Modern Slavery Laws in Australia: Steps in the Right Direction?

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I. Introduction

Governments are increasingly introducing legislative measures imposing reporting requirements on corporations to address a range of human rights abuses including modern slavery. A new federal Modern Slavery Act (Federal Act) took effect in Australia on 1 January 2019, and a state-level modern slavery law was adopted in June 2018 in New South Wales (NSW). This follows similar laws enacted in the United Kingdom (UK) and California, with draft bills under consideration in other jurisdictions such as Canada, Hong Kong and the United States.

These modern slavery laws introduce social disclosure regimes requiring large businesses to report publicly on the actions they are taking to address modern slavery in their operations and supply chains. The intent behind such legislation is to facilitate public scrutiny of company statements on modern slavery by civil society, investors and consumers. Interested parties can access a company's public statement and assess the extent to which a business is addressing the risk of modern slavery in its operations, or those of its suppliers. The availability of this public information aims to facilitate sharing of best practices and further engagement with those companies identified as lagging in their efforts, either because they fail to report, or because they produce low-quality or non-compliant statements. In short, such legislation aims to spur companies into action through the power of public scrutiny, coupled with fear of reputational damage. It is designed to create 'a level playing field' for businesses and drive a 'race to the top' in terms of respecting human rights. What is less clear, however, is whether such disclosure requirements can link transparency with accountability and generate substantive (not just procedural) compliance with human rights standards.

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This piece will first provide an overview of the NSW Modern Slavery Act 2018 (NSW Act), followed by a discussion of the Federal Act. Some comparisons will be made between these Australian laws and the UK Modern Slavery Act 2015 (UK Act). Such a comparison should be useful for determining the relative impact, and value, of these laws over time, as well as for influencing the framing of future legislation elsewhere. The piece will conclude by considering elements that could be incorporated to enhance the efficacy of modern slavery laws generally.

II. Australian Modern Slavery Laws

The NSW Act was introduced as a private member's bill and it quickly passed through the state parliament. The Federal Act, by contrast, was subject to extensive public consultation processes conducted over a period of nearly two years. These consultations began in February 2017, when a joint Parliamentary Inquiry into whether Australia should adopt national legislation to combat modern slavery was announced. Following lengthy public consultation, the Joint Parliamentary Inquiry Committee produced its final report in December 2017.[1] The report included significant recommendations for mandatory supply chain reporting provisions, including penalties for failings in reporting. Further public consultation processes were conducted by the Department of Home Affairs in 2017 and the Senate Legal and Constitutional Affairs Legislation Committee in 2018. Following its inquiry, the Senate Committee released a report recommending a public list of reporting entities, independent statutory officer and statutory three-year review of the legislation.[2]

In debating legislative provisions, stakeholder groups generally agreed that the Federal Act should not be a 'copy and paste'[3] of the UK Act, but should improve upon the UK's example by mitigating its weaknesses.[4] A key consideration in Australia was avoiding the poor reporting standards and low reporting levels experienced under the UK Act. Perceived weaknesses in the UK Act, which some groups in Australia were keen to avoid, included the absence of financial penalties for failure to comply with the reporting requirement and fact that compliance with the disclosure requirements depends largely on the pressure exerted by external parties – consumers, investors, civil society – to induce compliance.[5] In developing the Federal Act, stakeholders also highlighted the need to include other key elements missing from the UK Act, namely, a government-run registry of statements and public list of reporting entities.

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[1] Parliament of the Commonwealth of Australia, 'Hidden in Plain Sight' (December 2017), https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf (accessed 23 March 2019).

[2] The Senate Legal and Constitutional Affairs Legislation Committee, 'Report Modern Slavery Bill 2018 [Provisions]' (24 August 2018), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ModernSlavery/Report (accessed 23 March 2019).

[3] Comments by Mr Chris Crewther MP made at Global Compact Network Australia's *Modern Slavery Forum* held in Sydney on 6 April 2017.

[4] Amy Sinclair and Felicitas Weber, 'Australia Must Legislate to Prevent Modern Slavery in our Supply Chains, *The Guardian* (11 April 2017), https://www.theguardian.com/sustainable-business/2017/apr/11/australia-must-legislate-to-prevent-modern-slavery-in-our-supply-chains (accessed 23 March 2019).

