Joint Standing Committee on Foreign Affairs, Defence and Trade:

Inquiry into establishing a Modern Slavery Act in Australia

Submission of the Australian Institute of Employment Rights

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Introduction

The Australian Institute of Employment Rights welcomes the opportunity to make a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into establishing a Modern Slavery Act in Australia.

The Australian Institute of Employment Rights (AIER) is an independent, not-for profit organisation with the following objective:

> "Adopting the principles of the International Labour Organisation and its commitment to tripartite processes, the Australian Institute of Employment Rights will promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework."

Our Australian Charter of Employment Rights, developed by preeminent labour law academics and practitioners, offers a blueprint for workplace fairness. We believe that workplace practices can and should align to ensuring fairness for all participants, as should national and international regulations.

The AIER is an organisation independent of government or any particular interest group. We include employer and employee interests along with representatives of the academic and legal fraternity in our makeup, membership and operation.

Our submission focuses on issues concerning the exploitation and abuse of human and employment rights experienced by many people within global supply chains. We note the Committee's earlier report, "Trading Lives: Modern Day Human Trafficking", concluded that

> "It is important for Australia to take appropriate and effective action that will play a significant role in the reduction of goods and services produced by trafficking, slavery and forced labour. It is also important for Australia to establish a mechanism that is suitable for the Australia context."

The Committee went on to recommend that the Australian Government, in consultation with relevant stakeholders, undertake a review to establish anti-trafficking and anti-slavery mechanisms appropriate for the Australian context. The review should be conducted with a view to:

- introducing legislation to improve transparency in supply chains;
- the development of a labelling and certification strategy for products and services that have been produced ethically; and
- increasing the prominence of fair trade in Australia.

From this context, AIER's submission is focused on discussing the most effective mechanisms the Australian Government could implement to reduce the exploitation of people, including through slavery, slavery-like practices and forced labour, in global supply chains.

AIER makes the following recommendations to the Committee:

1. The Australian government establish a Modern Slavery Act that contains the following elements:
   - A requirement on corporations that operate in Australia and have a combined turnover of $150 million (including all global subsidiaries) to develop a due diligence plan to eradicate in the first instance slavery, slavery-like practices and forced labour, [subject to the comments below about expansion over time to other human rights abuses];
   - The plan must contain:
     1. A mapping that identifies, analyses and ranks risks;
     2. Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;
     3. Appropriate action to mitigate risks or prevent serious violations;
     4. An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned;
     5. A monitoring scheme to follow up on the measures implemented and assess their efficiency.
   - Failure to develop and publish a plan and the results of the monitoring scheme will make the company liable for a fine of up to $10 million.
   - Persons who are subject to slavery, forced labour or other abuses of human rights will have the capacity to take civil action against the company, in circumstances where the company has failed to develop and implement a plan according to the legislative requirements.
   - The legislative requirements to be phased in over an appropriate timeframe to enable compliance, noting large multi-national corporations should already be developing and implementing plans to minimise human rights abuses in their supply chains.

2. The Modern Slavery Act could at first focus on slavery, slavery-like practices, forced labour and trafficking but should allow for future expansion to cover other human rights abuses and environmental crimes. It should be underpinned by a broad understanding that corporations should be taking all reasonably practicable steps to ensure fairness in their supply chains, as with the rapidly changing nature of work abuses may occur that sidestep existing concepts of human rights.

3. If the Inquiry is not prepared for Australia to implement robust regulations against human rights abuses by corporations and instead chooses to rely on the incentive of reputational damage, at the very least it should recommend legislation similar to the UK Modern Slavery Act but also fund civil society organisations to monitor compliance with requirements to publish a plan and to assess the efficacy of any plans. The work undertaken by civil society organisations in this regard should be covered by good faith protections against potential attempts to litigate for silence.

Global supply chains and abuse of human rights

Globalisation has ensured that many, if not most, of the products we use or consume have made their way to us through a global supply chain. Clothing and textiles, food, all types manufactured goods, technologies, and wood products amongst others are all likely to have been wholly or partly sourced through global supply chains.

