
***TURNING A BLIND-EYE: ANALYSING
AUSTRALIA'S BROKEN MODERN SLAVERY LAWS***

Inquiry Into Australia's Human Rights Framework

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Terms of Reference

This submission responds to the following terms of reference:

- *To consider developments since 2010 in Australian human rights laws (both at the Commonwealth and State and Territory levels) and relevant case law; and*
- *To consider any other relevant matters*

Introduction

1 The submission welcomes the inquiry into Australia's human rights framework. This submission recognises the inquiry's capacity to bridge the gap for victims of modern slavery in accessing remediation and provide a solid framework for reforming domestic Australian law. This submission makes two recommendations. The first is the inclusion of a recognised national compensation scheme for victims of modern slavery under the *Modern Slavery Act*.¹ The second is a reform to the *Modern Slavery Act*² which would place traditional penalties on corporate entities. This submission examines the current national schemes available for victims of modern slavery to conclude that they are not aligned with Australia's international law obligations and require specific codification. Additionally, this submission will discuss the effectiveness of the *Modern Slavery Act*³ and its shortcomings in providing corporations with incentives to respond to potential human right breaches within their operations and supply chains.

¹ 2018 (Cth).

² *Ibid.*

³ *Ibid.*

Human Rights Framework

- 2 The act of modern slavery does not have a universal definition. However, it has been considered to include acts of the deprivation of liberties and the exertion of ownership over another individual.⁴
- 3 At an international level, the *International Covenant on Civil and Political Rights* (ICCPR) highlights that modern slavery practices result in a breach of human rights.⁵
- 4 The ICCPR also highlights that victims of a human rights breach are entitled the right to a remedy.⁶
- 5 As a signatory to the ICCPR, Australia is required to consider both of these obligations when establishing legislation concerning human right breaches.
- 6 At domestic law, Australia has responded to article 8 of the ICCPR by enacting the *Modern Slavery Act*⁷ which addresses modern slavery offences within the supply chains and operations of corporations. However, the legislation fails to consider a victim's right to remedy and does not provide corporations with incentives to address modern slavery breaches within their supply chains and operations.

⁴ Parliament of Australia, Joint Standing Committee on Foreign Affairs, Parliament of Australia, *Modern Slavery and Global Supply Chains: Interim Report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry into Establishing a Modern Slavery Act in Australia* (Parliamentary Paper, August 2017); *R v Tang* (2008) 237 CLR 1, 61, Hayne J at [155].

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ('ICCPR') article 8.

⁶ *Ibid* article 2.3.

⁷ 2018 (Cth).

Recommendations

Recommendation 1: Reforming the Modern Slavery Act 2018 (Cth): Including a national compensation scheme for victims of modern slavery offences

Recommendation 2: Reforming the Modern Slavery Act 2018 (Cth): Providing traditional penalties for failing to address modern slavery offences

Inconsistent Compensation Forums

- 7 As a signatory to the ICCPR, Australia is obligated to provide victims who have had their rights or freedoms violated, access to remediation.⁸ However, current compensation schemes within Australia are inconsistent and require victims of modern slavery to jump through hoops to possibly receive some economic recovery.⁹ Compensation can be claimed through some forums including, reparation orders; state compensation schemes; civil remedies of the Fair Work Act;¹⁰ and tort actions.¹¹ As these avenues are each under different bodies of law, it limits the ability of victims to actually access these forums, and accordingly justice.
- 8 The Commissioner for Human Rights published a set of guidelines concerning human trafficking.¹² Guideline 9 highlights that victims of trafficking should be provided with legal and material assistance to help them understand their right to a remedy.¹³ Most victims of modern slavery are vulnerable individuals, who often do not realise that they have been subject to such offences,¹⁴ highlighting the importance of this guideline. However, the current Australian legislative framework does not encompass an investigatory body that ensures victims are aware of their rights and provides them with access to justice. This is demonstrated by a landmark case in which Ms Ning Chaladone,¹⁵ a victim of trafficking, succeeded in claiming compensation under the former NSW Victims Compensation Tribunal. At the time, the Tribunal was capable of providing compensation for individuals who were victims of modern slavery offences occurring in NSW.¹⁶ However, access to justice for other victims of modern slavery under this tribunal would have been limited at the time given its state jurisdiction, meaning that

⁸ *International Covenant on Civil and Political Rights* (n 7) art 2.3.

