

INQUIRY INTO ESTABLISHING A MODERN SLAVERY ACT IN AUSTRALIA

ACTU SUBMISSION

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INTRODUCTION

The Australian Council of Trade Unions (ACTU) is the peak body for Australian unions, made up of 46 affiliated unions. We represent more than 1.6 million working Australians and their families.

The ACTU welcomes the opportunity to make a submission into establishing a Modern Slavery Act in Australia. As the ACTU works on issues related to workers and human rights both in Australia and internationally, we have several comments to make in relation to terms of reference outlined.

Our comments align with our mission to protect the labour and human rights of workers in Australia and ensure these rights are respected both here and abroad.

Slavery is a crime against humanity. Freedom from slavery is a human right.

We strongly believe that having a robust act which clearly compels companies to pay attention to the risks in their supply chains would have a very beneficial impact both by stopping the practices of modern slavery and by creating a level playing field amongst companies. As trade unions, we would like to see the act require businesses to report on what they are doing to address slavery because we believe that a minimum standard established in law provides clarity to business and prevents good practice from being undermined by less responsible companies.

In addition, we also argue that the act could be a pioneering piece of legislation if it sets out to improve on the UK Modern Slavery Act and other current pieces of legislation in other countries which are all dedicated to ending the scourge of this practice.

As such this legislation must be another piece of the puzzle that contributes to the overall effort required to clean up supply chains domestically and internationally by implementing and enforcing greater transparency, accountability and ultimately responsibility of business and government to provide safe and decent jobs.

When goods and services are produced by forced labour, servitude or slavery, businesses in the supply chain can become beneficiaries of the lower prices that flow into that part of the supply chain. That price signal is a distortion of the market. In that vein, we argue for procurement policies which prevent the import or use of goods and services whose production is at risk of such abuses.

For some businesses these initiatives will be seen as extra “red tape”, but in reality this is the only way to reassure the community that companies are being open about what they have found and how they are dealing with incidence of modern slavery.

In this way the Act can really be a game changer in fighting slavery in supply chains.

SUMMARY OF RECOMMENDATIONS

1. There needs to be greater provision of resources for a strong monitoring program which would provide better quality and more segregated data. This would enable policy makers and relevant stakeholders to make relevant interventions in the anti-slavery system.
2. In order to comply with the obligations under the UNGPSs the Government should introduce Australian anti-slavery legislation. This would greatly contribute to giving effect to a global effort to promote human rights in business supply chains.
3. The Government must commit further resources to the FWO so they are able to investigate and run more cases.
4. The Fair Work Act should be amended to clarify that all workers are covered by the Act, regardless of immigration status which would encourage more exploited workers to seek help.
5. The Government should provide funding to unions and relevant community organisations to provide all arriving visa holders with education and contacts in their languages. This would create relationships of trust allowing exploited workers to remain legally in Australia to pursue civil action against offending employers.
6. In line with the Queensland state government, the Federal Government should establish a licensing and regulation scheme for the labour hire industry. This would compel labour hire agencies to stop exploiting workers and create the threat of losing their right to operate if they do.
7. The Government should amend the Charging for a Migration Outcome section of the Migration Act to reflect the power relations inherent in the transaction.
8. The modern slavery act should apply to a broad range of companies - This should be done based on annual turnover. The model should ensure that all large Australian businesses are captured, with the exemption of small businesses not engaged in international trade.

9. The modern slavery act should cover public bodies - This is currently being proposed in the legislative amendment to the MSA UK currently before their parliament. Procurement by all levels of government has a huge role to play in ridding supply chains from forced labour.
10. A central register of statements hosted by a Government agency should be set up– This will allow trade unions and the rest of civil society as well as all levels of government, to monitor whether companies that are meant to report have done so, and the quality of their reporting. A repository hosted by government also implies oversight and some level of accountability. There are a number of different options for the control/location of this repository including ASIC, DFAT, the Australian Human Rights Commission, or the National Contact Point under the OECD Guidelines on Multinational Corporations.
11. A list of companies subject to the act's provisions should be published by the Government – This would further improve the capacity of stakeholder to adequately scrutinise compliance.
12. A template on the form and substance of mandatory disclosure requirements should be created - A template outlining reporting standards would provide clear guidance for companies on how and what to report and allow adequate comparison. Australian legislation should mandate these standards.
13. Penalties should be enacted for failure to publish a statement or issuing a fraudulent statement – In order to emphasise the seriousness of the legislation, the Government should enforce financial penalties, as well as exclusion from Commonwealth tendering for companies that fail to disclose.
14. The legislation should apply extra-territorially – Australian companies operating abroad should disclose the risks in their supply chains domestically and overseas.
15. The Australian Government should include due diligence in its modern slavery act. This would bring them in line with their commitments to the UN Guiding Principles on Business and Human rights.
16. The Australian Government should incorporate the French corporate duty of vigilance law in its legislation.

17. To clarify the Australian Government's expectations of contracting parties and their suppliers, the Commonwealth Procurement Framework should be amended to:

- Perform and mandate risk assessments based on industry, commodity and location to determine the extent of exposure to supply chain exploitation;
- Require parties bidding for government contracts to provide information about measures they have taken to avoid labour exploitation in their supply chains;
- Make the award and renewal of government contracts, as well as any subsidies to companies, conditional on efforts to avoid exploitation in supply chains;
- Create a process whereby unions and civil society groups can report concerns about suppliers of government contracts, and have these concerns addressed and resolved effectively to ensure that suppliers are held accountable for human rights abuses in the supply chain.

18. That the Australian Government support the ACTU's "Buy Australian" Act.

19. The Government in its trade negotiations should look to negotiate enforceable labour chapters which would create a level playing field for Australian companies to compete with.

The submission that follows provides the ACTU's responses to the terms of reference of the inquiry and reasons behind our recommendations.

1. THE NATURE AND EXTENT OF MODERN SLAVERY (INCLUDING SLAVERY, FORCED LABOUR AND WAGE EXPLOITATION, INVOLUNTARY SERVITUDE, DEBT BONDAGE, HUMAN TRAFFICKING, FORCED MARRIAGE AND OTHER SLAVERY-LIKE EXPLOITATION) BOTH IN AUSTRALIA AND GLOBALLY

Definition of Modern Slavery

Modern slavery is not a term defined in international law. It generally exists where a person's freedom and ability to make choices for themselves have been undermined or removed.

The definition of forced labour, according to the ILO Forced Labour Convention, 1930 (No. 29) provides that forced or compulsory labour is "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily."¹

The ILO Forced Labour Protocol (Article 1(3)), to which Australia will hopefully become party to very shortly, explicitly re-affirms this definition.²

This definition consists of three elements:

- a. Work or service refers to all types of work occurring in any activity, industry or sector including in the informal economy.
- b. Menace of any penalty refers to a wide range of penalties used to compel someone to work.
- c. Involuntariness: The terms "offered voluntarily" refer to the free and informed consent of a worker to take a job and his or her freedom to leave at any time. This is not the case for example when an employer or recruiter makes false promises so that a worker take a job he or she would not otherwise have accepted.

This covers a wide spectrum of crimes, but the common thread is any situation of exploitation where a person cannot refuse or leave because of threats, violence, coercion, abuse of power or deception.

The term "modern slavery" is used to refer to human trafficking, slavery and slavery like practices such as servitude, forced labour, deceptive recruiting and debt bondage.

¹ http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029

² http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

These crimes are often the most exploitative and grievous circumstances of abuse, but it is important to recognise that they are often accompanied by other human rights abuses and poor labour standards, hidden behind systemic corruption and bribery.

Organisations can be implicated in modern slavery both directly and indirectly in a variety of ways: in their own operations, through their global supply chains and through their involvement with business partners. Companies also risk employing exploited workers in the construction, maintenance and servicing of their facilities, particularly in cases where those functions are outsourced to third-party suppliers.

Estimated numbers

The International Labour Organisation (ILO) estimates that 21 million people are victims of forced labour, 19 million of whom are exploited by private individuals or enterprises and 2 million by States.³ Many of these people are now in global supply chains, which have grown substantially in recent decades. The ILO estimates the number of jobs in global supply chains in 40 countries increased from 296 million in 1995 to 453 million in 2013, which represents more than one fifth of the global workforce.⁴ The largest number of forced laborers are in the Asia-Pacific region, which gives Australia a special and important role to play in ending this scourge.

Statistics about modern slavery can be highly unreliable as the issue is a complex one and often involves hidden crime. The crime can impact anyone and, in the case of migrants, through visa programs not subject to close regulation or scrutiny. Fear, shame, mistrust of authorities, and ignorance of rights are all reasons why victims find it hard to come forward.