The ILO suggests that more than 450 million people work in supply chain related jobs.[1] Slavery, forced labour, child labour are all present in global supply chains. In “a world of 80 000 transnational corporations, ten times as many subsidiaries and countless national firms, many of which are small and medium enterprises” [2], regulating effectively against human rights abuses is a complex problem.

Adverse human rights impacts including the exploitation of workers through global supply chains is not a new phenomenon but one that has been attracting greater action from governments around the world in recent years. The last few years has seen renewed attention on developing various mechanisms to better protect workers in global supply chains in light of tragedies such as the Rana Plaza fire that killed over 1000 workers and the spate of suicides in factories supplying companies such as Apple.

Australia is by no means immune. Not only are numerous multinational companies active in Australia supplying us with endless goods, but Australian companies have also been implicated in extreme human rights abuses through their supply chains. In 2016, Rip Curl, the iconic Australian brand, was discovered to have been selling clothing made by likely forced labour in North Korea.[3] The 2017 Baptist World Aid report into the Australian Fashion Industry assessed 106 companies, awarding each a grade from A to F based on the strength of their labour rights management systems to mitigate the risk of child labour, forced labour and exploitation in their supply chain. While the conclusion of the report is positive about the steps being taken by the Australian fashion industry, the median grade was still only a C+.[4]

Global supply chains are extremely complex, exist across many different types of economic activity, and across all the regions of the world. They encompass lead companies, numerous contractors and subcontractors, home countries, and host countries.

The complexity and length of supply chains is a challenge for developing effective regulations. Supply chains can also be fluid and unpredictable depending on factors such as political instability and technological changes. “Global supply chains frequently include multiple layers of suppliers, which may be difficult to trace and therefore regulate. Since companies often rely on first-tier suppliers to identify and audit those in second-tier, who in

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[1] Human Rights Watch, *Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence* (2016) https://www.hrw.org/sites/default/files/report_pdf/human_rights_in_supply_chains_brochure_lowres_final.pdf

[2] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, Business and human rights: further steps toward the operationalization of the “protect, respect and remedy” framework”* (2010) A/HRC/14/27, 17 [82].

[3] Nick McKenzie and Richard Baker, “Surf clothing label Rip Curl using 'slave labour' to manufacture clothes in North Korea”, *The Age* (online), 21 February 2016 http://www.smh.com.au/business/surf-clothing-label-rip-curl-using-slave-labour-to-manufacture-clothes-in-north-korea-20160219-gmz375.html

[4] Baptist World Australia, *The Truth Behind the Barcode: The 2016 Australian Fashion Report* (2016) https://baptistworldaid.org.au/wp-content/uploads/2016/05/2016-Australian-Fashion-Report.pdf

turn identify and audit the next tier and so on, comprehensive monitoring by the company may not be possible."[5] The distinction between the lead company undertaking risk management and taking action to mitigate risks as opposed to actually being able to trace the entire supply chain becomes important when considering the scope of potential regulation.

Global supply chains exemplify what John Ruggie, the UN Secretary-General's Special Representative for Business and Human Rights, calls the "governance gap" that has been created by globalisation whereby there is a gap between "the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences." [6] However, the challenge for the Government and the Parliament is not to give up in the face of the complexity but to do what can be done to minimise the governance gap.

There are many different ways to approach the protection and enhancement of the rights of people working in global supply chains. This submission focuses on regulatory mechanisms states like Australia can implement specifically in relation to transparency and due diligence through supply chains but it does so acknowledging the complexity of the issue and that "the regulation of corporate activity with respect to human rights requires a multiplicity of stakeholders and a very nuanced mix of public and private regulation that may be difficult to replicate easily across different sector, states and cultural boundaries."[7]

Why should Australia act?