⁹ Frances Simmons, Jennifer Burns and Fiona McLeod, 'Modern Slavery and Material Justice: The Case for Remedy and Reparation' (2022) 45 (1) *University of New South Wales Law Journal* 148, 165.

¹⁰ 2009 (Cth).

¹¹ *Ibid.*

¹² United Nations Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (Report, 2003) Guideline 9.

¹³ *Ibid.*

¹⁴ See specifically *R v Kanbut* [2019] NSWDC 931; *DPP v Kannan* (2021) 359 FLR 181, Justice Champion at [101].

¹⁵ 'Tribunal Pays Compensation to Sex Trafficking Victim', *ABC Radio* (Samantha Donovan, 30 May 2007) <<https://www.abc.net.au/radio/programs/pm/tribunal-pays-compensation-to-sex-trafficking/2562502>>

¹⁶ *Ibid.*

Commonwealth trafficking offences, which are the majority of trafficking offences would not have been recognised under this tribunal.¹⁷

- 9 Currently in New South Wales, the operation of compensation for victims of modern slavery breaches can be examined in accordance with *Victims Rights and Support Regulation*.¹⁸ Under this regulation, a victim of modern slavery can only claim up to \$30,000 for economic loss.¹⁹ However, Justice Cole held that a compensation claim could only be brought under this scheme where offences occurred ‘in and of New South Wales’.²⁰ The issue that occurs for victims of modern slavery is that a majority of victims are victimised between states and territories.²¹ If the specific offence did not take place within the confines of the NSW jurisdiction, compensation would not be granted.
- 10 Furthermore, it has been argued that by having inconsistent compensation schemes and forums in place, it creates ‘inconsistent and unfair outcomes.’²² This submission recommends the *Modern Slavery Act*²³ is reformed to include a national modern slavery compensation scheme for victims of modern slavery offences.

¹⁷ Frances Simmons, Jennifer Burns and Fiona McLeod (n 11) 166.

¹⁸ 2019 (NSW).

¹⁹ *Ibid* rr. 10.

²⁰ *DRJ v Commissioner of Victims Rights* [2019] NSWCATAD 195 at [121].

²¹ Frances Simmons, Jennifer Burns and Fiona McLeod (n 11), 166.

²² *Ibid*.

²³ 2018 (Cth).

Favouring Reputational Penalties Opposed to Traditional Penalties

- 11 The *Modern Slavery Act*,²⁴ as a nascent piece of legislation, had the ability to place Australia as a pioneer in legislating against modern slavery. The enactment has, however, received opprobrium²⁵ due to favouring reputational penalties as opposed to fines and penalties for businesses who find modern slavery breaches within their supply chains and operations.
- 12 The only deterrent which currently exists is a public government register where ‘The Minister must maintain a register of modern slavery statements.’²⁶ Under the gaze of this register, lies significant emphasis on corporate reputational responsibility. By establishing a public register, and having no traditional penalties in place, businesses will only suffer reputational damage. However, it has been argued that an ‘ethical consumer’ does not exist,²⁷ meaning that boycotting corporations typically does little to deter them from engaging in their practices. Given that the *Modern Slavery Act*²⁸ only penalises based on reputational damage, there is less of an extent to address and provide remedies for individuals who have had these human rights breached.²⁹ This is applicable specifically to corporations who are not public facing and have less reputation-based policies.³⁰ This results in market penalties such as those present within the *Modern Slavery Act* to be considered weak,³¹ as consumers are not consistent, and industries do not all have the same reputation embedded morals.³²

²⁴ 2018 (Cth).

²⁵ See Frances Simmons, Jennifer Burns and Fiona McLeod (n 11); Margaret Cusenza and Vivienne Brand, ‘“A Tiger Without Teeth”? The Forthcoming Review of the Modern Slavery Act 2018 (Cth) and the Place of “Traditional” Penalties’ (2021) 38 *Company and Securities Law Journal* 152; Paul Redmond, ‘Regulating Through Reporting: An Anticipatory Assessment of the Australian Modern Slavery Acts’ (2020) 26 (1) *Australian Journal of Human Rights* 5.

²⁶ Modern Slavery Act 2018 (Cth) s 18 (1).

²⁷ Nitish Monebhurrn, ‘Consumer Social Responsibility as a Requirement for Corporate Social Responsibility’ (2018) 15 (2) *Brazilian Journal of International Law* 13, 14.

²⁸ 2018 (Cth).