We do know that 10% of Australia's workforce consists of temporary visa migrants, and the extent of labour exploitation is by now well documented through government inquiries and media reports. We also know, as the Australian Tax Office recently reported, that approximately 1.6 million businesses, with an annual turnover of up to AUD\$15 million each, are operating across 233 industries in Australia's illegal cash economy.⁵ The World Bank has estimated that Australia's black market economy now constitutes 14% of GDP.⁶

³ International Labour Organisation Global Estimates of Forced Labour, 2012.

⁴ IndustriAll, 'Holding multinational companies accountable', 9 June 2016.

⁵ <http://www.smh.com.au/business/workplace-relations/illegal-cash-in-hand-payments-in-australias-black-economy-on-the-rise-20161111-gsnaue.html>

⁶ <http://www.abs.gov.au/ausstats/abs@.nsf/Products/5204.0.55.008~2012~Main+Features~Comparison+of+ Results?OpenDocument>
http://www.gfintegrity.org/storage/gfip/documents/reports/world_bank_shadow_economies_all_over_the_world.pdf

The Global Slavery Index (GSI) estimates there are approximately 3000 people trapped in slavery or slavery-related conditions in Australia. To date, most cases of slavery in Australia have involved migrants, though it is recognised citizens and residents also experience slavery, servitude and forced labour as well.⁷

Labour trafficking and exploitation has risen in recent years with many cases reported in hospitality, agriculture, cleaning and construction industries.⁸

While the number of known victims in Australia is not large in comparison with other crimes, slavery is likely to be under-reported for reasons listed above. Indeed, the UN Special Rapporteur on Trafficking in Persons, especially women and children confirmed this in her mission to Australia report, stating:

“The Special Rapporteur observes that the official numbers of identified victims may not be indicative of the true extent of the problem...For a variety of valid reasons, victims...may not make their cases known to the authorities, as highlighted by the trafficked persons with whom the Special Rapporteur met.”⁹

Whilst some basic statistics are maintained by core response agencies like the Australian Federal Police (AFP) and Red Cross, there is no comprehensive national monitoring program. More resourced need to be provided to gather data and allow a good basis for analysis. The Government recently announced it would launch a pilot monitoring program, which will compile data from the core response agencies in the anti-trafficking framework.

There needs to be greater provision of resources for a strong monitoring program which would provide better quality and more segregated data. This would enable policy makers and relevant stakeholders to make relevant interventions in the anti-slavery system.

⁷ Commonwealth of Australia. (2014) Trafficking in Persons: The Australian Government Response 2012-2013. Fifth Report of the Interdepartmental Committee on Human Trafficking and Slavery p.35. Canberra: Commonwealth of Australia.

⁸ Commonwealth of Australia (2015). Seventh Report of the Interdepartmental Committee on Human Trafficking and Slavery. p.33.

⁹ Special Rapporteur Report p.12

2. THE PREVALENCE OF MODERN SLAVERY IN THE DOMESTIC AND GLOBAL SUPPLY CHAINS OF COMPANIES, BUSINESSES AND ORGANISATIONS OPERATING IN AUSTRALIA

For reasons mentioned above, putting an exact figure on the prevalence of modern slavery is hard to do. However a selection of case studies below show examples of what modern slavery looks like in both domestic and global supply chains of businesses operating in Australia.

Cases reported by the FWO and the Media

*The Carabooda Case*¹⁰

On 3 May 2014, a multi-agency Government taskforce raided a market garden property in Carabooda, Western Australia, in response to an investigation into the use of undocumented foreign workers. The property was the worksite of brothers Michael and Cahn Le's company TLF Export Co. The market garden, which is WA's largest tomato producer, supplied fresh produce to Woolworths and IGA.

Authorities arrested the brothers and several co-accused on more than 100 charges including 27 counts of harbouring unlawful citizens. This illegal workforce was allegedly created by recruiting and harbouring foreigners who had entered Australia lawfully but had overstayed their visas. During the raid on the Le brothers' property, some 200 workers were found, including more than 130 workers mainly from Malaysia, Indonesia and Vietnam, working illegally and living in very poor conditions. There are indicators that workers identified in the raid were victims of abuse and exploitation, possibly even as serious as forced labour.

It is clear that most of the 200 workers rescued in the raid were taken to a detention centre and deported within a very short time.

*Samuel Kautai*¹¹

In 2006, the Construction, Forestry, Mining and Energy Union (CFMEU) was notified by one of its delegates about the situation of Samuel Kautai, a young man from the Cook Islands. Samuel, along with another four young men, all about 17–18 years of age, had been living with and working for Manuel Purauto. Samuel was physically abused (which resulted in permanent blindness in his one

¹⁰ <http://www.abc.net.au/news/2014-05-05/ten-charged-after-carabooda-raids-uncover-foreign-workers/5429852>

¹¹ Australian Institute of Criminology's 2010 report "Labour trafficking"

eye and brain damage), underfed and not paid properly, and he had to work long hours without decent breaks. Samuel's colleagues had the same experience. The case was pursued by the CFMEU under industrial mechanisms and by the NSW Police Force under state criminal law. The case was decided both times in favour of the applicant, which resulted in Mr Purauto having to pay back Sam Kautai and his other employees. Although the Magistrate commented that this case was serious enough to be prosecuted in the District Court, this was halted by the NSW Director of Public Prosecution's decision not to further prosecute the case.

Restaurant operator penalised for "morally moribund" exploitation of Indian couple¹²

A former Victorian restaurant operator was penalised more than \$50,000 for his "morally moribund" and "calculated and deceitful" exploitation of an Indian couple who were paid no wages for more than a year's work. Farok Shaik was found to have exploited a husband and wife who stated they endured the exploitation because Shaik had threatened to have them deported if they quit. The woman gave evidence that Shaik had threatened to kill her.

Despite having promised to pay the couple a combined income of \$1600 week, Shaik provided them only food and accommodation and short-changed them a total of \$85,844 (\$42,922 each) between August 2012 and October 2013. The workers had been reluctant to complain about the lack of payment earlier because they were reliant on Shaik's support for the woman's Regional Sponsored Migration Scheme Visa application, which they hoped would lead to permanent residency in Australia. Despite working long hours at Shaik's restaurants, the couple was forced to borrow amounts of up to \$2000 from friends and family and take on extra work cleaning motels "simply to survive".

Judge Wilson found that "His [Shaik's] conduct was calculated in the sense that it was deliberate and well thought out. His strategy was deceitful in the sense that he deceived (the couple) to continue working when he had not paid them and, self-evidently, had no intention of paying them." He also said the penalty should create general deterrence. "I accept without reservation that this case is a further, lamentable, illustration of a prevalent phenomenon in the hospitality industry where employers exploit vulnerable workers by underpayment of salary entitlements and in other ways".

¹² <http://www.sbs.com.au/yourlanguage/punjabi/en/article/2016/09/09/indian-restaurant-operator-penalised-50872-exploiting-indian-couple>;
<https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/september-2016/20160909-shaik-penalty>

*Debt Bondage*¹³

A European man was recruited by a labour hire company in his home country. He was told to apply for a Working Holiday Maker visa and pay a fee to the labour hire company. He was told that the labour hire company would pay for his airfare and accommodation, and would arrange for employment in Australia.

When the man arrived in Australia he was employed as a mechanic for an Australian host company. He was forced into a situation of debt bondage. He stayed in a hostel and was only given \$100 per week to cover his living expenses, which was less than he had been originally promised. The man had bank account set up for him, into which his wages were to be paid. These accounts were under the complete control of their employers.

The labour hire company told him that the debt he owed was much higher than he originally thought. He was forced to sign 'contracts' stating that they owed the employer AUD\$25,000. A third party, to whom the man told his story, contacted the police on his behalf. Following his escape, demands were made by the employers for money allegedly owed by the trafficked man. Over the course of two or three months, the man was repeatedly threatened by email and over the phone. His family in his home country was also threatened.

Detective Sergeant Ken Foster said of the matter: "They [the victims] come from different parts of the world, their views of policing are somewhat different to what we understand here, they're frightened of that type of thing, they are also a long way from home, and threats were made against them, not only them but their families..." Ultimately, there were no convictions for trafficking or debt bondage offences in this matter.

*Baiada*¹⁴

In November 2013, an inquiry was launched into Baiada, the largest Australian-owned poultry processing company with a market share of more than 20 per cent, following complaints from plant workers that they were being underpaid, forced to work extremely long hours and required to pay high rents for overcrowded and unsafe employee accommodation.