[5] Whilst injunctive relief is available under the UK Act, this avenue of recourse remains untested.

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A further consideration was introducing public procurement controls into the Federal Act. Under the UK Act, there is no reporting requirement for public bodies, or exclusion of non-compliant companies from public procurement processes. Another issue was the benefit of introducing a statutory review period, which is also absent from the UK Act. Additionally, there was an awareness that comprehensive guidance would be required, in advance of reporting deadlines, to assist and encourage reporting entities to effectively comply with the provisions of the Federal Act, noting that the UK government's guidance on the UK Act has been criticised for lacking clarity and being published too late.

A. NSW Modern Slavery Act

The NSW Act was passed on 27 June 2018, ahead of the Federal Act, and will come into force on 1 July 2019. This law applies to commercial organizations having NSW employees that supply goods or services for profit and have an annual turnover above AUD$50 million. The Act requires reporting entities to file an annual modern slavery statement[6] and has broadly equivalent provisions to the Federal Act discussed below. A notable distinction is the introduction of financial penalties, rather than a reliance on public scrutiny, to drive compliance.

The NSW Act introduces financial penalties of up to AUD$1.1 million. These apply for failure to prepare and publish a statement, when required, or for giving false or misleading information. This has, however, created an anomalous situation where entities with NSW employees and a turnover of AUD$50–100 million are subject to penalties, but those with a turnover above AUD$100 million are not, as they would be subject to the national Federal Act.[7]

The NSW Act follows the UK Act by establishing an Anti-Slavery Commissioner and has a similar application threshold. It also introduces several improvements on the UK Act. First, it establishes an electronic register, which is free and publicly available. The public register will identify organizations that disclose that their goods or services are potentially a product of modern slavery. This focus on listing only those entities disclosing a link to modern slavery, suggests the register will operate like a 'dirty list'. Second, reporting is mandatory, and statements must include information to be set in accompanying regulations. Third, the NSW Act introduces modest public procurement obligations. These require the Anti-Slavery Commissioner to monitor the effectiveness of due diligence procedures to ensure that goods and services procured by government agencies are not the product of modern slavery. The Commissioner also has powers to create 'codes of practice', which have the potential to provide useful guidance on identifying modern slavery in supply chains.

The NSW Act does not require board approval of statements in the same way as the UK and Federal Acts, although this might be stipulated in the accompanying regulations. Arguably, the dirty list approach of the NSW registry will be less effective because it may disincentivize business from acting responsibly and taking steps to identify slavery

[6] The method of publication and prescribed reporting content will be detailed in accompanying statutory regulations, which will also likely take effect on 1 July 2019.

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

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risks. Many aspects of the NSW Act remain to be established in its accompanying regulations. There will be public consultation on the proposed regulations in 2019 and it is anticipated that they will be informed by, and further harmonized with, the provisions of the Federal Act. It is also anticipated that the accompanying regulations may introduce an exemption from the NSW Act penalty regime for entities reporting voluntarily under the Federal Act.

B. Federal Act

The Federal Act was passed on 29 November 2018 and took effect on 1 January 2019. It establishes a national modern slavery reporting requirement. This requires an estimated 3,000 large companies and other entities, including the Commonwealth government and its agencies, to publish annual public statements on modern slavery in their operations and supply chains. Statements must detail (i) the identity, structure, operations and supply chains of the reporting entity, (ii) the modern slavery risks identified, (iii) actions taken to assess and address these risks (including due diligence and remediation), (iv) how the entity assesses the effectiveness of such actions, and (v) the process of consultation with other entities it owns or controls. Statements must be approved by the principal governing body of the entity (i.e., a company's board of directors, or equivalent) and signed by a responsible member of the entity. Statements will be held on a free, government-run register which is accessible online.

The Federal Act applies to entities (including not-for-profits and universities) based, or operating, in Australia, with an annual consolidated revenue of at least AUD$100 million (equivalent to approximately £60 million). Other entities based, or operating, in Australia may report voluntarily. The Federal Act requires mandatory reporting against specified criteria. It does not penalize entities financially for failure to report, although non-reporters run the risk of being publicly identified on the public register. Nor does it establish an Anti-Slavery Commissioner. The operation of the Act will be reviewed after three years, at which point additional measures to improve compliance, including civil penalties, may be considered. A dedicated modern slavery business engagement unit within the Department of Home Affairs will support implementation of the Federal Act.

