

Business
Council of
Australia



SUBMISSION

Submission to the Inquiry into
Establishing a Modern Slavery Act in
Australia

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The Business Council of Australia is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

About this submission

This is the Business Council's submission to the Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a modern slavery act in Australia.

This submission primarily addresses two aspects of the inquiry's terms of reference:

- 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
- Whether a Modern Slavery Act should be introduced in Australia.

Key recommendations

The Business Council recommends that:

1. The government establish a Modern Slavery Act in Australia that requires selected large businesses to prepare and publish a modern slavery statement each year, consistent with the United Kingdom's Modern Slavery Act requirements.
2. The government adopt six key principles that would underpin how the Modern Slavery Act will be drafted:
 1. The legislation applies to large businesses with a substantial presence in Australia and extensive supply chains.
 2. The legislation focuses on promoting better performance by companies, rather than punishing companies for any problems that are identified through the reporting requirement.
 3. The legislation requires a company's slavery statement to be approved by the Board.
 4. The legislation does not mandate the areas a company must report against in its slavery statement or the disclosure's structure so companies have flexibility to determine what activities are reasonable and appropriate.
 5. The legislation is consistent with the United Kingdom's *Modern Slavery Act 2015* and allows mutual recognition of reporting across countries.
 6. The legislation manages disclosure via a central, searchable repository to enable easy monitoring, tracking and benchmarking of performance.
3. Responsibility for oversight of modern slavery should rest within the Attorney-General's Department, overseen as appropriate by the Attorney-General or the Minister for Justice.

Summary

Business has a role to play in combatting modern slavery

Several countries known to have modern slavery occurring in parts of the labour market produce goods and services that are sold in the Australian market.

The complex and multi-tiered nature of supply chains can limit many companies' visibility of what is occurring, particularly where there is outsourcing or subcontracting. This has increased the risk that goods and services in the Australia have been tainted by modern slavery.

Business has a responsibility for respecting human rights, so it should play a role in addressing the issue of modern slavery in supply chains.

While it is unrealistic to expect business to trace every product or service back to its origin, business can seek to get a better understanding of their supply chains and put in place reasonable steps to respond to the risk of modern slavery.

The Business Council believes that large businesses should take a leadership role on this issue. Large businesses have the resources and expertise required to get a better understanding of their supply chains and their purchasing power gives them the capacity to affect change throughout their supply networks.

A Modern Slavery Act is an important piece of the jigsaw

The Business Council supports an effective approach to combatting modern slavery, including the introduction of a Modern Slavery Act (MSA) in Australia.

Many organisations already voluntarily disclose issues relating to modern slavery and use established business processes (for example, corporate social responsibility reporting, human rights reporting and ethical sourcing policies) to prevent, identify, monitor, engage and report on the governance of their supply chains.

The United Kingdom (UK) supplemented these arrangements by introducing the *Modern Slavery Act 2015*, which requires certain businesses to report and publish a slavery statement each year.

The Business Council believes the introduction of similar legislation in Australia would be beneficial because it would help:

- close the governance gap that is inherent in global supply chains
- increase transparency by providing more information about what is occurring in global supply chains
- shape corporate behaviour
- ensure there is a level playing field so companies who are regulated in other jurisdictions are not put at a disadvantage by companies that do not face the same requirements and therefore may not face the same costs as well as scrutiny.

The design of the MSA must be carefully considered

The design of a MSA must balance the desire for increased transparency of supply chains with the need for practical and measured reform.

A poorly designed MSA will increase regulatory burden and costs to business without achieving its desired objective.

To minimise this risk, the legislation must clearly define which companies will be required to report and easily determine what parts of their supply chains they have to report on.

The government should consult extensively with business to determine the legislation's threshold and the types of guidance needed to support them to produce a slavery statement.

It is also important that the legislation is not overly prescriptive or it will limit a company's ability to align MSA reporting to existing internal processes, which would make compliance more onerous.

