is allocation in the 2018 budget for a dedicated Modern Slavery Business Engagement Unit within Government, the work of the UK

[10] http://www.modernslaveryregistry.org/
[11] Fiona McGaughey and Justine Nolan, *Modern Slavery Bill a Step in the Right Direction, Now Businesses Must Comply* (The Conversation, 29 June 2018) https://theconversation.com/modern-slavery-bill-a-step-in-the-right-direction-now-businesses-must-comply-99135.

Commissioner goes far beyond business engagement. In order for the Australian MSA to be successful, we consider provision for an anti-slavery commissioner to be essential.

Although the availability of a publicly available repository is a positive development, there are some concerns that the Minister's view in the second reading speech that: "Businesses that fail to take action will be penalised by the market and consumers and severely tarnish their reputations" is problematic. Firstly, relying on civil society actors to 'enforce' the laws by using the repository is inadequate. For example, the Australian NGO sector could play an active role this regard but is neither sufficiently funded, nor sufficiently unfettered in its advocacy role to be able to perform this function.[12] Furthermore, for markets, consumers and investors to act, they must be aware of which businesses 'fail to take action'. The MSB needs to be strengthened by indicating those entities which should have reported but have not.

The current bill proposes a Register (cl 18) to contain only the reports ('Modern Slavery Statements') from those entities which have given the Minister their Modern Slavery Statement (per cl 13). The bill indicates which entities are required to give a Modern Slavery Statement (in cl 5), as being those exceeding a minimum consolidated revenue. The Government, through broader financial and annual reporting required to ASIC and the ASX, will know where entities meet these criteria and thus should provide a Modern Slavery Statement. Indeed, the 2017 Parliamentary Committee's report recorded that 'the Government notes it will monitor general compliance with the reporting requirement and entities that do not comply with the reporting requirement may be subject to public criticism'.[13]

A better approach would simply be for the Register to include some indication of non-compliant entities (together with an option for those entities to provide a short statement explaining their non-compliance). This could work by:

- the Government's databases of company reporting (though ASIC, ASX and others publicly available information) automatically noting where an entity exceeds the threshold for a Modern Slavery Statement;
- the Government's system can then send a notice to the registered office(r) of every such entity, referring to the requirement for a Modern Slavery Statement;
- the notice could inform the entity that if a Modern Slavery Statement is not provided (or a one-page statement as to why that is not required), then Register will display the entity's publicly reported consolidated revenue and the fact no Modern Slavery Statement has been supplied.

[12] Sarah Maddison and Andrea Carson, *Civil Voices: Researching Not for Profit Advocacy* (2017, Pro Bono and Human Rights Law Centre).
[13] Commonwealth of Australia, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (December 2017) 5.152.

This approach would be consistent with many aspects of the *Open Government National Action Plan*, including Datasets and innovation, Corporate and administrative reporting, and Enhancing public participation. This approach would also save the Government's time and resources in having to 'monitor ... entities that do not comply with the reporting requirement [and related] public criticism'.

(b) Guidance on the Reporting Requirement

We commend the Government's commitment (in the Minister's Second Reading Speech) to work with business and civil society in developing guidance about the reporting requirement, and the 2018 budget allocation of a dedicated Modern Slavery Business Engagement Unit within Government. There is existing international guidance on reporting, and the earlier due-diligence work that must inform reporting, which the Government expressly endorsed in the Regulatory Impact Statement accompanying this bill:

> Government intervention is consistent with the UN *Guiding Principles on Business and Human Rights* (UN Guiding Principles), which require companies to respond to human rights impacts that are 'directly linked to their operations, products or services.' The UN Guiding Principles are not legally binding on Australia as a matter of international law. However, Australia supports the UN Guiding Principles and encourages businesses to apply them in their operations.

Accordingly the guidance on reporting and due diligence, which the Government will subsequently issue, should be consistent with the UN Guiding Principles. How reporting and due diligence occurs under UN Guiding Principles is being further developed through OECD processes around the *Guidelines on Multinational Enterprises*, which the Australian Government also supports. Accordingly, the Government should draw on these for Australian guidance, rather than draft and implement inconsistent guidance. The OECD has issued numerous guidelines including its 2018 general 'Due Diligence Guidance for Responsible Business Conduct'.

