

Centre for Research on Modern Slavery Briefing

How modern slavery legislation might impact New Zealand companies' supply chains

New Zealand (NZ) is giving consideration to introducing some form of legislation against modern slavery. Legislation might obligate firms operating here to report on human rights abuses in their supply chains (SCs) and leverage their economic power to prevent these abuses. Considering legislation “requiring businesses to report publicly on transparency” forms part of MBIE’s five-year Plan of Action published in March 2021.

Whether such transparency legislation or the next generation due diligence legislation is chosen, a basic question remains: how will SCs be defined? A definition would set the breadth and depth of compliance obligations on captured companies. Yet new research shows the law is largely unfamiliar with the amorphous SC concept.

Management research views SCs as sets of entities both up - and downstream of a firm in flows of products, services, finances, or information. Upstream alone, firms’ tier 1 suppliers often branch back to hundreds more outsourced subcontractors - all legally independent - in more remote tiers, which can harbour labour abuses. Furthermore, SCs implicate companies’ beyond the regulating state’s jurisdiction. Without formal registers or membership classification systems, the law assumes firms know their own SCs.

SC transparency Acts now exist in NZ’s common law cousins (where Judge-made law supplements Parliamentary Acts), the UK (2015) and Australia (2018). Rather toothlessly, the UK Act initially let obligated companies report they had undertaken no action. Both Acts let companies define their own SCs. By contrast, due diligence legislation emerging in Europe imposes tougher requirements to evaluate and remedy human rights violations. But again, the limits of SCs are largely undefined.

Should NZ follow the UK and Australia, companies may just briskly scan their most amenable tier 1 suppliers of physical products. That approach (which would discharge the basic duty) might frustrate Parliamentary intent. Legislation should require reporting remoter abuses and attempted remedies and overcome its upstream fixation that reflects soft, buyer-centred industry codes of practice. That ignores

abuses downstream in, for instance, domestic logistics providers or telcos, where modern slavery occurs but often remains overlooked. Thus, the law might interpret SCs as “value chains”, narrowing the focus to suppliers of inputs to which a company adds value, but including customers downstream.

The extent and direction of regulated SCs, becoming burning questions if non-compliance attracts meaningful penalties. If legislators do not answer those questions, courts will. UK Supreme Court judgements (2019, 2021) accept companies might owe duties of care for human rights abuses by foreign subsidiaries. They also entertain firms’ superior knowledge - or international ethical norms - as potentially founding responsibility for offences by reliant entities. Alternatively, courts might adapt vicarious liability (typically governing acts of one’s employees) or organisational/enterprise liability.

If NZ’s Parliament does not define regulated SCs, its courts eventually will, likely following such expansive common law judgements from the UK, and being influenced by international instruments such as the UN Guiding Principles on Business and Human Rights. Until then, firms would grapple with second-guessing them. Or, embracing the expansive trend, NZ drafters could pioneer a more precise definition of SC to offer clarity and action guidelines.

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