A number of Australian companies have made slavery statements under the UK Act. Having an Australian MSA that is consistent with the UK Act would assist companies who are required to report under both Acts because it would streamline the reporting processes. This would limit the extra cost and administrative burden derived from having to report under two schemes. For this reason, the Business Council believes there should be mutual recognition of reporting.

At the same time, the MSA's effectiveness will be undermined if the threshold for reporting is set at an inappropriate level. The legislation should not apply to companies that do not have substantial scale in their supply chains and resources to complete the process in a meaningful way.

Further, the legislation could be strengthened by the implementation of a central, searchable repository for the statements to enable monitoring, tracking and benchmarking of the disclosures.

Context for the inquiry

What problem does a Modern Slavery Act aim to address?

'Modern Slavery' is an umbrella term used to describe a range of range of crimes, including human trafficking and forced labour.

The Business Council believes the Walk Free Foundation's definition of modern slavery is helpful in considering the appropriate scope for legislation:

'Modern slavery refers to situations where one person has taken away another person's freedom – their freedom to control their body, their freedom to choose to refuse certain work or to stop working – so that they can be exploited. Freedom is

*taken away by threats, violence, coercion, abuse of power and deception. The net result is that a person cannot refuse or leave the situation.*¹

According to the 2016 Global Slavery Index, an estimated 45.8 million people around the world are in some form of modern slavery.² Two thirds these people were identified in the Asia-Pacific region, which includes Australia.³

Several countries in this Asia-Pacific region are involved in the production of goods and services for the Australian market.

Consumers and businesses are, understandably, keen to ensure the products and services they consume or produce have not been tainted by modern slavery. Investors too are increasingly asking companies how they manage involvement in these risks to mitigate against potential financial, reputational and legal ramifications.

However, the global and multi-tiered nature of supply chains has limited many companies' visibility of what is occurring, particularly where there is outsourcing or subcontracting. Further, suppliers may not have provided accurate information about working conditions, sub-contracting which breaches contract terms or the use of unauthorised third party recruiters.

The United States, France and the UK have sought to address the governance gap inherent in global supply chains by introducing legislation that requires certain businesses to either report on steps taken to ensure slavery is not occurring or undertake due diligence. Switzerland and the European Union are currently considering similar regulations.⁴

Australian business supply chains

The global fragmentation of supply chains has seen many businesses source products or services from numerous locations across the world. Seventy-five per cent of global trade is now comprised of intermediate inputs and capital goods and services.⁵

These global supply chains enable businesses to derive additional value from either reducing costs or accessing expertise and know-how. The benefits of supply chain fragmentation and globalisation flow to consumers through more affordable products and services.

Many Business Council members have highly-developed and multi-layered supply chains that span a range of countries and regions. For example, Wesfarmers has around 15,000

¹ Walk Free Foundation, *The Case for a Australian Modern Slavery Act*, The Minderoo Foundation, 2017, Australia, p.7.

² Global Slavery Index, *Global Slavery Index 2016*, The Minderoo Foundation, <http://www.globalslaveryindex.org/findings/>, accessed 26 April 2017.

³ Ibid.

⁴ Walk Free Foundation, *Harnessing the Power of Business to End Modern Slavery*, The Minderoo Foundation, 2016, Australia, p.35.

⁵ OECD and World Bank, *Inclusive Global Value Chains Policy options in trade and complementary areas for GVC Integration by small and medium enterprises and low-income developing countries. Report prepared for submission to G20 Trade Ministers Meeting Istanbul, Turkey, 6 October 2015*, OECD and World Bank, 2015. <http://www.oecd.org/development/istanbul-g20-trade-ministers-meeting-presentation-of-the-oecd-wbg-inclusive-global-value-chains-report.htm>, accessed 27 April 2017.

suppliers and sources products from a range of countries outside Australia, including China, Bangladesh, Europe, Indonesia, India, Thailand, New Zealand, Vietnam, South Korea and Malaysia (this supply chain is underpinned by very strong ethical sourcing arrangements that prohibit the use of slave labour).⁶

Domestic supply chains remain a key part of many supply chains. In Australia, domestic small and medium businesses are the main supplier of goods and services for just over 40 per cent of large businesses, while 14 per cent of small and medium enterprises use domestic large business as their main supplier. The Business Council estimates that large businesses in Australia do more than \$500 billion worth of trade with small and medium businesses every year.

