

‘Staying with the pack’: Is Australia’s Current *Modern Slavery Act* More Bark Than Bite?

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Abstract

Modern slavery is a complex human rights challenge in our 21st century world. When Australia’s *Modern Slavery Act* was first enacted, the reporting regime invited scrutiny regarding how corporations addressed modern slavery risks within their corporate operations and supply chains. Now, evidence from the statutory review following the first three years of modern slavery reports suggests that what was envisioned as a ‘race to the top’ has yet to fully achieve its intended transformative impact. This article outlines some of the recommendations for statutory reform and how this can improve the current Act’s efficacy. Introducing financial penalties for non-compliance and mandating due diligence could help incentivise businesses to take more proactive action in reporting and incorporating anti-modern slavery practices than what has arguably been witnessed to date. The public view seems to be that corporations could be doing more to address modern slavery risks. A notable challenge is improving regulation and engagement within existing supply chains. Australia’s statutory review comes during a time where corporations must now give weight to environmental, social and governance (‘ESG’) standards. In the future, businesses will need to demonstrate their ongoing commitment to addressing human rights concerns.

Introduction & Overview

Slavery is by no means a modern phenomenon. Rather, contemporaries use the term ‘modern slavery’ to recognise the ways in which slavery has continually evolved within the context of our ever changing 21st-century paradigm. The world has become increasingly globalised. As the complexity of doing business within this interconnected network of countries continues to expand, so has modern slavery problems and the expectation that our existing legal frameworks should be able to fix it.

As emphasised during the 2023 National Modern Slavery Conference, modern slavery is ‘complex, ever evolving, and [often] hidden.’¹ For reference, the 2023 Global Slavery Index estimates that 49.6 million currently live in modern slavery conditions.² Within Australia alone, approximately 40,000 people are believed to be victims of modern slavery.³ The value of goods imported to Australia with some form of connection to modern slavery in supply chains is estimated to be \$17.4 billion.⁴

At its core, the umbrella term ‘modern slavery’ encompasses instances of ‘coercion, threats or deception [that] exploit victims and undermine their freedom.’⁵ Australia’s *Modern Slavery Act 2018 (Cth)*, the focal piece of legislation in this article, sets out the relevant definition:⁶

- (a) ‘Offences under Division 270 or 271 of the Criminal Code’. This refers to offences that cover trafficking, as well as slavery and other slavery-like practices.⁷
- (b) ‘An offence under either of those Divisions if the conduct took place in Australia’.
- (c) ‘Trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27)’; or
- (d) ‘The worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38)’.

There are other Acts beyond the *Modern Slavery Act* that enhance Australia’s existing legislative framework.⁸ For instance, the *Modern Slavery Act 2018 (NSW)* applies to organisations that meet a certain financial threshold in New South Wales.⁹ However, this article focuses on the Federal Act (hereby referred to as the ‘*Modern Slavery Act*’) as it provides a poignant opportunity to highlight how corporations have increasing obligations with respect to anti-modern slavery practices on a national level. According to the United Nations Guiding Principles on Business and Human Rights, businesses are required to respect and promote human rights in everyday operations.¹⁰

This article provides an overview of some interesting observations about the Act’s efficiency and purported weaknesses, particularly when it has been criticised by some as not achieving significant change in anti-modern slavery practices. The recent statutory review undertaken by Professor John McMillan, put forward some key recommendations that may help increase the strength of existing legislation. This article first maps out the international context behind Australia’s legislative approach, noting it was inspired by UK legislation. It then summarises some of the potential areas for reform raised during the statutory review. It will

detail some of the potential difficulties that come with mitigating modern slavery, particularly now that businesses are reliant on complicated supply chains. Finally, this article will note the consumer relevance of taking a stronger stance on anti-modern slavery measures in light of heightened corporate social responsibility and ESG criterion.