The Inquiry encountered a failure by the Baiada Group to provide any significant or meaningful documentation as to the nature and terms of its contracting arrangements with businesses involved in sourcing its labour. Moreover, the Baiada Group denied Fair Work Inspectors access to its three

¹³ <http://www.watoday.com.au/wa-news/perth-people-trafficking-ring-busted-20130321-2gh3g.html>

¹⁴ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/june-2015/20150618-baiada-group-statement-of-findings>

sites in NSW that would have provided them with the opportunity to observe work practices as well as talk to workers about work conditions, policies and procedures.

In summary, the Inquiry found non-compliance with a range of Commonwealth workplace laws, very poor or no governance arrangements relating to the various labour supply chains and exploitation of a labour pool that is comprised predominantly of overseas workers in Australia on 417 working holiday visas facing underpayments, long hours of work, high rents for overcrowded and unsafe worker accommodation, discrimination, misclassification of employees as contractors).

The outcome of the Inquiry was a set of recommendations to Baiada Group as well as a set of actions for the Fair Work Ombudsman to undertake, such as investigation of minimum employee entitlements, sham contracting and engagement with major buyers of chicken products, such as Coles, Woolworths, Aldi and others.

Maritime Workers – Pocomwell ¹⁵

The Pocomwell case involved four Filipino workers hired as painters on drilling rigs off the coast of Western Australia. The workers were paid only \$3.00 AUD per hour, worked 12 hours per day, seven days per week. The manner of recruitment mirrored common tactics of traffickers with layers of recruitment agents, contractors and subcontractors. According to K & L Gates:

“Each painter was employed by Pocomwell Limited, a company incorporated in Hong Kong. The terms of their contracts of employment were agreed in the Philippines and governed by the law of the Philippines. Survey Spec Pty Ltd, an Australian company, hired the painters from Pocomwell through agent Supply Oilfield and Marine Services Inc. (SOMS), incorporated in the Philippines. The drill rig operator (Operator) then hired each painter from Survey Spec at a daily rate of approximately AUD300. Survey Spec was hiring out the painters to the Operator at a rate more than nine times greater than the monthly payments made to the painters by Pocomwell.”

The FWO filed a case in the Federal Court alleging contravention of the *Fair Work Act 2009*, however, the judge ruled the Act did not apply on the basis that the platforms were not “fixed” to the seabed and the crew were not majority Australian. This decision raised significant questions about employer accountability in the zone and gaps within the *Fair Work Act* affording adequate and equal protections for migrant maritime workers.

¹⁵ Labour, Employment and Workplace Safety Alert. <http://www.klgates.com/no-fair-work-act-for-foreign-rig-workers-11-21-2013/>

7-Eleven ¹⁶

The FWO's report 'Identifying and addressing the drivers of non-compliance in the 7-Eleven network' contains a case study which highlights the barriers to reporting breaches of the Fair Work Act 2009 (Cth).

Fair Work Inspectors investigated a 7-Eleven store after receiving a complaint from an employee alleging underpayment of wages. During a visit to the store, they spoke with two other employees. One employee working the day shift said he'd started at 8 am, would finish at 4.00 pm, and he was being paid \$27 per hour. However, the timesheet subsequently obtained showed the employee working from 7.00 am to 2.00 pm only. This contrasted with register reports which showed specific employee log in and log out times. These showed the employee started at 7.00 am and finished at 5.00 pm. Pay records provided by the employer showed payment at \$35.00 per hour for 7 hours.

During the same site visit, a second employee told the inspector he received a rate of pay well below the award rate. She didn't respond when Fair Work Inspectors tried to contact her immediately following the visit. Some months later, she told inspectors she'd given incorrect information because she'd been confused.

The Fair Work Inspector attempted to contact other employees on the company records. A number were uncontactable. Of those spoken with, one stated they were paid \$35 per hour, another \$18 per hour and a third \$14 per hour.

One employee agreed to an interview, but later changed his mind. He explained he was an international student who had worked in excess of his visa obligations. He was scared that if his employer found out he was assisting the FWO it might ultimately jeopardise his visa and his study.

Only one employee was willing to participate in a comprehensive interview. This employee described a system of payment where payslips recorded \$35 per hour, while her actual hourly rate was \$14. This employee's actual hours were divided by 2.5 to determine the number of hours processed in payroll. She described creating timesheets at the employer's directions showing shifts that matched the hours intended to be processed in payroll.

FWO sought from 7-Eleven CCTV for the store for the period leading up to the site visit. After reviewing evidence, including CCTV, register reports and one recorded interview, the investigation determined the employer underpaid its workers and had provided false and misleading records.

¹⁶ <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports>

*Manildra Group*¹⁷

41 Chinese and Filipino workers (13 and 28 respectively) were employed under 457 visas and short-term temporary 400 visas as welders, electricians and metal fabricators. The Chinese workers were paid no wages at all for three months and were forced to survive on a \$15 a day food allowance. They were working six days a week for 9 to 11 hours a day. The Filipino workers were paid just \$9 an hour with their pay deducted by \$250 a week for accommodation, and other unlawful pay deductions for visa processing, insurance, food and flights.

The workers were housed in cramped and degrading accommodation, almost 30 workers living in one five bedroom house. The workers were working at the ethanol plant in Bomaderry, NSW, and other sites in Manildra and Narrabri owned by the Manildra Group. The workers were supplied to Manildra through a Taiwanese company called Chia Tung Development Corporation and a recruitment agent, Yangwha. The CFMEU referred the matters to the Minister for Immigration, following a tip-off from non-visa workers at the plant that was pursued by CFMEU organisers. Following an investigation by the FWO, Chia Tung was ordered to back pay the workers a total of \$873 000, but no prosecution was launched by the FWO. DIBP has no jurisdiction over Yangwha which recruited the workers in the Philippines, despite the agent having a presence in Australia.

*Schneider Elevators*¹⁸

Eleven Filipino lift mechanics on 457 visas were not paid for six weeks at Schneider Elevators. The workers were recruited by an agent in Manila and the first commenced work in August 2014. Upon commencement, the workers were paid a \$30 per hour flat rate, with no additional payments for overtime worked. Amounts were deducted from their pay without authorisation - in some cases allegedly as much as \$1,000 per pay - for the cost of their visa, flights, red card, and commission payments to the agent in Manila. At the beginning of February 2015, payments to the workers ceased altogether. Three of the workers arrived in Australia around this time and allege they have never been paid. At this time, the eleven Filipino workers commenced sleeping on the floor of Schneider's office in South Melbourne. This arrangement appears to have persisted for six weeks until the workers contacted the unions. Attempts to recover entitlements are ongoing.

¹⁷ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/april-2015/20150420-chia-tung-eu-presser>

¹⁸ <http://www.sbs.com.au/news/article/2015/03/20/vic-457-workers-lived-office>

*Murphy Pipe and Civil*¹⁹

Reports that Murphy Pipe and Civil repeatedly misled the Immigration Department to help dozens of Irish workers fraudulently obtain visas to work on the Queensland Curtis LNG project and Western Australia's Sino Iron project. The Immigration Department reportedly failed to investigate the fraud, despite being contacted by whistleblowers over the past three years. The fraud involved workers being nominated to work as project coordinators and contract administrators but who were actually working as riggers, labourers, and machine operators - lower-skilled jobs that would not be available under the standard 457 visa program and where there are plenty of Australians qualified and able to perform those roles. "It was about getting a compliant workforce" one source said. In February 2015, Fairfax media reported raids on Murphy Pipe and Civil but it is not known where the investigation is currently at.

*Dulo Ram*²⁰

An illiterate cook was brought from India on a 457 and forced to work 12 hours a day, seven days a week for 16 months. The cook, Dulo Ram, had his passport taken when he arrived in Australia, and was told he could not leave Australia until he repaid a \$7000 debt. Mr Ram lived in the restaurant storeroom and washed in the kitchen using buckets of hot water. The employer threatened action against him and his family back in India if he did not do as he was told. The judge ordered nearly \$200 000 in back pay. The judge said the case raises questions about the integrity of the 457 visa program, with the FWO and Immigration Department having failed to take necessary action against the employer. The judge observed that the notion that the employer could not find an Indian chef in Australia was 'risible'

Cases Reported to the ACTU 457 Visa Confidential Hotline

- A bakery in South Australia employing 457 visa holders on a 21 day roster working 12 hours a day with no breaks, and not paying them for public holidays. Baking students and cooks looking for sponsorship to get permanent residency were put on as delivery drivers. One worker reported: "When I was signing my contract for my job my boss asked me if I belong to a union. When I asked my boss why, he said '*I don't want any union representatives working into my workplace*'. If they find out I joined a union I will be sacked." The employer has asked workers for \$50 000 in return for PR sponsorship.