These domestic partnerships allow mostly small businesses to participate in larger, sometimes global supply chains and they ultimately result in large businesses influencing the standards and practices outside of their company.

What is the role of business in combating modern slavery?

Business has a responsibility for respecting human rights so it should play a role, in tandem with government, in combatting modern slavery.

Recognised international standards such as the United Nations Guiding Principles on Business and Human Rights (UNGPs) provide an important roadmap for how business can prevent and address their own involvement in this area.

The complexity of many supply chains makes it unrealistic for companies to monitor every product or service back to its original source. However, companies can seek to get a deeper understanding of their supply chains, including understanding where there is a risk of modern slavery and put in place reasonable steps to respond to this risk.

While under the UNGPs all businesses have the same responsibility to respect human rights, including freedom from slavery. It is accepted that the way in which this role is fulfilled will differ depending on the size of the business. Small and medium enterprises have more limited supply chain exposure and resources to address this issue. Large businesses and governments should take a leadership role in promoting and supporting clean supply chains.

This role has already been acknowledged and voluntarily acted upon by many Australian companies.

Companies use a range of mechanisms to prevent, identify and report on modern slavery in their supply chains. These include:

- sustainability, corporate social responsibility or human rights reports
- supplier codes of practice/standards
- ethical sourcing policies and contracts
- risk assessments

⁶ Wesfarmers, *Wesfarmers Sustainability Report 2016*, Wesfarmers, <http://sustainability.wesfarmers.com.au/>, accessed 25 April 2017.

- audits and on-site assessments
- direct engagement with suppliers, including overseas suppliers
- training to help staff identify high-risk suppliers
- specific performance indicators.

These types of reporting and business processes also provide an opportunity for a company to improve its reputation and access to finance, which can be a source of competitive advantage.

There is also a plethora of voluntary initiatives that focus on ensuring decent working conditions in a sector or region, or have a broader focus on respecting and promoting human rights.

For example, the UN Global Compact is a principle-based framework for businesses to align their strategies and operations to 10 universal principles in the areas of human rights, labour, the environment and anti-corruption. Two principles specifically relate to slavery and human trafficking: *Principle 4 - the elimination of all forms of forced and compulsory labour and Principle 5 - the effective abolition of child labour.*⁷

The Compact is supported by local networks. In Australia, the UN Global Compact Network Australia (GCNA), brings together signatories to provide a platform to support companies' implementation of the Compact and share best practice.⁸ This includes a Human Rights Leadership Group which builds the capacity of Australian businesses to fulfil the Compact's principles and the UNGPs. Twenty-five Business Council member companies are part of the GCNA.

Business Council members' experience complying with overseas modern slavery legislation

Forty-six Business Council members have published a modern slavery statement in some form.

The Business Council has received largely positive feedback from members who have undergone this process. They note that it has helped identify reporting gaps and systemic issues and provided an impetus for enhanced supply chain governance and the risk of modern slavery to be discussed by a large group of people across the organisation.

In particular, the UK Act's requirement that the Board approve the statement is seen to have fostered increased awareness of the risks of modern slavery that may not have otherwise occurred.

Members estimate the time taken to prepare a slavery statement is between 6–18 months, depending on the complexity of the organisation's supply chain.

A significant amount of this time is dedicated to determining how to report, that is:

- the scope of the statement's coverage (who to include)
- how to translate the broader intent of the legislation into what is measured and reported on the ground

⁷ United Nations, *UN Global Compact*, United Nations, <https://www.unglobalcompact.org/what-is-gc>, accessed 25 April 20167.

⁸ United Nations, *UN Global Compact*, United Nations, <http://www.unglobalcompact.org.au/about/gcna/>, accessed 25 April 20167.

- additional mechanisms required to fulfil the statement's reporting requirements.