(c) Definitions

We argue that it is essential to include definitions of key terms in the Australian MSA, rather than provide definitions subsequently. Accordingly, we recommend the bill be amended to include some key definitions. Two significant terms are 'supply chain' and 'operations' – essential concepts in how the proposed scheme is to work. We realise the Government proposes to define these terms later. The Explanatory Memorandum says 'The Australian Government will clearly explain and clarify the terms 'risks', 'operations', 'supply chains', 'due diligence' and 'remediation processes' in formal administrative guidance'. Parliament should specify what it envisages in these central concepts or, at the very least, give some indication or criteria by which the executive should define these.

The concepts 'supply chain' and 'operations' are used in these places in the MSB:

- In its Long Title: 'A Bill for an Act to require some entities to report on the risks of modern slavery in their **operations and supply chains** and actions to address those risks, and for related purposes'.
- In what is required in a Modern Slavery Statement under cl 16(1) (which is the key function of the whole scheme): 'A modern slavery statement must ... (b) describe the ... **operations and supply chains** of the reporting entity; and (c) describe the risks of modern slavery practices in the **operations and supply chains** of the reporting entity'.
  [Emphasis added]

There is already international guidance on these terms (through the UN Guiding Principles and the OECD) and the 2017 Parliamentary Committee recommended that these be considered in defining these terms. The concept of Parliament legislating a general requirement, for its application to later be determined by the executive of the day, is essentially a regulatory 'blank cheque' and effectively abrogating parliament role. This course is discouraged by Parliament,[14] the Australian Law Reform Commission,[15] and the Administrative Review Council.[16]

Particularly for 'supply chains', it is unclear whether this would include only direct contractors or also further 'tiers' of goods and services beyond direct contractors, and whether it goes down (to distribution) as well as up (to originators of material). A suitable definition might be as follows:

> "supply chain" means the network of organizations that cooperate to transform raw materials into finished goods and services for consumers. It includes parties with which the reporting entity has a direct or indirect business relationship and which either (a) supply products or services that contribute to the entity's own products or services, or (b) receive products or services from the entity.

This proposed definition has been drawn from two key international publications from the OECD and UN.[17] We recognise there are aspects in that which may have some ambiguities, but this given the Act envisaged a review period at three years, this can be one area covered in that review.

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[14] Senate Standing Committee for Scrutiny of Bills 2012 *Final Report*, 5.1-5.9.
[15] Australian Law Reform Commission (2016 *Fundamental Freedoms* report, 17.23-17.32.
[16] Administrative Review Council (1992 *Rule Making by Commonwealth Agencies* report, 1.1-1.3).
[17] Business for Social Responsibility, *Supply chains and the OECD Guidelines for Multinational Enterprises* (2010, Discussion Paper for the OECD), 4: explanation of "supply chain"; and Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012, UN doc HR/PUB/12/02), 8: explanation of "value chain".

(d) Selection of reporting companies

According to the MSB, companies with an annual turnover of $100 million or more will be required to report under a MSA. It is disappointing that this threshold is significantly higher than the UK MSA's £36 million threshold, which is approximately $60 million Australian dollars.

Internationally, a number of approaches have been taken to the selection of companies for reporting. As stated, the UK uses a monetary threshold. The French due diligence laws use a number of employees as a reporting threshold. The USA's Dodd Frank Act applies to all companies if they manufacture or contract to be manufactured products for which conflict minerals are necessary to functionality or production of the product.[18] Conflict minerals represent a particular risk and other products and industries are also known to present particular modern slavery risks. Certain countries and regions are known to present higher risks of modern slavery, such as the Asia Pacific region. Other laws apply only to vulnerable groups, such as the Dutch child labour law.

Given that these laws are all relatively recent, it is recommended that further consideration be given to selection of reporting companies and that at the time of the three-year review, alternative, extended or supplementary reporting selection be considered.