Australian policy-makers have acknowledged there is a role for the Australian government in addressing the issue of the responsibility of Australian companies for human rights in their overseas supply chains, particularly focused on the existence of slavery and forced labour. The Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Modern Slavery and Human Trafficking in 2012, recommended in relation to supply chains that the Government undertake a review on appropriate mechanisms, including:

- legislation to improve transparency in supply chains,
- the development of a labelling and certification strategy for products and services that have been produced ethically; and
- increasing the prominence of fair trade in Australia.[8]

Australia also has responsibilities under the United Nations human rights framework. The United Nations General Principles on Business and Human Rights sets out the "Protect, Respect and Remedy" framework that includes the responsibility of states to protect against human rights abuses including by business enterprises.[9] While States have discretion on the appropriate steps to take to prevent, investigate, punish and redress human rights abuse by

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[5] Galit Sarfaty, 'Shining Light on Global Supply Chains' (2015) *Harvard International Law Journal*, 56(2), 431.
[6] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, (2008) A/HRC/8/5, p. 3.
[7] Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30(78) *Utrecht Journal of International and European Law* 7, 9.
[8] Joint Standing Committee on Foreign Affairs, Defence and Trade, T*rading Lives: Modern Day Human Trafficking* (2013) http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/slavery_people_trafficking/report.htm
[9] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

private enterprise, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication.

Home state regulation that seeks to impose transparency and/or due diligence requirements on corporations has the capacity to touch on all three aspects of the "Protect, Respect and Remedy" framework of the UNGP. States are acting on their obligation to protect human rights, the regulations are directed to requiring corporations to comply with their responsibility to respect, and there is the potential for such regulatory regimes to contain some form of remedy.

Accepting the need for some form of regulation, a further issue is whether a country like Australia needs to regulate given the existence of initiatives in other countries. If laws in the United States or the United Kingdom and other parts of Europe already capture significant Australian companies why does Australia need its own laws and risk further regulatory complexity? The AIER argues that it is through regulations by nations like the US, UK, other European countries, and nations like Australia that will provide the necessary incentive for the deeper cultural shift required in corporations to respect human rights and eradicate slavery-like practices and exploitation in their supply chains. Another argument in favour of Australian regulation is that there are gaps in the regulations already in place, as discussed further below, and Australia is now in a position to learn from existing regimes and implement more effective laws.

AIER also submits that once Australia has established a robust mechanism towards eradicating human rights abuses in supply chains, that mechanism can be reflected in trade agreements Australia becomes a party to; thereby providing a further mechanism to spread globally robust standards on corporations when it comes to respecting human rights and protecting people from slavery forced labour and trafficking.

There has arguably already been a significant shift over the past 30 to 40 years where previously very few companies acknowledged any obligation to address working conditions in factories of their overseas suppliers, and now "for many (but not all) companies the question is no longer 'Do we have an obligation to address workers' rights in suppliers' factories? It is how do we do it, at what cost, and with whom do we collaborate in addressing the problems that exist?"[10] For example the response to the Rana Plaza fire was not to deny any responsibility on the part of global firms being supplied by the factory but that there was a rapid amount of activity leading to the establishment of three different initiatives aimed at improving working conditions in Bangladesh factories.[11]

However, given many of the initiatives targeting various industries in specific countries are voluntary there remains a strong argument for state-based laws to compel multi-national corporations to act with respect to their entire supply chains.

Assessing regulations in other jurisdictions

There have been a number of legislative and other governmental actions in recent years addressing transparency in supply chains that could provide a model for the Australian Government.

[10] Nolan, above at n5, 10.
[11] *Ibid.*, 10-11.

United States

Summary of regulations

The United States has been the most active jurisdiction in creating laws and regulations to address the exploitation of labour and other human rights abuses in supply chains in a range of different contexts:

- The California Transparency in Supply Chains Act;
- the Dodd-Frank rule relating to conflict minerals from the Democratic Republic of Congo;
- An Executive Order strengthening the prohibition US federal contractors from engaging in human trafficking activities; and
- An Executive Order for reporting requirements on companies investing in Myanmar.

The California Transparency in Supply Chain Act, which came into force in 2012, requires

> "Every retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars ($100,000,000) shall disclose, as set forth in subdivision (c), its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale."[12]

The activities that companies must report on include supply chain verifications to evaluate and address risks of human trafficking and slavery, audits of suppliers, and training for employees and mangers who have direct responsibility for supply chain management. However, the law only requires disclosure on a company's website and the only remedy for non-compliance is injunctive relief sought by the Attorney-General.