Should Australia introduce a Modern Slavery Act?

The Business Council supports the introduction of a MSA because it will help:

- increase the transparency of supply chains, therefore reducing the risk of modern slavery
- hold businesses to account by helping customers, investors and business partners more easily distinguish between businesses on the basis of their efforts in improving supply chain governance
- create fairer competition by levelling the playing field with other jurisdictions.

It is important that any new legislation be clearly delineated and avoid overlapping with the existing legal framework. There are existing laws and regulations that already deal with certain aspects of modern slavery. The Criminal Code criminalises human trafficking, slavery and slavery-like practices and the Code's offences apply extra-territorially and can be attributed to companies. The *Migration Act 1958* and the *Fair Work Act 2009* also provide similar protections.

The evidence indicates that modern slavery reporting is resource-intensive and can be hard to implement effectively. It may require a business to introduce new reporting mechanisms to collect the relevant data. It can also be difficult for a business to get clarity about what is occurring, particularly when it involves outsourcing and sub-contracting arrangements overseas. For this reason, the transitional arrangements should allow two years to put the new arrangements in place and the government should complete a regulatory impact statement to explore options to achieve the legislation's goals at the least cost to business.

In this context, the Business Council believes that an Australian MSA should focus on reporting (the UK model) rather than a due diligence model (the French model).

The French *Corporate Duty of Vigilance Law 2017* is new and untested. There is a high-risk that this type of approach will result in unnecessary regulatory overburden and be onerous and costly for companies without any experience reporting on modern slavery issues.

Recommendation 1: The Business Council recommends that the government establish a Modern Slavery Act in Australia that requires selected large businesses to prepare and publish a modern slavery statement each year, consistent with the United Kingdom's Modern Slavery Act requirements.

Designing an effective Modern Slavery Act

This inquiry is an important opportunity to examine how best to achieve the goal of reducing the risk of modern slavery in supply chains through increased transparency, while also minimising the risk of regulatory burden and excessive costs for business.

The following sections highlight some design issues and suggests six principles that should underpin the design of the legislation.

Threshold for reporting

Careful consideration must be given to determining which companies will be required to make a disclosure under an Australian MSA.

Setting the threshold requires a trade-off between having the legislation apply to a broader group, thereby providing more information into the market, with the risk it will place undue burden on business by capturing companies where there is little benefit from disclosure. For example, setting a threshold based on turnover that is too low might make the legislation apply to organisations that do not have a supply chain or companies that have limited resources to complete the process in a meaningful way.

There are a range of measures that could be used to determine the threshold, including:

- annual turnover
- business size, measured by the company's number of employees
- combination of both measures.

Using one measure would provide certainty about which companies are required to report. However, it may also be a blunt measure that would not provide flexibility to help ensure the legislation applies to a more meaningful sample of companies.

Both the Californian *Transparency in Supply Chains Act 2010* and the UK Act have used annual turnover to set the threshold for compliance (US\$100 and £36 million respectively).

The UK's threshold meant that just over 12,000 businesses were captured by the legislation.⁹ The Business Council believes the UK (or Californian) threshold is unsuitable because it is likely to capture a number of medium sized enterprises.

The Business Council believes the MSA will be most effective if the threshold is set at a level that targets large businesses with a substantial presence in Australia and extensive supply chains. These types of businesses have purchasing power that enables them to bring about change throughout their supply chain, including influencing businesses who are their domestic suppliers.

However, it will be important that the government does detailed work to explore different options for the threshold and consults extensively with business before they define which businesses the legislation will apply to or which parts of a supply chain a business must report on.

The Business Council also believes government should also take a leadership role on this issue. They have the ability to affect change through their role as a large purchaser of products and services and as an influencer on the community's expectations of supply chain governance arrangements.

⁹ Cordery, UK Government's response to Modern Slavery Act compliance consultation: threshold figure set but guidance content detail still to come, media release, 25 August 2015.