The relevance of modern slavery is linked to the enduring global battle of enforcing human rights and rule of law. Some of the key characteristics intrinsic to the rule of law include that it is readily enforceable and applied equally to all individuals in similar circumstances.¹¹ However, the lack of enforceable penalties identified in the statutory review cast doubt upon the extent to which the *Modern Slavery Act* sufficiently protects the marginalised, vulnerable groups of society impacted by modern slavery. To this extent, the deficiencies in the *Modern Slavery Act* influence the extent to which human rights are safeguarded.

A. International Context: The British Predecessor

It is important to acknowledge the context which gave rise to Australia's *Modern Slavery Act*. At the time, a majority of submissions to the Australian Joint Standing Committee relied on the *Modern Slavery Act 2015 (UK)* as the starting point for Australia's own domestic response.¹²

The *UK Modern Slavery Act 2015* was the first domestic legislation to adopt the term 'modern slavery' instead of often used phrases like 'forced labour' and 'human trafficking' which previously shaped discourse around various kinds of exploitation.¹³ The use of the term 'slavery' effectively helped create a wide legislative scope to tackle various forms of slavery. Broad and Turnbull argued that this definitional change acknowledges the continuities of slavery as complete ownership and modern slavery including but not limited to forced labour and debt bondage.¹⁴ The issue of rules of law arises again as this change reflects the need for protecting those on the 'periphery of employment and society...particularly in the context of restrictive migration policy and increasing hostility towards migrant workers'.¹⁵ Historical responses to slavery and trafficking have struggled with this. For instance, Doezenia found that the UN's 2000 'Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children omitted articulating harm to female sex workers, especially in the Third World.'¹⁶

The shift towards using the term 'modern slavery' also places greater responsibility on consumers to consider the ethical implications behind their product choices.¹⁷ The UK Act, as well as Australia's *Modern Slavery Act*, rely on consumers' knowledge of and reaction to modern slavery embedded in corporate supply chains.¹⁸ Academics Nolan and Frishling have noted that the UK Act relies on the current wave of corporate responsibility at the domestic and international level, whereby corporations assume responsibility for social problems and human rights.¹⁹ In addition, Broad and Turnbull argue the UK response was emboldened at a time where organised crime and issues regarding human trafficking and sexual slavery were brought to the forefront by heightened immigration to European Union countries.²⁰

There are some notable differences between the UK and Australia's legislative responses. For instance, both Acts define 'modern slavery' with reference to criminal offences but there are some discrepancies about the scope of the provisions and the Acts' wording.²¹ Unlike Australia, the UK offence provisions do not cover forced marriage or debt marriage, and it also does not refer to the convention concerning the worst forms of child labour.²² Moreover, Australia's model uses seven mandatory reporting criteria which increases the onus on what must be covered.²³ Interestingly, this led to Vijayarasa arguing that Australia's reliance on the UK Act enabled the current definition of 'modern slavery' to encompass crimes that are already being regulated and which 'have little to do with supply chain exploitation by medium and large-sized corporations'.²⁴ To some extent, Australia could have benefited from narrowing down the scope of submissions so that it placed greater emphasis on addressing the root cause of modern slavery within corporate supply chains.²⁵

B. Australia's *Modern Slavery Act*

This section highlights some of the issues identified during the 2023 statutory review of the Act. Currently, certain businesses and entities in Australia are required to submit a yearly report called a 'modern slavery statement'.²⁶ This statement must describe the modern slavery risks within the reporting entity's operations and supply chains, including what steps have been taken to enact due diligence and prevent goods and services from being a product of modern slavery.²⁷ It is intriguing to note that the Act does not define 'due diligence'. The Explanatory Memorandum suggests that certain terms were incorporated from the United Nations Guiding Principles on Business and Human Rights (2011).²⁸ If so, we can infer that the Act directly references Principle 17 from these Guiding Principles, which describes 'human rights due diligence' as being the '[assessment of] actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.²⁹