Section 1502 of the *Dodd-Frank Financial Reform Act* imposes reporting requirements on companies that manufacture products using conflict minerals sourced in the Democratic Republic of Congo (DRC) or bordering countries. The regulation requires publicly traded companies to report on whether they sourced minerals from the DRC or neighbouring countries and, if so, to report on due diligence measures taken by the company to determine whether the minerals financed or benefited armed groups in the relevant countries. The due diligence reports are required to audited and meet international standards such as the OECD Due Diligence Guidance. There are penalties for not reporting or complying in good faith or for providing false or misleading statements.[13]

In 2012 President Obama issued an Executive Order strengthening the existing laws prohibiting US government contractors and subcontractors and their employees from engaging in trafficking or using forced labour in the performance of US government contracts. The Executive Order went further by prohibiting contractors with contracts in excess of $500 million engaging in various specified types of trafficking-related activities and requiring they agree to compliance audits and investigations.

One further example is an Executive Order from President Obama related to the lifting of economic sanctions on Myanmar, requiring US companies to investing more than $500 000

[12] Section 1714.43 of the California Civil Code.
[13] Sarfaty, 'above at n7, 438-439.

to comply with reporting requirements including outlining steps taken to ensure their commercial activities do not contribute to human rights abuses.[14]

Limitations

The California law was landmark legislation when passed in 2010 but has been subject to criticism for a lack of transparency as there is no requirement for the companies subject to the law to be named or made public and the lack of effective sanctions for non-compliance with the reporting requirements.[15] In effect, the law requires human rights and consumer activists to have the time and resources to find out both whether a company has complied with the law in relation to disclosing its efforts to eradicate slavery and trafficking form its supply chains; but also then whether those efforts are in themselves effective. It relies on consumer pressure to ensure the companies act on their human rights obligations.

United Kingdom

Summary of the regulation

Following the lead of the California Transparency in Supply Chains Act, the United Kingdom enacted the Modern Slavery Act in 2015, which contains a supply chain disclosure obligation. The obligation applies to commercial organisations that carry out business in the UK. Like the California law, the regulatory nexus is not related to the place of incorporation but rather focuses on the activities of business entities. This means the reach of the legislation extends to companies incorporated in foreign jurisdictions. The business must supply goods or services, but those goods or services need not be supplied within the UK. This provides broader scope than the Californian law which is restricted to retail sellers and manufacturers. The turnover threshold is also smaller at **£**36 million and includes the undertakings of subsidiaries. The disclosure obligation only applies to the entity though and not its subsidiaries if they do not form part of the supply chain.[16]

Entities covered by the transparency obligations must provide a slavery and human trafficking statement that sets out "the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, (ii) in any part of its own business, or …. that the organisation has taken not such steps." The statements must be published on the entity's website if they have one.

Limitations

A clear limitation of the UK law is that, like the Californian law, while the Secretary of State can enforce the disclosure obligation, there is no penalty for non-compliance. Compliance relies upon the potential of reputational or market consequences.

France

The French parliament last year passed legislation that goes further than the laws mentioned above, particularly in relation to compliance. The French law requires French companies that have more than 5000 employees in France or more than 10 000 employees

[14] Nolan, above at n5, 18.
[15] Brynn O'Brien and Martijn Boersma, *Human Rights in the Supply Chains of Australian Businesses: Opportunities for Legislative Reform*, Catalyst Report, 4-5, http://catalyst.org.au/campaigns/human-rights-supply-chains
[16] Modern Slavery Act 2015 (UK) section 54.

in France and abroad to effectively develop and implement a "*plan de vigilance*" (vigilance plan). The French Government estimates the law would cover around 150 French companies. The vigilance plans would require companies to develop measures to identify and prevent the occurrence of violations of human rights and fundamental freedoms, along with environmental damage and health risks, from company's activities, the activities of the companies it controls or the activities of its subcontractors or suppliers with whom the company has an established commercial relationship.[17] The plans are required to be made public and published in the companies' annual reports.

The law requires the plans be drafted in association with relevant stakeholders, such as trade unions and civil society organisations, and including within multiparty initiatives that exist in the subsidiaries or at territorial level. The plans are to include the following measures:

1. A mapping that identifies, analyses and ranks risks;

2. Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;

3. Appropriate action to mitigate risks or prevent serious violations;

4 An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned;

5. A monitoring scheme to follow up on the measures implemented and assess their efficiency.

Penalties of up to 10 million euros can apply for failing to meet these legislative requirements of developing and publishing a plan. Fines can go up to 30 million euros if this failure resulted in damages that would otherwise have been preventable.[18]

<u>Limitations</u>

The French Bill is significantly stronger than other similar legislation but it still fails to provide a remedy for those harmed by human rights abuses.