The impact of requiring large businesses to report on their suppliers is supported by evidence from the UK. Nine per cent of the Business and Human Rights Resource Centre's sample of statements were from companies with a turnover below the £36 million threshold. The report notes that *'from our experience we know that some larger companies are expecting modern slavery statements from all their suppliers, irrespective of their size, so the Act is having a ripple effect through B2B relations.'*¹⁰

Given this, it is possible that a MSA will increase the compliance burden on other companies in Australia, even if they are not legally required to prepare a slavery statement.

Large companies also have better resources to assess and monitor work conditions in their supply chain, including global supply chains. This is supported by evidence from the UK. The Business and Human Rights Resource Centre benchmarked a sample of slavery statements and found that the most informative reports were produced by the larger, multinational, consumer-facing companies.¹¹

Design principle 1: The legislation applies to large businesses with a substantial presence in Australia and extensive supply chains.

Nature of the legislation

It is worth acknowledging that in the absence of legislation, many large businesses in Australia are already willingly engaged on the issue modern slavery and that human rights reporting has, to date, been voluntary and business-led.

The MSA's overarching objective should be to further guide corporate behaviour by encouraging businesses to better understand their supply chains and mitigate against the risk of modern slavery.

Legislation that is punitive or has an excessive focus on compliance would be costly and it would fail to recognise the active role businesses have already taken in this area. It risks driving compliance behaviours (a 'tick and flick' approach to reporting) which will limit the effectiveness of the statements and would be counter to the intent of the legislation.

Further, punitive measures for companies that have reported on the steps they have taken (for example, fines) would perversely punish organisations that have committed resources to investigate their supply chains and engage with suppliers, rather than those who have opted to do nothing.

¹⁰ Ergon Associates, *Modern slavery statements: One year on*, Ergon Associates, https://business-humanrights.org/sites/default/files/documents/msa_one_year_on_april_2017.pdf, accessed 28 April 2017, p.2

¹¹ Ibid.

Design principle 2: The legislation focuses on promoting better performance by companies, rather than punishing companies for any problems that are identified through the reporting requirement.

The UK Act requires a slavery statement to be approved by a Board. This has proven to be an effective mechanism to encourage broader conversations about supply chain governance and it has raised the profile of the issue of modern slavery within organisations. For this reason, the Business Council believes the requirements should be replicated in the MSA.

Design principle 3: The legislation requires a company's slavery statement to be approved by the Board.

Level of prescription

To limit the reporting burden created by the MSA, legislation must be flexible, not mandating the areas a company must report against in its slavery statement or structure of the disclosure.

The length and complexity of global supply chains creates significant challenges for organisations trying to get a deeper understanding of what is occurring. Large companies can have thousands of suppliers and they can have limited access to data in some parts of their supply chain.

In this context, it is important that companies are provided with guidance that will help them take a risk-based approach by identifying which parts of their supply chain have a high-risk of modern slavery occurring.

Companies are likely to be cautious when preparing their statements to ensure they are reporting accurately. MSA reporting will be more practical and meaningful if individual businesses are able to determine what activities they think are reasonable and proportionate. This will generally be closely related to their commitments around international standards and stakeholder expectations.

The transparency provision in the UK Act has been specifically designed to minimise the burden on business by not dictating the type of activities businesses should undertake or how they should carry them out. Rather, it suggests six areas the statement should cover:

- organisation structure, business and supply chains
- its policies in relation to slavery and human trafficking
- its due diligence processes in relation to slavery and human trafficking in its business and supply chains
- the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk

- its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate
- the training and capacity building on slavery and human trafficking available to its staff.

The Business Council believes this is a sensible approach. It provides a common framework for the statements, while not limiting an organisation's ability to determine which areas they can meaningfully report on.

The effectiveness of the UK Act has been criticised because there are low levels of reporting against some of the six areas. However, it is worth remembering that the legislation is relatively new. The Business Council anticipates that more detailed reporting will develop over time, as businesses become familiar with the statement's content and as business systems start to capture more data.