¹⁹ <http://www.smh.com.au/federal-politics/political-news/multinational-contractor-murphy-pipe--civil-caught-in-immigration-fraud-probe-20140807-3dbhp.html>

²⁰ RAM v D&D Indian Fine Food Pty Ltd & Anor [2015] FCCA 389 (27 March 2015), reported in Workplace Express, 30 March 2015

- A farm outside a Victorian regional centre where 15-20 subclass 457 visa workers are living in very cramped accommodation, working long hours and rarely leaving the site. The caller said there are OHS issues related to the use of chemicals and many of the workers are presenting at a local medical centre with various health problems.
- An establishment in Melbourne where about 40% of workers are on 457 visas. The workers understood they were being employed as Thai Masseurs, but once here have been told if they do not have sex with clients they will be sacked.
- A 457 visa holder who was an OHS advisor and made repeated complaints about asbestos and legionella bacteria, and enquiries about his own pay and conditions in the weeks immediately leading up to his suspension and dismissal. The visa holder had not been paid any super the whole time he was working and had recently been making enquiries about his entitlements and Australian payroll/tax status which were not in line with his visa conditions. His son was also working for the company, earning around \$10 an hour in an administrative role. Apparently none of the UK employees on site were being paid properly and many of them were on visitor visas without work rights, rather than 457 visas.

Other Previous Cases Reported to the ACTU

- A migration agency represented to a Filipino worker that his wage in Australia would be \$51 000 per annum. Once he arrived, the owner of the agency coerced the worker to accept half pay from the employer with threats that if he did not accept the offer he would be sent home. Despite being employed as skilled workers, the workers were actually used as labourers. When they complained of the breach of agreement, they were told to like it or leave. The employment contract stipulated they could not join a union. The worker did not want to be identified in a claim against the agency because it is Filipino-owned and he is worried they may retaliate against his family in the Philippines.
- Filipino workers entering into loan contracts for payment of migration agent fees of \$13,620 with interest rate charges of 47.9%, paid in weekly instalments for over a year. In the words of one worker: "We signed for a loan contract in the amount of \$13,620 Australian dollars. If we refuse to sign the contract, we won't be able to reach...Australia...We've got no

choice but to signed it". The workers signed a contract in the Philippines that included a purported prohibition on trade union activities.²¹

- A case involving 21 Chinese nurses recruited by an immigration agent based in China to come to Australia on a temporary training visa, with the promise of work in the residential aged care sector and a 457 visa after completing a three-month English language program. Each nurse entered into a contract and paid an initial \$12,000 for training fees, agent fees and other expenses. Following their training in Tennant Creek, none were offered jobs or were able to get a 457 visa. When their original 442 visa expired, the migration agent organised three month tourist visas, and offered the prospect of employment in a nursing home in Adelaide. Several nurses took up the offer and moved to Adelaide at their own cost, where they found that there was no job, just another training centre with a \$7,000 fee attached. Other nurses were offered employment by a migration agent in Perth which turned out to be the same deal; more training and costs but no job. After this about half the nurses returned to China and around 10 remained in Tennant Creek. They had no job, no money, visas which were soon to expire and many were unable to pay for their flight home. A number of businesses in Tennant Creek ran raffles and other fund-raising activities in order to buy their return air tickets and, in the meantime, the nurses were housed and fed by the generosity of the people of Tennant Creek.

FWO Report on Survey of 417 Visa Workers

In addition the FWO report on the experiences of 417 visa workers is filled with stories told by workers which point to instances of modern slavery.²²

Cases of Forced Labour in Goods Imported into Australia

Companies in Australia have alongside other developed countries become reliant on labour from countries where labour standards are poor or poorly enforced and where violations such as excessive working hours, insufficient wages, and restrictions on freedom of association, discrimination and occupational health and safety risks are rife. The globalisation of production has resulted in lead firms mandating short lead times and tight margins, which puts suppliers under

²¹ <http://www.theage.com.au/national/big-visa-debts-cripple-filipino-workers-dreams-of-a-better-life-20130628-2p2wi.html>

²² <https://www.fairwork.gov.au/ArticleDocuments/763/417-visa-inquiry-report.pdf.aspx>

pressure to make products quickly and cheaply. Sourcing practices are very much contributing to the rise in exploitative practices. But companies and governments consistently throw the ball of responsibility around, none of which helps the victims.

Rana Plaza

The collapse of the Rana Plaza factory in 2013 in which 1,130 workers were killed brought to the world stage the inhumanity of global and Australian fashion companies use of “sweatshop” conditions in Bangladesh. Sadly whilst some of the brands were shamed by public outrage into making payments to the injured workers and the families of the dead, not all companies have paid yet. The Bangladesh Government is consistently hauled up before the ILO’s Committee on the Application of Standards for their total disregard of ILO Conventions including barring workers in Export Processing Zones from joining unions and denying 73% of union registration applications.²³

Thai Fishing industry

Thailand-based Charoen Pokphand (CP) Foods, buys fishmeal, which it feeds to its farmed prawns, from some suppliers that own, operate or buy from fishing boats manned with slaves with the Guardian reporting “large numbers of men bought and sold like animals and held against their will on fishing boats off Thailand are integral to the production of prawns... the brand’s “Authentic Asia” range of frozen meals are supplied to Woolworths, Costco, 7-Eleven and selected IGA stores”.²⁴

QuickSilver and Rip Curl

Australian fashion labels Quicksilver and Rip Curl have been linked to sourcing from factories in North Korea that use forced labour.²⁵ workers at a the Taedonggang Clothing Factory near the North Korean capital Pyongyang were contracted to make some of Rip Curl's 2015 winter range of clothing. The clothes were shipped to retail outlets and sold with a "made in China" logo. Fairfax reported that “workers in North Korea are routinely exploited. North Korean defectors have told investigators from NGOs, including Human Rights Watch, that employees are forced to work long hours with minimal or sometimes no pay. Workers who do not obey orders are imprisoned in work camps”.

²³ http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3284577

²⁴ <https://www.theguardian.com/global-development/2014/jun/12/prawns-sold-in-australia-linked-to-alleged-slavery-in-thai-fishing-industry>

²⁵ <http://www.smh.com.au/business/surf-clothing-label-rip-curl-using-slave-labour-to-manufacture-clothes-in-north-korea-20160219-gmz375>

Ansell

At the production facilities of Australian company Ansell in Sri Lanka, severe production targets resulted in workers fainting and urinating in their work stations.²⁶ In addition, workers were paid less than \$US 80 cents per hour without overtime pay, and the dormitories were found to be sub-standard. Precarious work holds down wages by denying workers basic labour rights, for example by frustrating efforts to form or join unions and to bargain collectively. After concerns were raised, Ansell initially did not engage with workers and union representatives, and the local Sri Lankan trade union president was reportedly assaulted. The repercussion of a strike at the Sri Lankan Ansell factory in 2013, in sympathy with 11 dismissed workers, was the further dismissal of almost 300 workers.

Migrants working at the Malaysian Ansell factory were charged recruitment fees equivalent to three months' worth of wages by labour hire companies and while employed had their identity documents confiscated. In addition, following a strike, ten worker representatives were dismissed. After years of campaigning and dialogue, IndustriALL Global Union and its Sri Lankan affiliate have finalised a Memorandum of Understanding with Ansell that sees the majority of workers rehired and recruitment fees are now paid for by the factory itself.²⁷

Statistics on Imported Goods

The Australian Attorney General's Department did a risk assessment of goods coming into Australia where there was potential of forced labour in their supply chain for the Supply Chain Working Group that was established under the National Roundtable on Human Trafficking and Slavery. The table lists the goods identified by the Attorney General's Department and the value of these goods imported into Australia in the 2015 and 2016 financial years.