I. Reporting Threshold

The current Act stipulates that Australian entities must provide modern slavery statements if they have reached the threshold of \$100 million and above in annual consolidated revenue.³⁰ This threshold is applicable to both Australian-based corporations and those with an extra-territorial reach.³¹

As part of its statutory review, one key recommendation was to lower the reporting threshold to an annual consolidated revenue of \$50 million.³² There was concern that the \$100 million threshold was not substantial enough to emphasise the importance of preventing modern slavery.³³ Many medium to larger sized corporations fell beyond the ambit of anti-modern slavery reporting obligations, which was originally a pragmatic decision as it balanced public benefit against the anticipated workload and administrative burden imposed on businesses needing to prepare the statements.³⁴

However, the review recognised that there has been a shift towards expecting entities ‘of all sizes’ to demonstrate greater awareness of modern slavery and explain how they intend to deal with those challenges.³⁵ As the growing impact of modern slavery and its inevitable expansion across all of our business sectors will likely have a spill-over effect into the broader economy, this seems to be a natural expansion and the next step that Australia should take. Of course, there are various ways that the Act can incorporate reporting requirements for smaller businesses without imposing a high administrative burden.³⁶

II. Penalties & Compliance

Perhaps one of the most contentious features of the *Modern Slavery Act* is its failure to include penalties for not submitting modern slavery statements. At the time, the justification was that businesses that were lax in complying with reporting requirements ‘[would] be penalised by the market’ and ‘tarnish their [consumer] reputation’.³⁷ To this extent, both the UK and its Australian counterpart relies on the notion of market sanctions. It assumes that active monitoring from both external stakeholders and media, coupled with the threat of reputational harm, will be adequate to generate effective outcomes for corporations.³⁸

There are numerous problems with this rationale. First, it appears incompatible for the government to introduce measures to promote fundamental human rights protection but choose not to include any robust mechanisms to ensure that businesses actually comply with their reporting obligations.³⁹ Secondly, structuring the Act in this manner means that the onus of regulatory oversight and company accountability has essentially shifted from the government to the everyday consumer.⁴⁰ It is dubious whether the existence of mere external pressure is sufficient in deterring businesses from being lax with mandatory reporting criteria.

The Act also does not impose any financial penalties for non-compliance with reporting requirements, and any subordinate legislative rules made under the Act do not establish ‘an offence or civil penalty, or authorise entry, search or seizure’.⁴¹ In the worst-case scenario, the current Act seems to allow for a situation where entities could benefit from lax compliance without incurring substantial financial loss. Consider this, if a reporting entity fails to detect modern slavery practices in business operations or supply chains, it will nevertheless continue to reap the financial benefits from these human rights abuses.

Of course, there are potential non-monetary consequences for non-compliance. Currently, the Minister of Home Affairs can publish information on the Register to expose reporting entities that failed to submit a modern slavery statement after receiving requests for an explanation or appropriate remedial action.⁴² However, it is questionable whether these consequences are substantial enough. This raises questions over the extent to which the existing *Modern Slavery Act* can genuinely enforce its required business obligations and human rights protection.

For this reason, the review recommended the introduction of stringent financial penalties to cover a variety of circumstances: the failure to provide a modern slavery statement without reasonable excuse, including materially false information, failure to comply with requests to take specific remedial action to comply with reporting obligations, and the failure of having a due diligence system in place.⁴³ These suggestions appear consistent with research undertaken by the Australian Human Rights Institute, which found that 54% of almost 90 business groups surveyed agreed that modern slavery responses would improve if the Act incorporated financial penalties.⁴⁴

III. Quality of Reports

The overall quality of modern slavery reports and information provided has also come under scrutiny. The current *Modern Slavery*

Act does not require modern slavery statements to be audited.⁴⁵ To some extent, this lack of mandatory auditing could allow for instances whereby companies overstate or insufficiently report on the extent to which they have implemented certain anti-modern slavery processes within their operations and supply chains. It is concerning that 56% of companies were found to have failed to take action and improve their first-year modern slavery statements in their second year of reporting.⁴⁶

The current Act provides that the annual modern slavery statement must include the following components listed under section 16(1):⁴⁷

- (1) the reporting entity's identity, structure, operations and supply chains;
- (2) actions undertaken to target the modern slavery risks within the operations and supply chain, involving due diligence and remediation processes;
- (3) the way in which the reporting entity examines the effectiveness of such actions;
- (4) the way the entities consult with any entities they own or control; and
- (5) ad hoc information that the entity sees as relevant.