Issues to consider in developing regulations

The transparency regimes discussed above raise a number of important issues for consideration if Australia was to implement transparency in supply chain regulations. Issues to be further discussed include: the jurisdictional nexus and reach of any regulation; the content of transparency obligations; and the question of penalties and enforcement.

[17] Anna Triponal, 'Can Consensus be Reached on the French Duty of Care Bill?", Business and Human Rights Resource Centre, https://business-humanrights.org/en/can-a-consensus-be-reached-on-the-french-duty-of-care-bill
[18] http://corporatejustice.org/news/393-france-adopts-corporate-duty-of-vigilance-law-a-first-historic-step-towards-better-human-rights-and-environmental-protection

Jurisdiction

Regulating businesses in relation to their global supply chains necessitates extraterritoriality. The question becomes how to create the nexus between the companies to be regulated and the home nation, such as Australia. There are two main options: the company is incorporated or registered in the home nation or traded on its stock exchange (the Dodd-Frank conflict minerals regulations; the French law); or the company conducts business in Australia (the UK and Californian laws). The broader reach is obtained through the nexus of business being conducted in the home state. Arguably, the stronger nexus is through regulating Australian companies, that is, companies either incorporated here or publicly listed in Australia. The stronger French regulation has a more direct jurisdictional nexus, applying only to French companies. The weaker regulations have a broader jurisdictional reach. AIER recommends the broadest jurisdictional reach possible given the nature of multi-national corporations and the ease by which regulations can be avoided. However, if the Inquiry believes stronger regulations should require a more direct jurisdictional nexus, then we would prefer stronger regulation, over broader reach.

Content of the obligations

The content of the obligations contained in any regulation is the most complicated part of designing a transparency regime. As discussed above, supply chains can be very complex. The Stern Report into the Bangladesh textile industry demonstrates the complexity of supply chain in just one industry in one country.[19] The most egregious human rights abuses and labour exploitation are likely to occur at the ends of the supply chain.

Obligations in the examples discussed above range from reporting on company policies and actions through to a requirement for due diligence to be undertaken throughout the supply chain with external auditing and transparency on actions taken to mitigate any human rights impacts. The matters to which the obligations attach are also important – whether it is only the more extreme forms of exploitation such as slavery and forced labour, or whether broader human rights impacts are included, or whether particular commodities or regions are targeted. The more complex the supply chain and the broader the impacts in question, the more difficult it will be for companies to comply with strict due diligence requirements.

AIER's submits that the range of issues to be addressed by corporations should extend through to protection more generally of human rights, not merely limited to slavery, forced labour and trafficking. Although we do so with the understanding it makes regulations more difficult. We propose that there should be a catch all relating to corporations taking all reasonably practicable steps to ensure fairness in supply chains, given that with the rapidly changing nature of work abuses may occur that sidestep existing concepts of human rights.

While regulations such as the UK Modern Slavery Act and the Californian Transparency in Supply Chain Act are at the softer end of the scale requiring reporting rather than due diligence and focused on slavery and human trafficking rather than broader human rights impacts, such laws can create shifts in corporate culture by requiring corporations to engage with the issue of human rights in their supply chains.

[19] Sarah Labowitz and Dorothée Baumann-Pauly, *Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza*, Center for Business and Human Rights, Stern School of Business, New York University, April 2014.

A significant example of a company voluntarily assuming the responsibility to transparently monitor its supply chains is Unilever. In 2015, Unilever released its first Human Rights Report utilising the United National Guiding Principles Reporting Framework. Unilever is a massive multinational corporation with over 76 000 suppliers selling in more than 190 countries with different cultural norms, social and economic challenges and varying levels of the rule of law.[20]

The report outlines the various measures Unilever has undertaken to ensure it is fulfilling its responsibility to respect human rights throughout its business and supply chains. Unilever identified the following as the salient human rights issues it would report on: discrimination, fair wages, forced labour, freedom of association, harassment, health and safety; land rights; and working hours. It worked with external stakeholders and committed to transparency. The report acknowledges that: "Despite the efforts undertaken over the past several years and the gains we're making, human rights issues remain too prevalent across our value chain."[21]

The Unilever experience is important as it demonstrates that corporations can have a genuine commitment to human rights that leads to improvements in their supply chains and they can report in a transparent manner about human rights impacts in their supply chains and their attempts to mitigate those impacts.