²⁶ <http://nation.lk/online/2015/08/29/australian-trade-unions-support-sackedansell-sri-lanka-strikers.html>

²⁷ <http://www.industriall-union.org/breakthrough-for-ansell-workers-in-sri-lanka>

Goods produced with high risk of forced labour (ABS data - commodity by SITC)		Value of Imports to Australia (\$A thousands) ²⁸	
		FY2015	FY2016
1	Bricks (SITC class. clay construction materials and refractory construction materials)	476 198	568 878
	(SITC class. Lime, cement and fabricated construction materials (excl. glass and clay materials))	476 189	548 911
	According to IBISWorld Report (Clay Brick Manufacturing in Australia C2021) imports specifically for clay brick and paver manufacturing (excl. refractory bricks) will reach AUD \$2.2 million over 2016-17) (pg. 17)		
2	Coal (SITC class. Coal, coke and briquettes)	64 646	56 391
3	Cocoa	267 467	334 728
4	Coffee (SITC class. Coffee and coffee substitutes)	722 990	825 151
5	Cotton (SITC class. not manufactured into yarn or fabric)	324	396
	(SITC class. fabrics, woven)	83 719	79 242
6	Floor coverings	514 526	605 335
7	Footwear	1 958 052	2 281 331
8	Garments (SITC class. articles of apparel and clothing accessories)	7 808 863	9 024 643
9	Gems/Jewellery/Diamonds (SITC class. pearls and precious or semi-precious stones, unworked and worked)	668 492	769 382
	(SITC class. jewellery, goldsmiths' and silversmiths' wares, and other articles of precious or semiprecious materials, nes)	1 266 119	1 479 507

²⁸ Source: Australian Bureau of Statistics, *ABS.Stat*, 'International Trade - Imports - Merchandise Imports (\$ Thousands) - Imports by SITC' <http://stat.data.abs.gov.au/Index.aspx#>

Goods produced with high risk of forced labour (ABS data - commodity by SITC)		Value of Imports to Australia (\$A thousands) ²⁸	
		FY2015	FY2016
10	Natural Rubber	12 031	13 173
11	Rice	199 037	199 598
12	Seafood (SITC class. fish (excl. marine mammals) crustaceans, molluscs and aquatic invertebrates, and preparations thereof (excl. extracts and juices of fish, crustaceans, molluscs or other aquatic invertebrates, prepared or preserved of SITC 01710))	1 771 583	1 797 794
13	Sugars/sugarcane (SITC class. sugars, molasses and honey)	237 509	225 303
14	Textiles (SITC class. textile fibres unprocessed and waste)	102 865	102 756
	(SITC class. textile fibres processed)	3 235 449	3 683 317

3. IDENTIFYING INTERNATIONAL BEST PRACTICE EMPLOYED BY GOVERNMENTS, COMPANIES, BUSINESSES AND ORGANISATIONS TO PREVENT MODERN SLAVERY IN DOMESTIC AND GLOBAL SUPPLY CHAINS, WITH A VIEW TO STRENGTHENING AUSTRALIAN LEGISLATION

International Obligations

The global international community has a range of norms which Australia is obligated to respect and promote.

UN Conventions

Labour rights, which are a part of broader human rights, such as the right to form and join trade unions, freedom of assembly, right to work, freedom from discrimination and other rights are established by several UN conventions, including:

- Universal Declaration of Human Rights 1948;²⁹
- International Covenant on Civil and Political Rights 1956;³⁰
- International Covenant on Economic, Social and Cultural Rights 1956;³¹ and
- Slavery Convention 1926.

International Labour Organisation Conventions and Declarations

In addition to UN conventions and principles, the ILO has also introduced key initiatives to prevent slavery in supply chains, including:

- Declaration on Fundamental Principles and Rights at Work 1998³² - adopted in 1998, the Declaration commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation;
- Forced Labour Convention 1930 (No.29) and its 2014 Protocol.³³

²⁹ UDHR Articles 1,2,4, 20, and 23.

³⁰ ICCPR Articles 2, 8 and 22.

³¹ ICESCR Articles 6, 7, 8, 10 and 11.

³² <http://www.ilo.org/declaration/lang--en/index.htm>

³³ http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029.

UN Guiding Principles on Business and Human Rights

The UN Framework for Business and Human rights is a “best-practice framework” developed to provide a common basis for how to address the issue of business and human rights. The Framework clarifies the different roles of business and governments. Aspects can be incorporated into laws, treaties, regulations, CSR activities and company policies. The Framework is based on three pillars:

1. The State duty to protect against human rights abuses by third parties, including business; clearly stating that governments must “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.
2. The corporate (business) responsibility to respect human rights; including ““identify, prevent, mitigate and account for”.
3. The need for more effective access to remedies by victims of human rights abuse.

This is formally known as the “UN ‘Protect, Respect Remedy’ Framework for Business and Human Rights” which was unanimously endorsed by the UN Human Rights Council in June 2011.³⁴ The Australian Government co-sponsored this resolution. The UNGP represents a global standard for addressing and preventing corporate human rights violations by companies, including modern slavery and includes reference to the ILO Core Labour standards.

Pillar 2 of the UNGP articulates the corporate responsibility to respect human rights which requires business to act with 'due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved'.³⁵ This entails businesses knowing what their potentially adverse human rights impacts are, including those in their supply chains³⁶. The UNGP further requires that companies must show, via public statements, how they are addressing any adverse impacts, integrating and acting upon the impact findings and tracking responses.

Guiding Principles 2 and 3 also set out obligations for the State to clearly set out the expectation that all business enterprises in their jurisdiction respect human rights “throughout their operations” and “encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts”. The UNGPS thus requires States to look at how companies report on their compliance with human rights obligations, including with respect to their overseas operations and global supply chains.

³⁴ A/HRC/RES/17/4.

³⁵ UNGPS 11-24.

³⁶ UNGP 13.

In order to comply with the obligations under the UNGPSs the Government should introduce Australian anti-slavery legislation. This would greatly contribute to giving effect to a global effort to promote human rights in business supply chains.

Organisation for Economic Cooperation and Development Guidelines on Multinational Enterprises

The OECD's Guidelines on Multinational Enterprises mirror and embed the content of the UNGPS. They are government-backed recommendations addressed to multinational companies for the responsible business conduct of these enterprises in the countries adhering to the Guidelines. They cover a broad range of areas including human and labour rights. The OECD Guidelines have been endorsed by the Australian Government. As with UN conventions, these guidelines are addressed to States. However, their content is important and should be used to inform the Government's approach to corporate human rights obligations. These guidelines were updated in 2011 and have been used for addressing slavery issues.

The OECD recently issued guidance for companies on conducting due diligence in garment and footwear supply chains in order to avoid and address the potential negative impacts of their activities in supply chains.³⁷

One of the key features of the OECD guidelines is that victims of abuse can seek to have their cases addressed through a complaints mechanism.

All these instruments show that a common understanding amongst the international community exists regarding the need to eradicate slavery from supply chains.

European Union

In November 2014, the EU Parliament adopted the Directive on Non-Financial Reporting³⁸. This requires large, public interest companies³⁹ with more than 500 employees to report annually on their human rights policies, due diligence processes, problematic supply chain relationships, assessment and management of risks.

The law applies to approximately 8,000 companies and the first reports are anticipated in 2018, as the new national reporting provisions apply to reports for financial years starting on or after 1 January 2017.

³⁷ <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Garment-Footwear.pdf>

³⁸ http://ec.europa.eu/finance/company-reporting/non-financial-reporting/index_en.htm#legal-framework

³⁹ Being listed companies, banks, insurance undertakings and other companies as designated in national regulations

The new reporting regime was required to be implemented into national laws by EU member states by the end of 2016.

National Initiatives

Governments are increasingly introducing laws mandating transparency, or disclosure and laws that require companies to reveal how they are addressing the issue of forced labour in corporate supply chains. These laws are emerging as a public policy tool of choice. They facilitate corporate transparency and accountability which drives action to eradicate slavery, whilst presenting minimal financial burden to governments.

The following legislative initiatives provide good examples of practices employed by governments to prevent modern slavery in domestic and global supply chains. They provide useful points of reference in considering how to strengthen Australia's legislation.

Denmark

Large Danish companies are required to report on corporate social responsibility which specifically includes human rights policies, if the company has adopted such policies.⁴⁰ This disclosure requirement is mandatory and applies to approximately 1,100 companies in Denmark.⁴¹

United States

California Transparency in Supply Chains Act (2010)

The California Transparency in Supply Chains Act 2010 ⁴² is a state-level disclosure law aimed at combating slavery in supply chains. It applies to large retailers and manufacturers doing business in California with gross receipts in excess of US\$100 million. Companies to which the act applies are required to disclose, in a statement, the steps taken to verify that their supply chains are not 'tainted' by slavery or human trafficking. This statement must be available on their website, with an obvious link on their homepage. A weakness of the California Act is that it does not specify how often businesses are required to report and there is no regulatory authority to follow up, making it a very voluntary initiative.