²⁹ Fiona McGaughey, ‘Behind the Scenes: Reporting Under Australia’s Modern Slavery Act’ (2021) 27 (1) *Australian Journal of Human Rights* 20, 23.

³⁰ Margaret Cusenza and Vivienne Brand, ‘“A Tiger Without Teeth”? The Forthcoming Review of the Modern Slavery Act 2018 (Cth) and the Place of “Traditional” Penalties’ (2021) 38 *Company and Securities Law Journal* 152, 153.

³¹ Ibid; Paul Redmond, ‘Regulating Through Reporting: An Anticipatory Assessment of the Australian Modern Slavery Acts’ (2020) 26 (1) *Australian Journal of Human Rights* 5.

³² Nitish Monebhurrn (n 28) 14.

- 13 A lack of reputational responsibility does not provide adequate incentive to address modern slavery within business management. In a recent study,³³ 52% of 102 participant corporations failed to detect risks within their operations and supply chains. Further, only 27% were able to demonstrate that action was taken to prevent risks of modern slavery within their operation and supply chains.³⁴ As a result, it is clear that a lack of traditional penalties in the *Modern Slavery Act*³⁵ are not an effective incentive to provide corporations from addressing modern slavery offences within their operations and supply chains.
- 14 The purpose behind this non-traditional and reputational approach has been considered as an attempt to familiarise corporations with modern slavery related practices within business management.³⁶ However, this does not work in practice as the *Modern Slavery Act*³⁷ does not have a provision penalising the production of misleading or fraudulent statements. Under this assumption, businesses will only have to familiarise themselves with the Corporations Act³⁸ and Australian Competition and Consumer Act³⁹ as these are the leading sources of legislation prohibiting misleading and fraudulent statements. By outsourcing this area of law, the *Modern Slavery Act*⁴⁰ does little to achieve its original purpose in educating corporations on modern slavery practices. Rather, it promotes corporations to act more sneakily around the confines of these areas of law.
- 15 Under French and Dutch Law,⁴¹ corporations are required to undergo due diligence assessments for potential human rights breaches.⁴² If breaches are found and not addressed, penalties are present.⁴³ These traditional penalties are also present within New South Wales' *Modern Slavery Act*⁴⁴ where businesses can be penalised for failing to

³³ Amy Sinclair and Freya Dinshaw, *Paper Promises? Evaluating the Early Impact of Australia's Modern Slavery Act* (Report 2022) 2.

³⁴ *Ibid.*

³⁵ 2018 (Cth).

³⁶ Margaret Cusenza and Vivienne Brand (n 30) 165.

³⁷ 2018 (Cth).

³⁸ 2001 (Cth) s 80.

³⁹ 2010 (Cth) s 51ADG.

⁴⁰ 2018 (Cth).

⁴¹ See *Corporate Duty of Vigilance Law* 2017 (France); *Child Labour Due Diligence Law* 2019 (Netherlands)

⁴² Ramona Vijeyrasa 'A Missed Opportunity: How Australia Failed to Make Its Modern Slavery Act a Global Example of Good Practice' (2019) 40 (3) *Adelaide Law Review* 857, 859.

⁴³ *Corporate Duty of Vigilance Law* 2017 (France); *Child Labour Due Diligence Law* 2019 (Netherlands)

⁴⁴ 2018 (NSW) s 30.

report adequately on these statements. From both international and domestic law, it is evident that traditional penalties are the international accepted standard.

- 16 The *Modern Slavery Act's*⁴⁵ lack of traditional penalties has allowed it to be called ‘a tiger without teeth.’⁴⁶ This submission recommends that the *Modern Slavery Act*⁴⁷ is reformed to penalise corporations who find modern slavery breaches within their supply chains and operations and fail to address them.

Conclusion

⁴⁵ 2018 (Cth).

⁴⁶ Commonwealth, Parliamentary Debates, House of Representatives, 17 September 2018, 9144 (Graham Perrett, Opposition Whip).

⁴⁷ 2018 (Cth).

17 This submission rests that the current legislative frameworks in place for victims of modern slavery are inadequate and businesses do not have an incentive to address modern slavery offence within their supply chains and operations. This submission highlights these inadequacies with recommendations for a reform to the *Modern Slavery Act*.⁴⁸ This reform would see a national compensations scheme for victims of modern slavery and traditional penalties placed on corporations where modern slavery breaches occur, to ensure engagement with the eradication of modern slavery practices within their businesses.

⁴⁸ Ibid.