Similarly, the Business Council believes that the MSA should not prescribe the structure of disclosure (e.g. whether a statement should be included within a company's annual report). A business should be able to decide what format is most appropriate and will best align with their existing reporting processes.

Design principle 4: The legislation does not mandate the areas a company must report against in its slavery statement or the disclosure's structure so companies have flexibility to determine what activities are reasonable and appropriate.

Consistency with the UK Act

Making the MSA consistent with the UK Act will assist those companies who are already under an obligation to carry out transparency-related activities because it will reduce the cost and administrative burden associated with fulfilling two reporting requirements.

It will also assist smaller companies who are suppliers to businesses that report under the UK Act because variations between the two pieces of legislation are likely to increase the level and/or scope of information required by the reporting company.

Ideally, the MSA should allow mutual recognition of reporting or enable a business to fulfil the Australian legislation's reporting requirement by replicating their UK slavery statement.

Design principle 5: The legislation is consistent with the United Kingdom's Modern Slavery Act 2015 and allows mutual recognition of reporting across countries.

Ensuring transparency

As the intent of the MSA is to increase transparency, it is important the disclosures are easily accessible.

The UK Act requires companies to publish their slavery statements on the company's website, with a link to the statement on a prominent place on the company's homepage. However, a recent analysis found that 25 per cent of the sample of statements had failed to comply with this legal requirement.¹²

In the absence of not having a central government database for the statements, the UK's Business and Human Rights Resource Centre has been attempting to collate them through its Modern Slavery Register but to date it has only collected 1,700 statements – well short of the 12,000-companies that met the reporting threshold.¹³

The Business Council strongly believes that any reporting required under a MSA should be public and uploaded to a central, searchable repository. This will facilitate easier monitoring and tracking of compliance by government and other interested parties. It will also facilitate continuous improvement by enabling businesses to benchmark their statements against similar companies.

Design principle 6: The legislation manages disclosure via a central, searchable repository to enable easy monitoring, tracking and benchmarking of performance.

Recommendation 2: The Business Council recommends that the government adopt six key principles that would underpin how the Modern Slavery Act will be drafted:

1. The legislation applies to large businesses with substantial presence in Australia and extensive supply chains.
2. The legislation focuses on promoting better performance by companies, rather than punishing companies for any problems that are identified through the reporting requirement.
3. The legislation requires a company's slavery statement to be approved by the Board.
4. The legislation does not mandate the areas a company must report against in its slavery statement or the disclosure's structure so companies have flexibility to determine what activities are reasonable and appropriate.
5. The legislation is consistent with the United Kingdom's *Modern Slavery Act 2015* and allows mutual recognition of reporting across countries.
6. The legislation manages disclosure via a central, searchable repository to enable easy monitoring, tracking and benchmarking of performance.

¹² Ergon Associates, *Modern slavery statements: One year on*, p.3.

¹³ Ibid.

Transition arrangements

The Business Council recognises that the introduction of an MSA will be a significant and resource-intensive change for some businesses, particularly those with no prior experience making a disclosure or which are still in the early stages of implementing supply chain governance.

It will be important that the transitional arrangements provide affected businesses and their suppliers with a sufficient amount of time to adjust (two years) to reduce the costs and administrative burden caused by the change.

This will also give business time to introduce the new systems and reporting processes required to collect the relevant data and allow government time to consult on the types of guidance business needs to support them to comply with the new reporting requirement.

Anti-Slavery Commissioner

The Business Council does not support the establishment of an Anti-Slavery Commissioner at this stage.

A number of Commonwealth agencies already have responsibility for conducting the types of activities that would traditionally be undertaken by a Commissioner.

There are other options to enhance coordination of activities and raise the profile of modern slavery that should be explored before an Anti-Slavery Commissioner is established.

The Business Council believes the responsibility for oversight of modern slavery should rest within the Attorney-General's Department, overseen as appropriate by the Attorney-General or the Minister for Justice.

Recommendation 3: The Business Council recommends that responsibility for oversight of modern slavery should rest within the Attorney-General's Department, overseen as appropriate by the Attorney-General or the Minister for Justice.

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