Australia has benefited from the lessons learned in the UK: the Federal Act has addressed some of the shortcomings of the UK Act by including reporting obligations for Commonwealth entities, mandatory reporting criteria that will allow for more consistent and comparable statements and a government-funded online repository for statements. The Australian government is also seeking to provide reporting entities with advance guidance on how to report. The guidance will be prepared by the government, in consultation with an external expert advisory committee, and be subject to public consultation in 2019.

While the Federal Act is a welcome step forward, it does fall short in several key areas. This has given rise to concerns that Australia may experience high levels of non-reporting similar to the UK. The first shortcoming is that there are no financial penalties for companies that fail to report. This means that enforcement is effectively left to civil society and consumers which could use the public repository to 'name and shame' companies, and to shareholders or investors who could put pressure on the companies to comply with their reporting obligations.

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The second potential shortcoming is the absence of a central list detailing all entities required to report on an annual basis. The absence of a list undercuts the ability of external parties to hold a company to account. However, an amendment to the final version of the Federal Act (section 23A) now requires the Minister to prepare an annual report on compliance and non-compliance by reporting entities in preparing modern slavery statements. That annual compliance report must then be tabled before Parliament and may thus provide a retrospective record of which entities have failed to report.

Third, unlike the UK, there is no provision for the establishment of an Anti-Slavery Commissioner who might otherwise help implement the law. By contrast, the NSW Act includes both provision for financial penalties for a failure to report and for the appointment of an Anti-Slavery Commissioner. Fourth, there is no explicit requirement that companies conduct due diligence, but the reporting criteria require that companies must describe how they have addressed the risk of modern slavery, including referencing any due diligence undertaken [section 16(1)(d)]. Finally, there are also questions as to whether the AUD$100 million threshold reporting requirement is set too high, with only an estimated 3,000 companies expected to be subject to the reporting requirement.

III. Steps to Enhance the Efficacy of Modern Slavery Legislation

Consecutive modern slavery laws have introduced key improvements and, on balance, are steps in the right direction. The Australian and UK modern slavery reporting regimes each require the publication of annual statements. The benefits of this approach are threefold. It facilitates the dissemination of knowledge about corporate best practice in addressing modern slavery, (potentially) exposes laggards and, assuming the reports are consistent over time, enables company measures to be assessed longitudinally.

As a first step, the UK Act establishes a useful foundation for encouraging companies to address modern slavery. Subsequent Australian laws have built upon this model and enacted modern slavery legislation with key refinements – namely, government-operated public registers, financial penalties (NSW only), mandatory reporting against specified criteria and public procurement provisions. Modern slavery legislation is a mechanism significant for generating public awareness. It is generating increased engagement by consumers, civil society, investors and business with modern slavery issues and a broader understanding of the risks associated with consumptive spending and supply chain sourcing.

However, there are a number of outstanding questions around the efficacy of the current disclosure laws and whether such laws can result in a substantive improvement in working conditions in global supply chains. As transparency measures, all three laws are lacking. Critically, neither the UK Act nor the Federal Act introduces fines for non-compliance, hampering accountability. Consequently, under the UK Act, non-reporting is widespread with a significant portion of businesses required to publish a statement reportedly not having done so.[8] Research also reveals that the standard of disclosures is low, with minimum

[8] As at 23 March 2019, the Modern Slavery Registry contains 8,469 statements of the estimated 12,000–17,000 required statements. IASC, University of Nottingham Rights Lab, 'Agriculture and Modern Slavery Act Reporting: Poor Performance Despite High Risks' (2018), http://www.antislaverycommissioner.co.uk/media/1220/modern-slavery-act-and-agriculture-poor-performance-briefing.pdf (accessed 23 March 2019).

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requirements failing to be met.[9] It is too early to determine whether this experience will be repeated in Australia but, should initial reporting levels and standards be low, the Federal Act's statutory three-year review provides an opportunity to consider legislative refinements, including civil penalties and establishing an independent commissioner.