However, the question is then whether it is sufficient to leave it to corporations to decide whether they will report on human rights impacts and the extent to which they will report publicly. With the UK and Californian laws, a corporation can report that it has taken no steps and comply with the law. Corporations can take the risk that there will be no repercussions, as any repercussions will rely on non-government organisations or consumers or other non-state actors finding the information and publicising it sufficiently. It takes a lot of research from such non-state actors for the deterrent of reputation or market risk to be activated.

There is a strong argument that the "soft regulatory approach reflects the broader reluctance of states to impose strict social responsibility standards on business entities backed by sanctions and which ultimately undercuts the effectiveness of transnational supply chain regulation."[22]

There is an important distinction between a soft law and hard law approach: "A soft-law standard will allow an infraction to be cost-effective: that is, a violator of a norm of soft law may suffer reputational loss, but reputational damage may well be worth the benefits that are derived from non-compliance with the norm. By contrast, a hard-law system must, without exception, endeavour to make every violation cost-ineffective."[23]

AIER recommends a hard law approach. We believe the time for soft law has passed.

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[20] Unilever, *Enhancing Livelihoods, Advancing Human Rights: Human Rights Report 2015* (2015) https://www.unilever.com/Images/slp-unilever-human-rights-report-2015_tcm244-437226_1_en.pdf , 4.

[21] *Ibid.*, 14.

[22] Ryan Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) *Melbourne Journal of International Law*, 17, 195.

[23] as quoted in Nolan, "Refining the Rules of the Game", p. 19.

Penalties and enforcement

So how to make it cost-ineffective for companies to defy expectations that they will be transparent about and act to mitigate human rights impacts, particularly slavery-like practices, and forced labour, throughout their supply chains?

A key question before the committee in considering a Modern Slavery Act is who is given agency under the regulation to drive the necessary changes to minimise slavery and the other practices at issue. Is relying on consumers as the main drivers, like the UK Modern Slavery Act, an adequate and appropriate form of regulation? Should the state have a role in enforcing standards by companies making profit in Australia from these horrific practices? What about the people harmed by these practices? Should they be afforded some agency under laws that are designed to help them? If a key concern is to avoid people being harmed by these practices, should not those people have the right to access a form of justice?

The original French legislative proposal allowed for persons who suffered damage due to the action or lack of actions of corporations to bring civil actions where damages can be shown to flow from the lack of a plan or an inadequate plan. Providing some course of action through the courts that victims or representative bodies like unions can take is an important option to consider.

AIER believes all three approaches to enforcement should be included in any Australian Modern Slavery Act. There is a role for consumer advocates to hold corporations accountable via reputational and market concerns; there is a role for the State to enforce a requirement on companies to develop and make publicly available plans to eradicate human rights abuses in their supply chains; and there must the capacity for those injured by a company's practice or lack of diligence to seek justice.

Other issues for implementation of supply chain regulation

In a study of the Dodd-Frank conflict minerals regulation, Galit Sarfaty identified three barriers to effective implementation of the transparency regulations:

- international norms of supply chain due diligence are in their infancy;
- the proliferation of certification standards and sourcing initiatives are still evolving and often competing; and
- inadequate local security and weak governance are inhibiting the mapping of the mineral trade and the tracing of minerals in the region.[24]

The first two barriers identified above are particularly important in considering how to implement a broad regulatory scheme in relation to human and labour rights in supply chains. Both the UNGPs and the OECD Due Diligence Guidelines were only endorsed and approved in 2011 and there are still questions on how to interpret the norms these instruments seek to create.[25] Furthermore, in conducting due diligence there are numerous, sometimes competing, initiatives, programs or certification standards companies could look to use, whether developed by NGOs, organisations invested in the industry or private firms.