⁴⁰ <http://www.lexology.com/library/detail.aspx?g=7af7a899-eaf6-490f-8fbe-e4c0ab747c72>

⁴¹ https://samfundsansvar.dk/sites/default/files/danish_csr_reporting.pdf

⁴² http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.pdf

Trade Facilitation and Trade Enforcement Act (2015)

The Trade Facilitation and Trade Enforcement Act 2015⁴³ came into force in 2016 and restricts the import of products manufactured using forced or child labour. The US Department of Labor maintains a List of Goods⁴⁴ imported into the US from high risk countries that may be manufactured using child or forced labour. As at 30 September 2016, the List of Goods comprised 139 goods from 75 countries.⁴⁵ The list is a significant resource for companies when conducting risk assessments and due diligence on labour rights in their supply chains.

Dodd-Frank conflict minerals provision

In November 2012 the Dodd-Frank conflict minerals provision came into effect, which seeks to prevent the complicity of companies in the conflict in the Democratic Republic of Congo via the trade of minerals. Initial reports under this provision show encouraging results, although critics have pointed to the low levels of verification by a number of companies.⁴⁶

Strengthening Protections Against Trafficking In Persons In Federal Contracts⁴⁷

Furthermore, in 2012 the Obama administration announced an Executive Order, requiring Federal government contractors in the United States, with contracts that exceed \$US500 million in value, to take measures to ensure that their supply chains are free of human trafficking and slavery. The Executive Order was finalised in March 2015.

France

The new French Duty of Vigilance law⁴⁸ makes it compulsory for large French companies to:

“Establish and implement a diligence plan which should state the measures taken to identify and prevent the occurrence of human rights and environmental risks resulting from their activities, the activities of companies they control and the activities of sub-contractors and suppliers on whom they have a significant influence.”

⁴³ <https://www.congress.gov/bill/114th-congress/house-bill/1907>

⁴⁴ <https://www.dol.gov/ilab/reports/child-labor/list-of-goods/>

⁴⁵ <https://www.dol.gov/ilab/reports/child-labor/list-of-goods/>

⁴⁶ <http://www.amnestyusa.org/news/press-releases/nearly-80-of-surveyed-us-companies-fail-to-meet-requirements-of-conflict-minerals-law>

⁴⁷ <https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>

⁴⁸ http://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_entreprises_donneuses_ordre.asp

The Netherlands

The new Dutch law⁴⁹ requires companies to examine whether child labour exists in their supply chains. If child labour is identified, the company must develop a plan of action to combat child labour and draw up a declaration about their investigation and plan of action where measures have been introduced that require companies to undertake mandatory due diligence to ensure that their supply chains are slavery-free. The statement will be recorded in a public register to be operated by a designated public authority.

Australia

There are also important examples of good practice in Australia that should be used to craft potential new laws to combat slavery in corporate supply chains. Innovative domestic regulatory models have already been introduced in Australia that are designed to improve conditions for workers in supply chains and ensure that workers receive their lawful entitlements.

Textile, Clothing and Footwear Outworkers

There are a range of state laws that include all workers in the supply chain in the human rights due diligence protections and provisions: The model safeguards comprehensive protections, including fair pay and working conditions, health and safety, and entitlements for all workers regardless of their formal employment status or geographical location. This includes the most vulnerable workers at the bottom of the supply chain, clothing outworkers in the textile sector who are often considered independent contractors. A written contract is prescribed for all workers, and precarious working arrangements such as zero-hour contracts are proscribed.

- Ethical Clothing Trades Extended Responsibility Scheme, New South Wales;⁵⁰
- Victorian Outworkers (Improved Protection) Act 2003⁵¹
- Fair Work (Clothing Outworker Code of Practice) Regulations 2007, South Australia.⁵²

*Illegal Logging Prohibition Act 2012*⁵³

This act provides an example of mandatory due diligence legislation. This federal law aims to prevent the importation of illegally harvested timber products into Australia and the processing of timber

⁴⁹ The Child Labour Due Diligence Law, *Wet Zorgplicht Kinderarbeid*, was adopted by the Dutch Parliament on 7 February 2017.

⁵⁰ http://www.industrialrelations.nsw.gov.au/biz_res/oirwww/pdfs/ethical_clothing_trades.pdf

⁵¹ <https://jade.io/?a=outline&id=282391>

⁵² [https://www.legislation.sa.gov.au/LZ/C/R/FAIR%20WORK%20\(CLOTHING%20OUTWORKER%20CODE%20OF%20PRACTICE\)%20REGULATIONS%202007/CURRENT/2007.239.UN.PDF](https://www.legislation.sa.gov.au/LZ/C/R/FAIR%20WORK%20(CLOTHING%20OUTWORKER%20CODE%20OF%20PRACTICE)%20REGULATIONS%202007/CURRENT/2007.239.UN.PDF)

⁵³ <https://www.legislation.gov.au/Details/C2012A00166>

harvested illegally within Australia. It requires importers and processors to undertake a four step due diligence process that aims to minimise the risk of importing or processing illegal timber. Once it is fully enacted, non-compliance may result in imprisonment and/ or fines.

4. THE IMPLICATIONS FOR AUSTRALIA'S VISA REGIME, AND CONFORMITY WITH THE PALERMO PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN REGARDING FEDERAL COMPENSATION FOR VICTIMS OF MODERN SLAVERY

The cases mentioned earlier clearly show that many employers are exploiting temporary visa holders, which then undercuts honest competitors and places downward pressure on wages. Exploitation most commonly occurs at the “bottom” end of the supply chain, typically below one or more layers of sub-contracting. Indeed, the role of labour hire companies in committing and facilitating exploitation and forced labour of migrant workers is a primary reason many State Governments have held labour hire inquiries.

Often recruiters and employers collude to create and then take advantage of temporary migrant visa workers. Again, the cases listed above involve such practices including high payments to recruiters and being promised higher wages without that promise being realised, which results in indebtedness and being forced to live in squalid conditions.

Physical restraint and explicit threats are not required for a situation to amount to forced labour. As the changes made in 2013 to the Commonwealth Criminal Code noted, employers “often use subtle, non-physical means to obtain a victim’s compliance, such as psychological oppression, the abuse of power or taking advantage of a person’s vulnerability.”⁵⁴

Thankfully we have seen a heightened awareness of these issues in the last few years and some initiatives, which have made attempts at finding solutions. There have been various inquiries and taskforces, all of which have provided some workers with an incentive to tell their story.

The Protecting Vulnerable Workers Bill, currently before the House, has number of useful elements including higher penalties which should deter employers from exploitation, and changes to the Fair Work Act which would hold franchisor entities and holding companies responsible for abuses. However, more needs to be done in order to ensure an effective response to exploitation and abuse.

⁵⁴ CRIMES LEGISLATION AMENDMENT (SLAVERY, SLAVERY-LIKE CONDITIONS AND PEOPLE TRAFFICKING) BILL 2012. EXPLANATORY MEMORANDUM, p9.

To start with, we know that the problems are bigger than the resources available for the Fair Work Ombudsman to investigate and prosecute. There are 1.6 million workers with temporary work visas in the country. The Fair Work Ombudsman (FWO) is only resourced to run approximately 50 cases per year. Even though an additional \$20 million has been allocated for them this year, this will not be sufficient given the \$17 million in cuts to the FWO in the 2016-17 budget.

In addition, whilst applying penalties has benefits, it is not always effective. As the case of the 7-Eleven store owner who continued to require cash-back from workers even after extensive scrutiny of the franchise shows, where there is a power imbalance employers will keep exploiting workers if they think the risk of getting caught is low.

Similarly, in an effort to increase penalties on employers exploiting foreign workers, the Government recently passed legislation, *Migration Amendment (Charging for a Migration Outcome) Act 2015* creating new civil penalties for anyone who solicits or provides payment for a visa outcome. Though well-intended, the legislation also created a new \$40K penalty for a worker found to have paid for such an outcome; despite acknowledging that foreign workers, including victims of trafficking, are more vulnerable to being lured into such an arrangement.

The Government must commit further resources to the FWO so they are able to investigate and run more cases.

The Fair Work Act should be amended to clarify that all workers are covered by the Act, regardless of immigration status which would encourage more exploited workers to seek help.

The Government should provide funding to unions and relevant community organisations to provide all arriving visa holders with education and contacts in their languages. This would create relationships of trust allowing exploited workers to remain legally in Australia to pursue civil action against offending employers.

In line with the Queensland state government, the Federal Government should establish a licensing and regulation scheme for the labour hire industry. This would compel labour hire agencies to stop exploiting workers and create the threat of losing their right to operate if they do.