Despite this mandatory reporting criteria, research conducted on the second round of modern slavery requirements revealed that 66% of companies failed to comply with basic reporting requirements, and some companies simply did not submit any reports at all.⁴⁸ Research published in February 2022 further compounded these concerns by highlighting that 77% of over 100 companies reviewed failed to satisfy basic reporting guidelines, while only 27% had taken 'effective action' to reduce modern slavery risks.⁴⁹

Once again, these findings raise important questions about whether the reporting requirements are clear and how modern slavery can be effectively addressed if companies do not provide sufficient information on how they are assessing and addressing those risks. With 43% of companies reviewed failing to identify 'obvious' modern slavery risks within their supply chains,⁵⁰ it highlights the need for clearer guidance on reporting requirements and greater overall accuracy and consistency.

C. Emerging Concerns About The *Modern Slavery Act*

I. Reading the Room: Reaching the Middle of the Pack?

The Global Slavery Index Report 2023 praised Australia as having one of the 'strongest government responses' to modern slavery, particularly with the passing of its *Modern Slavery Act*.⁵¹ Despite this, others took a more sceptical view in the statutory review and submitted that there was substantial room for improvement. When the Act was introduced, it was lauded as a mechanism that would encourage a 'race to the top' between corporations.⁵² Yet, in the years since its commencement there have been concerns about the perceived level of complacency in businesses. Some submissions to Parliament noted that businesses seemed content to treat their reporting obligations as a bare minimum 'tick-box exercise', whilst others described an underlying tendency to '[stay] with the pack'.⁵³ The recent statutory review concluded that the Act has yet to cause 'meaningful change' for people who are victims of modern slavery.⁵⁴ Notwithstanding the mixed feedback about the successes of the current legislative model, the reality is that trying to solve an issue as complicated and entrenched as modern slavery will require an even more pragmatic and holistic approach than what has arguably been observed to date.

II. The Need for Greater Due Diligence and Regulatory Oversight

Rather than relying on a passive disclosure and reporting system, one recommendation was that the *Modern Slavery Act* should impose a positive obligation on businesses to implement due diligence in their business operations.⁵⁵ Currently, the Act only requires the statements to describe their due diligence systems. As the statutory review made abundantly clear, the emerging 'global norm' is that implementing strong due diligence processes is fundamental in addressing modern slavery and other human rights abuses.⁵⁶ The introduction of a due diligence obligation would be perceived as taking the extra step necessary to align Australia's *Modern Slavery Act* with other international jurisdictions, particularly Europe, which has made progress in introducing a mandatory human rights due diligence framework.⁵⁷ This may be supported by the results of an in-depth study that revealed that 61% of businesses would likely improve their modern slavery reports if it was mandatory to undertake due diligence.⁵⁸

Australia's initial lack of an independent body to ensure regulatory oversight and enforcement presented another noticeable gap in the perceived strength of anti-modern slavery measures.⁵⁹ The statutory review acknowledged that having a 'high profile, specialist and committed office' would help to signify the gravitas and urgency of addressing modern slavery risks, in addition to being more effective in drawing public attention to current deficiencies in reporting and business strategy.⁶⁰ This need was recognised by the Albanese Government, who allocated \$8 million towards the establishment of a Commonwealth Anti-Slavery Commissioner in the 2023-24 Federal budget.⁶¹ The

scope and powers have yet to be finalised. A key proposal was for the Federal Anti-Slavery Commissioner to have capacity to designate ‘special or high-risk’ modern slavery challenges for companies to address in specified reporting periods. It was also recommended that the Commissioner should possess express powers to release supplementary guidelines about the reporting requirements.⁶³