(e) Quality of reporting

The quality of reporting under the MSA will be key. Rather than the UK MSA, it is worth considering the slightly longer experience of reporting on human rights violations in supply chains in the United States regulation of conflict minerals. In 2010, as part of a major financial services reform known as the Dodd-Frank Act,[19] the US Congress adopted a reporting requirement in relation to conflict minerals from the Great Lakes region of Africa in supply chains.

The Dodd Frank Act provides some useful insights in this regard. For example, initial responses to the first wave of reports to the Dodd Frank Act in 2014 disagreed as to whether the standard of reporting was adequate, and NGOs continued to argue that the reports did not meet the OECD due diligence standard.[20] A more detailed review of the 2014 reports, by Professor Jeff Schwartz of the University of Utah, with quantitative data on all reports (over 1300) and qualitative data on the largest companies (over 200), agreed that the quality of reports was inadequate.[21] The SEC rules were too complex and the compliance was

[18] The only exclusion was retailers who only apply branding to a pre-manufactured product whose supply chain they did not control.
[19] Dodd-Frank Wall Street Reform and Consumer Protection Act.
[20] Holly Cullen, The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond' (2016) 48 *The George Washington International Law Review* 743, 769.
[21] Jeff Schwartz, 'The Conflict Minerals Experiment' (2016) 6 *Harvard Business Law Review* 129.

'shallow, almost cynical'.[22] The reporting process, while flawed, did result in companies admitting that there were conflict minerals in their supply chains, and encouraged companies to work with NGOs to identify processing facilities that were free of conflict minerals. As a result, Schwartz argues that the report process is worthwhile and worth reforming. He proposed a simpler reporting process, requiring companies only to identify their mineral processing facilities and to state whether these facilities were conflict free. It is worth noting that analysis such as that undertaken by Schwartz is only possible because the company filings on compliance with the conflict minerals rule are held centrally by the SEC. This supports the idea of establishing a central register of reports under the Bill, and making such a register publicly accessible.

The quality of reporting under the conflict minerals rule has improved over time. The most recent data provided by United States Government Accountability Office demonstrates that the percentage of reports identifying the sources of minerals improved from 30% to 49% between 2014 and 2015, and continued to improve to 53% in the 2017 reports.[23] Interestingly, despite SEC Division of Corporate Finance issuing a statement in April 2017 that it would not recommend enforcement against non-reporting companies, the number of reports in 2017 was comparable to the two previous years.[24] However, many reporting companies stated that they continue to have challenges in monitoring their supply chains, which suggests that Schwartz' recommendation of a simpler report continues to be worth considering. Schwartz also recommends a severe penalty for non-reporting, arguing that the current regime provides little intrinsic incentive for companies to report.

The rule originally required that companies publish the report on their websites, but this provision was found to be unconstitutional by a federal appeals court as contrary to the First Amendment guarantee of freedom of expression as it was compelled expression.[25] A similar provision if added to the Bill would be unlikely to face challenge, as it would not be a burden on the implied freedom of political communication – the reports were seen by the American courts as commercial rather than political expression.

Lessons for the MSB and MSA:

- Requiring publication of reports is seen by policy-makers (such as the SEC) as desirable; the striking down of the publication requirement would not be repeated in

[22] Ibid, 133.
[23] United States Government Accountability Office, Report to Congressional Committees, *Conflict Minerals: Company Reports on Mineral Sources in 2017 Are Similar to Prior Years and New Data on Sexual Violence Are Available*, 28 June 2018, https://www.gao.gov/assets/700/692851.pdf.
[24] Schwartz, 162-63, notes that the penalties for non-reporting were light, suggesting that the existence of a penalty for non-reporting was probably never a significant factor in a company's decision on whether or not to comply with the rule.
[25] *Nat'l Ass'n of Mfrs. v. SEC et al.*, 748 F.3d 359 (D.C. Cir. 2014).