The Government should amend the Charging for a Migration Outcome section of the Migration Act to reflect the power relations inherent in the transaction.

5. PROVISIONS IN THE UNITED KINGDOM'S LEGISLATION WHICH HAVE PROVEN EFFECTIVE IN ADDRESSING MODERN SLAVERY, AND WHETHER SIMILAR OR IMPROVED MEASURES SHOULD BE INTRODUCED IN AUSTRALIA

UK Modern Slavery Act

The relevant provision of the MSA is Section 54 on Supply Chain Transparency.

Section 54 asks companies to publish an annual “slavery and human trafficking statement”, which would disclose the steps the company has taken during that year to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its own business. The statement must be approved by the board or its equivalent. Where a company has a website, it must publish the statement on its website. The UK Government set a threshold so that the law applies to any company with an annual turnover of £36 million. As a result, the Act applies to an estimated 12,000 UK companies.

The idea was to create ‘a race to the top’ in terms of transparency, however, the Business and Human Rights Resource Centre found that most initial annual statements are little more than PR, and do not disclose information as recommended by the law and the non-binding guidance. Their analysis of the FTSE 100 companies’ statements reveals that “most companies provide very little information on the structure and complexity of their supply chains. Even less information is available on specific risks in the supply chain, both with regard to the type of risk and where in the supply chain the risk was identified (sector or location)⁵⁵. Indeed, the Government gave businesses significant flexibility as to what to disclose.

A number of anti-slavery campaigners note that “the act may be viewed by some companies as yet another compliance exercise, which would explain why some statements read as though they have been prepared with box-tick approach. Perhaps risk-averse lawyers are not allowing detailed disclosure, as we have heard from various companies. It is worth noting that of the 1,300 company statements on the UK Modern Slavery Act Registry, none of them explicitly states that the company has taken no steps to address modern slavery in its operations and supply chains.”⁵⁶

⁵⁵ <https://business-humanrights.org/sites/default/files/documents/FTSE%20100%20Modern%20Slavery%20Act.pdf>

⁵⁶ <https://business-humanrights.org/en/how-the-uk-modern-slavery-act-can-find-its-bite>

In addition, a recent analysis by Ergon Associates echoes this with the finding that there are indications of non-compliance with some of the requirements of the Act including that 21% of statements are not clearly signed off by a director or equivalent and 25% are not available directly from the homepage. In addition “most statements (58%) only address risk assessment processes minimally and do not identify priorities for action based on the assessment.”⁵⁷ The weak reporting requirements and enforcement mechanisms under s 54 were recently criticised by the UK’s Parliamentary Committee on Human Rights as making it very difficult to properly hold companies to account.⁵⁸

These results after two years of the UK Modern Slavery Act clearly show that Section 54 has some failings. These include:

1. The fact that the law does not provide for mandatory disclosures and the guidelines which accompany the UK MSA are also not binding. There is no fine or other consequence for failing to comply with the law to submit a statement.
2. The law does not even refer to information about companies’ remediation processes where negative impacts have taken place and the company has caused or contributed to them.
3. Wholly owned subsidiaries of UK corporations are outside the scope of the law which means as long as the goods or services are not coming into the UK, they are exempt from this requirement.
4. The MSA does not establish a central repository to which these statements must be uploaded. For the purposes of accountability, it is important that these are placed in one place otherwise concerned parties have to search one company website at a time to assess compliance, which not many have the resources to do.
5. There is a lack of penalties for businesses which fail to comply with the UK MSA supply chain provisions. Companies that ignore the requirement will technically be breaking the law, but they do so without risk of any consequence. This is very disappointing as the whole point of having the Act is for companies to disclose information about what they are sourcing and from where.

⁵⁷ <http://www.ergonassociates.net/component/content/article/41-selected-reports/287-what-are-companies-reporting-on-modern-slavery>

⁵⁸ <https://www.publications.parliament.uk/pa/it201617/itselect/itrights/443/44304.htm>

6. There is only a suggestion that the statement include information about a company's due diligence processes, but does not require a company to have a due diligence policy or to carry out effective human rights due diligence which falls below the expectations under the UNGP.
7. The law does not apply to public bodies.

Other Initiatives

The UK MSA is one of many initiatives that governments have undertaken as outlined under the term of reference number 3, which points to the fact that taking regulatory action on mandatory transparency and due diligence is a global trend.

6. WHETHER A MODERN SLAVERY ACT SHOULD BE INTRODUCED IN AUSTRALIA

Whilst unions, NGO's and academics have been raising these issues for a long time, recently more and more investors are also asking companies what they are doing to ensure their supply chains are free from labour rights abuses and modern slavery. As with climate change, investors do not only fear that their investee companies can suffer reputational damage if abuses occur, but they themselves will suffer it as well. It is imperative that leading companies step up and show other companies how to take effective action to combat modern slavery. At the moment, however, companies are wary of disclosing known risks and instances of modern slavery for fear of reputational damage, particularly if their peers are not disclosing similar information.

The \$100 billion corporate social responsibility industry⁵⁹ has failed in seriously addressing labour abuses and slavery in supply chains. A study of corporations self-reporting on ESG in their supply chains concluded, "The outcomes are disappointing. Only a minority of companies are able to demonstrate a responsible management of their supply chain."⁶⁰ The failure of corporate voluntarism is why increasing government regulation is of the essence.

⁵⁹ International Trade Union Confederation, 'Scandal. Inside the global supply chains of 50 top companies', 2016

⁶⁰ Nikki Gwilliam-Beeharee, Luciana Busian and Anne Rutten, 'Responsible Supply Chain Management. Where do companies stand?', Vigeo Eiris Rating, June 2016.

One could argue that the UK Modern Slavery Act is at least creating awareness, particularly with the CEO's and boards of companies, that they must think through how their goods and services are produced because the Government has laid down an expectation that they report. But for all the reasons explained above, it is clear that Australia should build on this Act to create something more effective at driving change. Otherwise we will just have one more amongst many voluntary initiatives which thus far have not delivered.

Improvements to the UK MSA

In order to build upon the effectiveness of the UK MSA the ACTU proposes a number of additions and changes.

The modern slavery act should apply to a broad range of companies - This should be done based on annual turnover. The model should ensure that all large Australian businesses are captured, with the exemption of small businesses not engaged in international trade.

The modern slavery act should cover public bodies - This is currently being proposed in the legislative amendment to the MSA UK currently before their parliament. Procurement by all levels of government has a huge role to play in ridding supply chains from forced labour.

A central register of statements hosted by a Government agency should be set up- This will allow trade unions and the rest of civil society as well as all levels of government, to monitor whether companies that are meant to report have done so, and the quality of their reporting. A repository hosted by government also implies oversight and some level of accountability. There are a number of different options for the control/location of this repository including ASIC, DFAT, the Australian Human Rights Commission, or the National Contact Point under the OECD *Guidelines on Multinational Corporations*.

A list of companies subject to the act's provisions should be published by the Government - This would further improve the capacity of stakeholder to adequately scrutinise compliance.

A template on the form and substance of mandatory disclosure requirements should be created - A template outlining reporting standards would provide clear guidance for companies on how and what to report and allow adequate comparison. Australian legislation should mandate these standards.

Penalties should be enacted for failure to publish a statement or issuing a fraudulent statement – In order to emphasise the seriousness of the legislation, the Government should enforce financial penalties, as well as exclusion from Commonwealth tendering for companies that fail to disclose.

The legislation should apply extra-territorially – Australian companies operating abroad should disclose the risks in their supply chains domestically and overseas.

Going Beyond Transparency

Whilst transparency is an important first step, our legislation should go further to mandate that companies conduct human rights due diligence in their supply chains regarding forced labour/human trafficking. This would be in tandem with the Government's current considerations regarding developing a National Action Plan under the UN Guiding Principles on Business and Human Rights, as well as its commitments regarding franchisor responsibilities under the Fair Work (Protecting Vulnerable Workers) Bill.

Australia already has legislation which requires due diligence. As previously mentioned the *Illegal Logging Prohibition Act* (2012) incorporates due diligence requirements which obligate the importers and processors of timber to initiate verification and certification processes to ensure the imported timber was not illegally logged. If an importer or processor intentionally, knowingly or recklessly imports or processes illegally logged timber they could face significant penalties, including up to five years' imprisonment and/or heavy fines. The proposed provision in an Australian modern slavery act could provide a defence for companies that could demonstrate they had robust due diligence programs in place.