III. Limitations of Social Reporting

In instances where reforming company operations depends on the weight given to peer pressure, it is questionable whether this will be effective in generating substantial change. According to Ford and Nolan, the current Act assumes, firstly, that the current reporting requirements adequately embed appropriate due diligence processes into businesses’ corporate governance; and secondly, that this generates sufficient information for the public to respond as needed.⁶⁴ However, there is limited research regarding the nature of the causal link between reporting obligations and internal changes within company structure and culture.⁶⁵ Moreover, the recent statutory review seemed to suggest that ‘good faith and... fear of adverse publicity’ may not adequately incentivise compliance with reporting requirements.⁶⁶ This further justifies the aforementioned reasons why incorporating financial penalties may be necessary.

There is reason to be cautious in believing that the current *Modern Slavery Act* will have its intended transformative impact on human rights protection unless more action is taken. In addition to increased regulatory oversight and enforcement capabilities, corporations can improve their due diligence by enabling workers to contribute towards reforming workplace monitoring and operational processes.⁶⁷ There also needs to be a greater focus on increasing the transparency of auditing processes and information provided.⁶⁸ Directing attention to these matters will be important in helping to improve company due diligence processes because it enhances overall engagement from within the workforce. Transparency is conducive to increasing accuracy and accountability.

IV. The Link in Our Supply Chains

We now live in a world where many businesses rely on complicated, globalised supply chains. The geographical and/or hierarchical distance between parent organisations and suppliers in a top-down company structure can increase transparency and data-sharing issues, making forced or bonded labour harder to detect.⁶⁹ Recent statistics collated in the Good Practice Toolkit highlighted that 65% of overall businesses surveyed agreed or somewhat agreed that their major suppliers were transparent regarding their labour force. However, 33% of overall businesses surveyed agreed or somewhat agreed that their major suppliers were hiding labour violations from them.⁷⁰ The fact that approximately a third of businesses hold such concerns is sufficient to raise alarm at the murkiness of supervising these complex supply chains.

There is evidence to suggest that the Act is still lacking with regards to how it encourages engagement with key suppliers. The Good Practice Toolkit highlighted a tendency for businesses to take a narrower focus and only engage with suppliers that have direct relations with their company.⁷¹ Unfortunately, this myopic approach risks overlooking other suppliers. With only 26% of Australian companies undertaking human rights due diligence as part of their selection process for new suppliers, there needs to be greater overall engagement and proactivity from businesses to further minimise modern slavery risks.⁷²

D. Intersection Between Modern Slavery and Corporate Social Responsibility

The increased scrutiny surrounding modern slavery practices parallels society’s increased focus on corporate social responsibility. Modern slavery falls under a subset of businesses’ renewed focus on the extent to which they manage their industry and take accountability for the social impact of their actions.⁷³ In short, businesses are now expected to take proactive steps to align with growing ethical and social responsibilities.

This intersection with modern slavery can be summarised by commentary from public figures like the head of policy at CHOICE, Patrick Veyret, who emphasised that consumers should not bear the onus of driving social change.⁷⁴ Rather, businesses are the ones who should arguably have the onus of ensuring that they take responsibility.⁷⁵ Of course, there will likely be some difficult policy questions regarding how current anti-modern slavery measures can be enhanced in a manner that is both effective, feasible but also not too onerous on companies to enforce. Regardless, businesses should be cognisant of increasing consumer awareness of corporate ethical responsibility.