[24] *Ibid.*, p. 423.
[25] *Ibid.*, p. 449; Nolan, "Refining the Rules of the Game", p. 16.

There is the potential for a proliferation of obligations at national, international or regional levels to "generate regulatory disarray."[26]

Sarfaty argues that in these circumstances the State needs to play a greater role along with international bodies to ensure robust and harmonised certification systems or initiatives for companies to utilise in undertaking due diligence.[27] These are important considerations for developing a framework for any Australian regulations.

In developing the framework for Australian regulation, Australian can play an important leading role in the international community in establishing robust and systems for companies.

A proposal for a Modern Slavery Act for Australia

In their 2013 World Report, Human Rights Watch makes the case for government regulation plain: "we have nearly reached the paltry limits of what can be achieved with the current enforcement-free approach to the human rights problems of global companies. It is time for governments to pull their heads out of the sand, look the problem they face in the eye, and accept responsibility to oversee and regulate corporate human rights practice."[28]

In 2016 Human Rights Watch has called for an international, legally binding standard that obliges governments to require businesses to conduct human rights due diligence in global supply chains. It recommends the due diligence include the following elements:

- Adoption and implementation of a clear policy commitment to respect human rights, embedded in all relevant business functions;
- Identification and assessment of actual and potential adverse human rights impacts;
- Prevention and mitigation of adverse human rights impacts;
- Verification of whether adverse human rights impacts are addressed;
- External communication of how adverse human rights impacts are being addressed; and
- Effective processes designed to ensure that adversely affected people are able to secure remediation of any adverse human rights impacts a business has caused or contributed to.[29]

Australia can and should enact due diligence laws that meet the recommendations of Human Rights Watch and address the limitations of existing regulatory schemes. In particular Australian laws at the very least should require due diligence on the risks of human rights impacts through a corporation's supply chains and transparency around actions taken to mitigate those risks, not just reporting on company policies and actions, and include sanctions for non-compliance. Such laws will obligate companies to meet their responsibilities under the UNGPs and create an environment that will ensure company cultures change to better protect human and labour rights in their supply chains.

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[26] Roel Nieuwenkamp, "Legislation on responsible business conduct must reinforce the wheel, not reinvent it", OECD Insights (online), 15 April 2015, https://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it/

[27] Sarfaty, "Shining Light on Global Supply Chains", pp. 454-457.

[28] Human Rights Watch, *2013 World Report* (2013) https://www.hrw.org/world-report/2013/country-chapters/global-0

[29] Human Rights Watch, above at n1, 4.

AIER makes the following recommendations to the Committee:

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   - A requirement on corporations that operate in Australia and have a combined turnover of $150 million (including all global subsidiaries) to develop a due diligence plan to eradicate in the first instance slavery, slavery-like practices and forced labour, [subject to the comments below about expansion over time to other human rights abuses];
   - The plan must contain:
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     iii. Appropriate action to mitigate risks or prevent serious violations;
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   - Failure to develop and publish a plan and the results of the monitoring scheme will make the company liable for a fine of up to $10 million.
   - Persons who are subject to slavery, forced labour or other abuses of human rights will have the capacity to take civil action against the company, in circumstances where the company has failed to develop and implement a plan according to the legislative requirements.
   - The legislative requirements to be phased in over an appropriate timeframe to enable compliance, noting large multi-national corporations should already be developing and implementing plans to minimise human rights abuses in their supply chains.

2. The Modern Slavery Act could at first focus on slavery, slavery-like practices, forced labour and trafficking but should allow for future expansion to cover other human rights abuses and environmental crimes. It should be underpinned by a broad understanding that corporations should be taking all reasonably practicable steps to ensure fairness in their supply chains, as with the rapidly changing nature of work abuses may occur that sidestep existing concepts of human rights.

3. If the Inquiry is not prepared for Australia to implement robust regulations against human rights abuses by corporations and instead chooses to rely on the incentive of reputational damage, at the very least it should recommend legislation similar to the UK Modern Slavery Act but also fund civil society organisations to monitor compliance with requirements to publish a plan and to assess the efficacy of any plans. The work undertaken by civil society organisations in this regard should be covered by good faith protections against potential attempts to litigate for silence.