Further, the newly adopted French legislation - the French corporate duty of vigilance law - establishes a legally binding obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship. After identifying risks, they must describe the ways they are working to mitigate the risk of violations and institute alert systems to track potential risks.

In addition, the Act should allow victims of modern slavery to seek civil remedies directly against companies in Australia that exercise significant leverage or control over a supplier or contractor and fail to put in place systems to prevent such violations from occurring.⁶¹ As the French legislation mandates if a company can demonstrate that they have undertaken thorough due diligence and put in place adequate systems to prevent such violations they would enable them to defend the case.

Such a measure would both provide an incentive for companies to take their due diligence and reporting obligations seriously and provide access to remedy for victims where they do not, in line with Australia's obligations under the UNGPSs to facilitate access to remedy for corporate human rights abuses.

The UN Guiding Principles introduced the concept of 'human rights due diligence' (HRDD), describing it as:

- 'an ongoing risk management process... to identify, prevent, mitigate and account for how [a company] addresses its adverse human rights impacts. It includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed.'⁶²

In the follow up to the UK Modern Slavery Act legislation, CORE a UK coalition of organisations working on corporate accountability published a guidance for companies to enable them to do due diligence⁶³ outlining that they need to:

- Map existing policies. Make sure that policies on modern slavery reflect the greatest areas of risk to impacted individuals and communities, and specify expectations for personnel, suppliers, customers, business partners and others who are directly linked to business operations, products and services.
- Consult with internal and external stakeholders, ensure policies are signed-off at the highest level of the business, and are available to all workers, business partners and other parties when developing new policies.

⁶¹ International Trade Union Confederation, "Closing the Loopholes- how legislators can build on the UK Modern Slavery Act" (2016), 7 accessible at https://www.ituc-csi.org/IMG/pdf/uk_modern_slavery_act.pdf.

⁶² http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁶³ <http://corporate-responsibility.org/publications/briefing-papers/beyond-compliance/>

- Conduct a human rights impact assessment with a specific focus on labour rights, women's rights and children's rights – examining the company's direct operations, supply chain and other business relationships in high risk environments, to identify risk factors in operations and supply chains.
- Examine internal business procedures to avoid making demands of suppliers or subcontractors that might lead them to abuse human rights.
- Develop clear action plans to prevent and mitigate modern slavery.
- Develop a process for informing business decisions - including the selection of suppliers, subcontractors, or third-party recruitment agencies - based on performance on policies and practices regarding labour rights issues.
- Include clauses on modern slavery and risk factors in contracts with suppliers, and closely monitor suppliers.
- Put in place procedures for reporting concerns over modern slavery within the company's operations, and communicate these effectively. Grievance mechanisms and remedy processes should be clear, transparent and accessible, and incidents should be reported and monitored.
- Include information in the report.

The Australian Government should include due diligence in its modern slavery act. This would bring them in line with their commitments to the UN Guiding Principles on Business and Human rights.

The Australian Government should incorporate the French corporate duty of vigilance law in its legislation.

7. ANY OTHER RELATED MATTERS

Eradication of modern slavery and labour exploitation requires much more than a Modern Slavery Act. A number of initiatives which have been already described in previous sections provide some guidance about what more can be done.

Incentivising Companies Through Procurement

The UN Guiding Principles on Business and Human Rights clearly define the role of national governments to respect human rights while procuring goods and services: “States should promote respect for human rights by business enterprises with which they conduct commercial transactions”.⁶⁴

In a similar way to companies, governments can also adopt ethical procurement policies and stipulate contractual requirements that ensure decent employment practices. Indeed, considering the size of public expenditure governments arguably have enough purchasing power to create major change. The value of public procurement in Australia has doubled in less than ten years from \$26,361.8 million in 2007-8 to \$56,912.3 million for the 2015-16 financial a year.⁶⁵

International research on public procurement suggests the Australian regulatory framework is insufficient to prevent human rights abuses from occurring in Commonwealth procurement.⁶⁶ Current provisions of the Commonwealth Procurement Rules do not explicitly refer to human rights nor provide guidance to ensure that all relevant human rights are adequately considered. As pointed out already, there are a number of countries that have already incorporated human rights into their procurement processes, including, but not limited to the United States of America and the Netherlands. It is expected that more countries will follow suit as part of their national action plans on business and human rights.

At present, an information sheet urges Commonwealth procurement officers to ensure that businesses supplying goods or services to the government are not implicated in human trafficking,

⁶⁴ Ruggie, J. (2011). Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

⁶⁵ Australian Government , Department of Finance Statistics *on Australian Government Procurement Contracts*, (2016).
<https://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>

⁶⁶ International Learning Lab on Public Procurement and Human Rights: A Survey of Twenty Jurisdictions
<http://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/>

slavery or slavery-like practices in supply chains.⁶⁷In addition, the Commonwealth Procurement Rules prohibit contractual agreement with parties that have had a judicial ruling against them, in particular concerning worker entitlements, and who have not fulfilled any resulting order from the court.

In March 2017, the Commonwealth Procurement Rules were modestly expanded with the following rule: “Officials must make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to tenderers’ practices regarding: a. labour regulations, including ethical employment practices; b. occupational, health and safety; and c. environmental impacts.”.⁶⁸

The ACTU welcomes the new clause however, the scope of this clause is inadequate in terms of the range of rights protected as it doesn’t specify what ethical procurement practices are. Further, it is limited in its application in that it applies only to procurement over \$80,000 (for non-corporate Commonwealth entities), \$400,000 (for prescribed Commonwealth entities) and \$7.5 million for procurement of construction services.

We also draw attention to the ACTU’s submission to the Commonwealth Procurement Framework inquiry which recommends preference for locally made goods over imported products.⁶⁹ In many ways, in addition to providing employment for local workers, procuring local products and services gives governments and civil society a greater ability to monitor and rectify breaches.

To clarify the Australian Government’s expectations of contracting parties and their suppliers, the Commonwealth Procurement Framework should be amended to:

Perform and mandate risk assessments based on industry, commodity and location to determine the extent of exposure to supply chain exploitation;

Require parties bidding for government contracts to provide information about measures they have taken to avoid labour exploitation in their supply chains;

⁶⁷ Federal Attorney-General’s Department. Ethical Procurement: Information Sheet for Commonwealth Government Procurement Officers. Government of Australia
<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Human-Trafficking-Information-sheet-for-Commonwealth-Government-procurement-officers.pdf>

⁶⁸ ibid

⁶⁹ http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Government_Procurement/CommProcurementFramework/Submissions

Make the award and renewal of government contracts, as well as any subsidies to companies, conditional on efforts to avoid exploitation in supply chains;

Create a process whereby unions and civil society groups can report concerns about suppliers of government contracts, and have these concerns addressed and resolved effectively to ensure that suppliers are held accountable for human rights abuses in the supply chain.

That the Australian Government support the ACTU's "Buy Australian" Act.

Changing Trade Policies

According to Slavery Links, forty-three per cent of Australia's imports came from countries that were not parties to the UN Abolition of Forced Labour Convention 1957 (105).⁷⁰ These countries do not protect workers from forced labour, in fact some of them create Export Processing Zones (EPZs) where labour laws are excluded for the purpose of attracting investment.

These trade relationships have official sanction in the sense that government has been an active player in developing such trade opportunities. Thus far there has been a political consensus ignore, or tackle in any fashion the labour rights abuses of our trading partners.

This issue was explored by a Senate Inquiry into the Fair Trade (Workers' Rights) Bill, 2013.⁷¹

This Bill sought to require the Government, through the minister, to ensure that an amended or new trade agreement with a country includes a binding agreement for minimum standards about workers' rights in the other country's domestic law. The Bill did not go forward, but the issues remain.

The ACTU has consistently called for robust labour chapters in trade agreements. The need to create a minimum social foundation for the development of trade - one that guarantees certain safeguards against social dumping as well as provide commitments for the protection of human rights at work is paramount for claims that free trade provides benefits.

⁷⁰ http://www.aphref.aph.gov.au-house-committee-ifadt-slavery_people_trafficking-subs-sub%207.pdf

⁷¹ http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=s901

Despite the fact that the US administration had attempted to introduce such a chapter into the Trans Pacific Partnership Agreement, its provisions were non-enforceable which made them simply a motherhood statement.

The Government in its trade negotiations should look to negotiate enforceable labour chapters which would create a level playing field for Australian companies to compete with.

ADDRESS

ACTU
365 Queen Street
Melbourne VIC 3000

PHONE

1300 486 466

WEB

www.actu.org.au

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