Some law firms have anticipated that these growing regulatory issues could eventually be raised under the guise of ‘blue washing’.⁷⁶ This effectively encompasses any marketing or public representations that deceptively convey that a company’s policies, services or goods are more socially or economically responsible than they really are.⁷⁷ It could also include companies which seek to improve the public

perception of their business values and governance, without incorporating any real, feasible measures to curb the issues they seek to address.⁷⁸ An example of modern slavery auditing that has been alleged to be insufficient was Leigh Day's claim against Tesco concerning negligence in factory working conditions.⁷⁹

A lack of transparency and adequate compliance with curbing modern slavery could eventually constitute misleading conduct.⁸⁰ We anticipate that there will be a greater shift towards examining company supply chains and the efficacy of due diligence systems being put in place to counteract modern slavery. There will be greater pressure from company stakeholders for businesses to accurately report and address potential or existing human rights abuses.

Conclusion

The *Modern Slavery Act* is the latest instalment in Australia's legislative framework to address modern slavery risks. The reporting regime deserves recognition for having helped to draw more attention towards this global issue.⁸¹ At the very least, it has helped to establish a base-level duty where corporations are more alert to potential modern slavery risks and challenges. Despite the benefits of implementing the Act, however, the statutory review revealed that further measures are required to ensure higher levels of regulatory oversight, reporting quality and internalised company processes to mitigate these risks.

Lowering the reporting threshold would be a natural step in acknowledging the importance of fighting modern slavery in cross-industry sectors for medium-to-large-sized corporations.⁸² The current absence of proper enforcement mechanisms for non-compliance within the Act can be remedied by imposing financial penalties.⁸³ Indeed, the current model is inconsistent with the notion of taking a definitive stance for human rights protection and it shifts the burden of regulation onto external stakeholders.⁸⁴ There are perceived limits on the extent to which relying on external market forces like consumers and stakeholders can result in meaningful change.⁸⁵ The statutory review has further observed issues about the quality of reporting because some reports are incomplete or lack sufficient information.⁸⁶ This may in turn lead to the adoption of clearer guidelines and procedures to generate more industry-wide consistency.

Some have expressed concerns that modern slavery reporting has been treated as a 'tick-box exercise'.⁸⁷ Instead, it would be more beneficial for Australia to incorporate a statutory human rights due diligence obligation.⁸⁸ This would help to bring Australia into alignment with other countries.⁸⁹ Australia's plans to establish a Commonwealth Anti-Slavery Commissioner signifies a positive development that further highlights the importance of addressing modern slavery.⁹⁰

Corporations may encounter practical difficulty in addressing modern slavery risks in the context of extensive, complex supply chains. It is necessary that corporations increase their engagement with their suppliers from a holistic rather than narrow perspective.⁹¹ Finally, these legislative amendments can be analysed against the backdrop of an increasingly global phenomenon that pushes for corporate social responsibility and ESG.⁹² Corporations will be expected to take further action to address human rights abuses and reduce modern slavery risks.

Australia has taken steps to establish a national state-wide regime to combat modern slavery practices. If it wants to continue leading the global pack in the enduring fight against modern slavery, then more statutory and industry-wide reform is required to help enhance the strength of businesses' anti-modern slavery practices.

END NOTES

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⁷⁹ Emily Dugan, 'Thai factory used by Tesco faces criminal charges over treatment of workers', The Guardian (online, 4 March 2023) <<https://www.theguardian.com/world/2023/mar/03/thai-factory-used-by-tesco-faces-criminal-charges-over-treatment-of-workers>>.

⁸⁰ Feng et al (n 46).

⁸¹ McMillan (n 21) 33.

⁸² Ibid 54–5.

⁸³ Ibid 94.

⁸⁴ Redmond (n 38) 88.

⁸⁵ Raby and Christ (n 40).

⁸⁶ Ibid.

⁸⁷ McMillan (n 21) 34.

⁸⁸ Ibid 69.

⁸⁹ Ibid 38.

⁹⁰ Ibid 105.

⁹¹ Good Practice Toolkit (n 70) 18.

⁹² Chih-Cheng Chen et al (n 73) 8275.