Australia in the absence of a constitutional level rule similar to the US First Amendment; this is not a case where the implied freedom of political communication would be burdened by the government as the American courts recognised the Dodd-Frank Act reporting as commercial rather than political expression; in addition, the First Amendment guarantee of freedom of expression is broader than most other constitutional and international rights to freedom of expression;

- Holding reports in a central, accessible location facilitates independent analysis and therefore legitimacy of the reporting system;
- There may be advantages to linking supply chain reporting to other forms of corporate regulation rather than having it as a free-standing duty with no government agency conducting oversight;
- Reporting requirements that are vague and complex are less likely to result in useful reports, and will encourage companies to give vague and non-informative reports; a simpler and more specific reporting requirement will make it easier for the market and civil society to respond to companies that do or do not take action to eliminate modern slavery in their supply chains;
- The quality of reporting may be disappointing in the early years, but may improve over time as companies learn how to improve their reports and take advantage of external expertise to support reporting;
- In order to incentivise companies to report, significant penalties for non-reporting are worth considering; if penalties are legislated they must be consistently enforced.

4. Importance of existing legislative provisions

Although businesses play an essential role in identifying and tackling modern slavery, existing laws could be used more effectively to regulate workplaces and report on and prosecute cases of slavery and trafficking. To this end, the role of anti-slavery commissioner, as discussed above, could play a very useful role in addressing modern slavery across a number of legal areas including workplace exploitation, bonded labour, trafficking, prosecution of offenders and support for victims.

While the focus of the MSB is to "require certain large businesses and other entities in Australia to make annual public reports (Modern Slavery Statements) on their actions to address modern slavery risks in their operations and supply chains", there is undoubtedly a relationship between this and matters related to the employment relations of labour migrants, especially in Australia. That is, there remain predictions of a shortfall in labour supply within prognoses of Australian labour force capacity. Undoubtedly, temporary labour migration provides a direct route to meeting this shortfall, thus creating the urgency for analytical lens about Modern Slavery to be cognisant of the link between this and temporary labour migration. Thus, it is important to also consider the MSB from the perspective of the system of employment relations for labour migrants.

Since the mid-1990s, socio-economic trends linked to temporary labour migration have exerted considerable stress on the agility of the employment relations system to craft responses that maintain both equality and protection for all employees in Australia. The controversy surrounding the administration of 457 Visas from 1996-2007, the incidents relating to the status of international students, most particularly the 2015 *"7-eleven case"* and now matters pertaining to backpackers and seasonal workers in the horticultural industry are examples of these trends. The subsequent enactment of the *Migration Legislation Amendment (Worker Protection) Act, 2008 ('Worker Protection Act')* and the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* have gone a long way towards restating principles of both equality and protection for temporary labour migrants who are contributing to the overall wealth of Australian society by living and working here. Nonetheless there remain gaps.

The first is about the phenomenon of "wage theft" as exposed by the *"7-eleven"* case amongst international students, but also amongst temporary labour migrant workers in the horticultural industry. The second, related, challenge is that faced by temporary labour migrants working as part of the gig economy (e.g. food delivery agents) in being recognised as workers and hence having access to rights and conditions that enable them to secure living wage from their work in Australia.

The relationship of these gaps to the focus of the MSB is that the work performed by those in the horticultural industry and the gig economy feature in supply chains. Therefore, the following is suggested:

- Supports provided to businesses reporting under the MSA should include information on risk sectors. Within Australia, these include those mentioned above.
- The work of those in the gig economy must recognised as a legitimate form of work that then enables them to secure the rights and conditions that will assist them earn a living wage in Australia and be afforded rights and protections.
- The Fair Work Ombudsman's Office should be adequately equipped to investigate and monitor these areas of the labour market, and take action against employers where required.

4. Conclusion

The MSB is welcomed by the authors and contains some positive provisions. Gaps remain, including enforcement, guidance, definitions, selection of reporting companies, and ensuring the quality of reporting. In addition, existing employment and criminal laws could be used more effectively and it is felt that an anti-slavery commissioner could play an essential role in developing a 'joined-up' approach.

The three year review will be essential to ensuring the effectiveness of the reporting requirement. It is recommended that robust qualitative and quantitative data collection

commence with the introduction of the MSA and that this, together with academic research drawing on the Australian and overseas experiences, is used to improve on the legislation.

ENDS

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