If modern slavery legislation continues to develop, a focus on harmonization will be increasingly important to achieve relative global consistency. A focus on the broader corporate responsibility framework established under the United Nations Guiding Principles on Business and Human Rights (UNGPs), notably human rights due diligence, will provide a useful a reference point for future developments. Key improvements to be retained and incorporated into future laws include penalties, statutory oversight, mandatory due diligence, and public procurement provisions. Future laws could also benefit from remedying the current gender-blindness seen in existing modern slavery legislation.[10]

Even with refinements, modern slavery reporting regimes are inherently limited, requiring companies to report, rather than to act, and attaching only indirect liability for human right abuses through failings in reporting. The assumption that greater transparency and availability of information about companies' activities will translate into both improvements in practice and increased corporate accountability remains largely untested. Whilst modern slavery disclosures may reveal that companies are adopting, or refining, policies and practices aimed at addressing modern slavery, it remains to be seen whether this changes corporate behaviour and results in greater respect for workers' rights on the factory floor. Nor is it apparent whether these laws will result in greater corporate legal accountability for inaction in addressing modern slavery. In the absence of penalties, reporting laws may, at best, provide indirect legal avenues, for example under consumer protection law,[11] to hold companies to account for human rights abuses.

An essential element of what companies should be reporting on is their due diligence efforts. Reporting is simply the final step in the process of identifying, assessing and addressing risks, and tracking the effectiveness of those responses. For reporting to be legitimate, it must be based on effective due diligence. The UNGPs provide a broad framework that sets out the general parameters of what companies should take into account in conducting human rights due diligence assessments.[12]

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[9] Business and Human Rights Resource Centre, 'First Year of FTSE 100 Reports Under the UK Modern Slavery Act: Towards Elimination?' (2017), https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Report%20FINAL%20%28002%291Dec2017.pdf (accessed 23 March 2019).

[10] See Surya Deva, 'Slavery and Gender-Blind Regulatory Responses', *BHRJ Blog*, http://blog.journals.cambridge.org/2019/03/08/slavery-and-gender-blind-regulatory-responses/ (accessed 23 March 2019).

[11] See *Melanie Barber et al v Nestle USA, Inc.*, No. 16-55041 9th Cir. (2018); *Monica Sud v Costco Wholesale Corporation et al, No. 4* 15-cv-03783; and *Tomasella v The Hershey Company No. 1* 18-cv-10360 (2018).

[12] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/17/31 (21 March 2011), Principles 17-20.

IV. Conclusion

Addressing modern slavery in global supply chains is complicated, requiring a multi-faceted approach. Reporting legislation is a step in the right direction, with the Australian laws improving upon the UK model. Corporate culture does not change overnight, but indicators suggest that modern slavery legislation is having an impact, at least in raising awareness of the issue, with engagement of Chief Executive Officers reportedly doubling in the UK since the Act was put in place.[13] Whether existing modern slavery disclosure laws will achieve improved conditions for workers at the production end of global supply chains is not yet clear. Mandatory due diligence would probably have greater impact, but reporting requirements are a building block for achieving fairer supply chains. It may transpire that their failings are, in fact, their greatest achievement, should this provide the impetus required to move towards mandated due diligence regimes. More effective might be an international instrument creating direct legal liability for human rights abuses by companies operating in cross-border supply chains.[14]

In the interim, what is key is ensuring that the laws encourage a move towards substantive compliance with human rights rather than simply cosmetic compliance.[15] Substantive compliance requires actions that are undertaken to satisfy the true objective of the law – for example, practical steps to address and reduce modern slavery in supply chains – rather than simply directing actions towards the objective of increasing transparency about the problem.

[13] Ethical Trading Initiative and Hult International Business School, 'Corporate Leadership on Modern Slavery: How Have Companies Responded to the Modern Slavery Act One Year On?', https://www.ethicaltrade.org/sites/default/files/shared_resources/corporate_leadership_on_modern_slavery_full_report_2016.pdf (accessed 21 August 2018).

[14] The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights is currently negotiating a binding instrument. The zero draft of the proposed instrument was released in July 2018: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf (accessed 23 March 2019).

[15] KD Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 *Washington University Law Quarterly* 487.

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