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ON MODERN SLAVERY**

Toward a Modern Slavery Act in New Zealand - Legislative landscape and steps forward

White Paper

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Above:
Te Toka Kāmaka o Waipārūrū
The soul of the Business School

Te Toka Kāmaka o Waipārūrū, the Pounamu Kahurangi at the centrepiece of this artwork, is a rare form of jade or greenstone. The greenstone stands at the main entrance to the Sir Owen G Glenn Building and represents the strength and solidity of the Business School, symbolically linking manuhiri or visitors, students and staff, the past and the present and the North and South Islands.

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Preface

New Zealand has committed to eliminate modern slavery. In March 2021, The Ministry of Business, Innovation and Employment (MBIE) published *Combatting Modern Forms of Slavery: Plan of Action against Forced Labour, People Trafficking and Slavery 2020–25*.¹ The present White Paper was begun in anticipation of the government's renewed engagement with modern slavery. It addresses – and indeed challenges the government to extend – key action 16 of the Plan of Action, which is to “[c]onsider introducing legislation requiring businesses to publicly report transparency in supply chains, to help eliminate practices of modern slavery”.² In the national fight against a global outrage, we hope it will interest and further inform conversation among many stakeholders beyond the policy sphere, including business, unions, researchers, and broader civil society.

The landscape of modern slavery law is rapidly changing in New Zealand and other jurisdictions. The main research for this White Paper concluded in June 2021, and later initiatives go unreported. However, we take this opportunity in the Preface to acknowledge that the petition organised by Trade Aid and World Vision New Zealand ‘Take Action against Modern Slavery’ was presented to Parliament on 1 July 2021. The petition signed by over 37,000 New Zealanders is currently before the Petitions Committee.

¹ Ministry of Business, Innovation and Employment *Plan of action against forced labour, people trafficking and slavery* (16 March 2021) at 7.

² At 14.



Executive Summary

Introduction

Modern slavery is a reality in New Zealand. Increasingly, New Zealanders buy goods produced in conditions of forced labour overseas and in doing so, indirectly help sustain practices of modern slavery. In a trade-dependent nation, this poses a potential risk for New Zealand businesses operating internationally.

New Zealand is increasingly out of step with legal advances in other countries. Transparency reporting legislation in a growing number of foreign jurisdictions requires entities to publish an annual statement outlining actions taken to prevent modern slavery in their supply chains. However, under such law, entities can fulfill their obligations simply by admitting they have not taken any preventative steps. Under more strict due diligence legislation, companies must do considerably more to prevent the violation of human rights in their supply chains. New Zealand must be careful not to fall behind the international trend to demand more private enterprises to protect human rights. It can aspire to take the lead regarding such moves.

This White Paper outlines existing international and domestic legal frameworks pertaining to modern slavery and then draws comparisons with legally proximate jurisdictions to formulate seven distinct Recommendations.

Definitions

Modern slavery is an umbrella term referring to a wide range of exploitative behaviour. In domestic and international legal discourse, modern slavery is not a distinct legal category. It conflates crimes of human trafficking, debt bondage, serfdom, forced marriage, slavery, forced labour, and child labour. Modern slavery encompasses forms of abuses conditional on the constraint of a worker's freedom to exit their employment relationship. It involves the exploitation of people for profit along a continuum of severity.

Globally, the contemporary response to modern slavery has involved a corollary of transparency in supply chains. This White Paper uses the term "transparency reporting" to describe a system in which entities are required to publish an annual statement outlining steps they have taken to prevent

modern slavery in their supply chains. Crucially, those entities are not required to take remedial action in response to their discovery of labour abuse in their supply chains or make any more robust effort to guarantee the accuracy of their reporting. In contrast, due diligence legislation requires companies to undertake responsible business activity and report on their human rights activities.

International legal framework

Within the international legal framework relating to issues of modern slavery, we identify two central pillars: transnational criminal law and business and human rights law. Transnational criminal law obliges states to enact and enforce domestic law defining criminal offences that cover contexts in which modern slavery arises. There is, however, no binding international legal instrument creating obligations on states or corporations with respect to transparency in supply chains or human rights due diligence. States are not obligated to legislate to set minimum due diligence standards on companies or for government procurement, nor are they required to impose international trade restrictions on the grounds of human rights violations. No multilateral treaty directly imposes obligations on multinational corporations as subjects of international law.

New Zealand's ratification of relevant International Labour Organization (ILO) Conventions is partial and has yet to ratify several ILO Conventions that, taken collectively, ensure states take comprehensive measures to minimize the potential for domestic slavery offences.

The area of business and human rights is addressed by a body of "soft" international law, creating non-binding, aspirational principles regarding the conduct and regulation of non-state actors regarding issues of modern slavery. Still, several codes of conduct and guidelines agree that corporations should exert themselves to ensure human rights are not violated due to their business activities.

Domestic Legal Framework

New Zealand's legal framework does not impose an obligation to generate supply chain transparency as found in the Australian and United Kingdom legal systems. An exception is found in the Customs and Excise Act 2018/ Customs Import Prohibition (Goods Produced by Prison Labour) Order 2019. This Order bans the import of goods manufactured or produced wholly or in part by prison labour; or in connection with prison labour. The effect of this may be viewed as a form of due diligence legislation: importers must be content that the goods are not a prohibited product, at the risk of having their goods seized.

In 2007, Trade Aid presented a petition to Parliament seeking an expansion of this prohibition on imports of goods made by slave labour. The Foreign Affairs and Trade Select Committee was of the view there would be legal difficulties with the implementation of a prohibition. The Committee endorsed an approach that the private sector should voluntarily ensure supply chain participants respect core labour rights. To date, this has not eventuated. In 2009, the Hon Maryan Street introduced a member's Bill seeking to amend the Customs and Excise Act to prohibit the import of goods produced by slave labour. The Bill was voted down at first reading. In 2015, MP Peeni Henare introduced a member's Bill, which was also voted down. The concern was that the Bills did not go far enough with respect to issues of definition. In 2017, MP Dr Liz Craig introduced a Transparency in Supply Chains member's Bill – the Bill was withdrawn in March 2018.

Domestic Policy Framework

The Ministry of Business, Innovation and Employment (MBIE) holds a key mandate to consider issues of modern slavery. The core document is *Combatting Modern Forms of Slavery: Plan of Action against Forced Labour, People Trafficking and Slavery 2020–25*, which sets out an all-of-government response, with MBIE playing a coordinating role. Immigration New Zealand has designed a special visa regime for victims of human trafficking. More recently, a six month work visa has been introduced for victims of migrant exploitation. In addition, the New Zealand Police have formulated several strategic goals around transnational organised crime, including aspects of modern slavery. They seek to create a robust and sustainable model of leading and governing New Zealand's work to tackle transnational organised crime.

Comparator: United Kingdom's Modern Slavery Act

The United Kingdom Modern Slavery Act 2015 did not contain any new offences since slavery, servitude, forced and compulsory labour and human trafficking were already designated as criminal offences. Instead, the Act increased punishments for these crimes and introduced several legislative and governmental mechanisms for understanding and addressing the kinds of abuses associated with modern forms of slavery. Reporting obligations apply to commercial organisations worldwide with a total annual turnover of £36 million that carry on a business or part of a business in the United Kingdom.

The Act ultimately created a soft law reporting regime around transparency in supply chains. Companies are at liberty to file a statement stating they have taken no steps on this matter in the last financial year. This has resulted in a lack of corporate commitment to filing modern slavery statements. The 2018 Independent Review of the Act recommended that modern slavery reporting be embedded into the business culture by tying it directly to existing company law reporting requirements and making it a company law offence to fail to report as required or to fail to act when slavery is found. However, the government did not accept this recommendation. In January 2021, the government announced that organisations that failed to meet their statutory obligations under the Modern Slavery Act would face financial penalties.

Comparator: Australia's Modern Slavery Act

The Australian Modern Slavery Act 2018 (Cth) is solely about supply chains. It applies to companies (and federal government) with annual revenue worldwide over AU\$100 million, thus impacting approximately 3,000 companies. Under the Act, companies must release a statement every 12 months on the risks of modern slavery occurring within their supply chains globally and the company's actions to assess those risks. The statement must be publicly available.

A Comparison: the United Kingdom and Australian Acts

The critical difference between the Acts is scope. The United Kingdom's Act consolidates law concerning criminal offences associated with modern slavery committed in the United Kingdom, and introduces a supply chain reporting provision. In contrast, Australia's Act is solely about supply chain transparency. While the United Kingdom has discretionary supply chain reporting criteria, Australia has mandatory reporting criteria. The United Kingdom legislation requires that a company's statement "may" include specified information. By contrast, the Australian legislation uses the word "must" and provides the specified information to be included. In terms of statutory language, the distinction between "may" and "must" is a significant point of departure.

Neither Act is clearly superior, and their scopes and structures differ. So far, neither Act imposes civil or criminal sanctions for failure to report, and therefore both acts are soft laws, but financial penalties will come into effect in the United Kingdom. In both statutes, there seems to be some ambivalence, and certainly caution, gradualness, and restraint, in placing obligations on companies and considerable reliance on the power of consumer sovereignty and civil society to identify and punish companies that either fail to report or report a poor state of affairs. Much of the statutes' relative effectiveness will depend on enforcement.

Legislative Initiatives by Other Jurisdictions on Modern Slavery in Supply Chains

In this White Paper, we broaden coverage to other overseas legislative initiatives on supply chains. The 2017 French Corporate Duty of Vigilance Law makes reporting entities liable for any harm that the effective implementation of due diligence would have prevented. In June 2021, the German Parliament adopted the Act on Corporate Due Diligence in Supply Chains, which comes into force in 2023. If companies do not meet their due diligence obligations, they can face fines of up to €8 million or 2% of their annual average turnover. Also, in June 2021, the Norwegian government passed the Transparency Act, which requires companies to undertake due diligence of their supply chains and to document their efforts to prevent or limit the risk of modern slavery. The European Union, in 2021, adopted the EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence proposal. If passed, it would hold member countries accountable to ensure they go beyond just modern slavery also to include environmental responsibility and good governance.

Legislative Status Quo

New Zealand's criminal penalties are not strictly in alignment with those of comparator states. The criminal laws of New Zealand, Australia and United Kingdom cover the same offences but New Zealand's sentences for such offences are lower than in United Kingdom and Australian legislation. For example, the offence of slavery incurs a maximum penalty of life imprisonment in the United Kingdom legislation and 25 years' imprisonment in the Australian legislation. By comparison, the same offence in New Zealand carries a maximum penalty of 14 years' imprisonment. We do not suggest that New Zealand increase the penalties for these offences, which are commensurate with the penalties for other serious offences. We highlight the difference to make the point that each jurisdiction has its own unique legal culture. In responding to modern slavery, commonalities must be found, while at the same time preserving the distinct features of each jurisdiction.

Unlike Australia and United Kingdom, the New Zealand regime omits supply chains. At the time of writing, at least 35 New Zealand companies are reporting under the Australian Act and a lesser number under the United Kingdom statute, while statutes in other trading partners will increasingly catch the edges of New Zealand business. Otherwise, New Zealand firms are not subject to reporting requirements, prompting many large New Zealand businesses to call for domestic supply chain legislation.

New Zealand can advance on the Australian and United Kingdom approach to abuses in supply chains, by preferring due diligence to transparency legislation. There is no international legal obligation requiring New Zealand to legislate for supply chain due diligence or transparency reporting. We are in uncharted waters, mapping transnational issues without the compass of international law.

Recommendations

New Zealand's business landscape is dominated by small and medium-sized enterprises (SMEs), not by large companies and/or multinational corporations. It is unclear to what extent domestic consumer awareness of offences in supply chains will act as a stimulant to remedial action. Thus, to simply graft even the "best" of international initiatives and practices onto New Zealand law would likely be simplistic and would not guarantee fitness for purpose. Instead, the objective should be to take account of the distinct features of the New Zealand context, and develop a bespoke solution which ensures an appropriate degree of harmonization with other states. In making these recommendations, we take the view that New Zealand's criminal law largely encapsulates offences of modern slavery, and does not need urgent reform. To do so would risk introducing unnecessary confusion and uncertainty, for little gain.

Recommendation 1: Introduce due diligence legislation, not United Kingdom- or Australia-style transparency

Commentary: Neither the United Kingdom nor the Australian legislation requires companies to take any direct action to remove modern slavery from their supply chains. Both aspire only to transparency. A contrasting example is the 2017 French Act, which may be described as due diligence legislation. Further careful attention should be paid to the draft EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence.

Existing legislation imposing supply chain reporting obligations on private enterprise apply only to larger companies, defined by a specified threshold. The next generation of legislation imposing duties on firms with respect to modern slavery is likely to apply to all firms, regardless of size. The due diligence principle recognises that what is reasonable to expect of a large MNE with respect to auditing, reporting, and remediation may be far beyond the means of an SME. Accordingly, a company defending itself against allegations of complicity in human rights abuses need not show that it has met or exceeded a standard set by global corporations but has done what might be reasonably expected of an enterprise of its size, industry, and dominant business model.

Recommendation 2: Define "modern slavery" in the context of New Zealand and specify the core criteria of modern slavery legislation

Commentary: Consideration should be given to defining the term modern slavery in a New Zealand context to ensure it is fit for purpose. In defining modern slavery in New Zealand, this must capture the experience of temporary migrant workers, particularly those on employer-sponsored visas, which makes them vulnerable to exploitation.

We are cautious about advocating for the creation of a "gold standard" modern slavery act that does not prioritise harms done in, to, and by New Zealanders. This is an inherently transnational issue, with potentially vast economic and social impact across many countries. We suggest that a cautious, harmonised approach is what is needed.

Recommendation 2a: Introduce disclosure obligations

Commentary: Create obligations on companies to regularly disclose actions taken to eradicate modern slavery specifically, and human rights abuses more generally, within a company's supply chain. Introduce regular reporting requirements reflecting on any potential detected for modern slavery.

Recommendation 2b: Define human rights abuses

Commentary: Broadly define human rights abuses to include not just slavery, human trafficking and forced labour but also employment rights abuses and immigration abuse.

Recommendation 2c: Introduce an extraterritorial penalty regime

Commentary: Introduction of an extraterritorial penalty regime whereby the importation of goods into New Zealand through supply chains that contain human rights abuses is subject to sanction.

Recommendation 3: Consider the global context of modern slavery legislation

Commentary: In the absence of an international legal standard governing the modern slavery regime, we suggest that a common approach is discernible from an analysis of the Australian and United Kingdom experiences with modern slavery legislation, even though we advocate for stronger due diligence legislation.

Recommendation 4: New Zealand should criminalise forced labour more completely, like Australia and United Kingdom

Commentary: The New Zealand's Crimes Act 1961 fails to sufficiently criminalise forced labour. Despite the broad definition of slavery in section 98, there are conceivable situations of forced labour that would not rise to the threshold under section 98, requiring an alternative pathway for prosecution (such as via the offence of human trafficking). By comparison, forced labour is explicitly prohibited in the United Kingdom and Australia.

Recommendation 5: New Zealand should emulate Australia in capturing transnational forms of debt bondage

Commentary: Current New Zealand legislation differs from the Australian criminal code in that the New Zealand definition of debt bondage does not include as an independent qualifying criterion where the debt owed is manifestly excessive. This seems to be a significant oversight because many instances of worker exploitation involve migrant workers who often enter into substantial debt to migrate to New Zealand. These workers are also not always protected under the Wages Protection Act 1983 (prohibiting premiums for employment).

Recommendation 6: New Zealand should consider implementing a statutory defence of [being a victim] of human trafficking

Commentary: The New Zealand legislative framework may fail to protect victims of human trafficking and modern slavery adequately. The United Kingdom legislation introduces a defence for victims of human trafficking who are compelled to commit offences of any kind. In contrast, the New Zealand legal framework has no such provisions, potentially resulting in victims of human trafficking being prosecuted for offences committed as a result of their status as trafficked persons.

Recommendation 7: Consider ratification of additional ILO instruments and additional regional engagement

Commentary: New Zealand is not bound by unratified ILO Conventions, although in some instances its law may meet or exceed the standards set out therein. Ratification ensures that New Zealand adopts a vigilant position, minimizing the possibility even of labour rights abuses deemed unlikely to occur here. Recent cases of trafficking, modern slavery, and labour exploitation in New Zealand indicate that former complacency was misplaced. We recommend that in particular, the government consider ratification of ILO Convention 143 — Migrant Workers (Supplementary Provisions) Convention, 1975.



1. Introduction

The New Zealand government is seeking to address modern slavery: it has committed to “[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms”.³ Officials have updated the *Combatting Modern Forms of Slavery: Plan of Action against Forced Labour, People Trafficking and Slavery 2020–25* in an effort to ensure New Zealand’s compliance with international standards. However, further legal action is required. We see a risk that New Zealand is increasingly out-of-step with rapid jurisprudential advances occurring in other countries to address modern slavery. Legislative moves toward either reporting transparency or due diligence obligations regarding supply chains seen elsewhere create firmer legal obligations aimed at proactively addressing conditions of exploitation – through the mechanism of modern slavery legislation. The Australian Modern Slavery Act 2018, in particular, has implications for New Zealand companies carrying out business in Australia. Moreover, New Zealand is supplied by countries in well-known hotspots of modern slavery. Some 62% of victims of modern slavery worldwide are estimated to occur in the Asia-Pacific.⁴

[F]urther legal action is required [...] New Zealand is increasingly out-of-step with rapid jurisprudential advances occurring in other countries to address modern slavery

In this paper, we proceed on the primary assumptions that:

- regardless of the merits of the term modern slavery itself, the forms of exploitation encapsulated by the term modern slavery should be opposed;
- a legal response is – at least in part – an appropriate mechanism by which to address issues raised by modern slavery; and
- New Zealand aims to follow its international obligations as meaningfully as possible and keep up with other international moves where those are effective but preferably take the lead.⁵

Background: Why fight modern slavery in New Zealand?

Modern slavery is a loose but widely used and rhetorically persuasive umbrella term for the more serious end of a range of characteristically work-centred exploitation, where abusers of human rights appropriate the value created by vulnerable people. In this White Paper, modern slavery refers to forced labour, human trafficking, and slavery (as historically understood).

The problem is global, trapping an estimated 40 million victims in a shadow economy, yielding some US\$150 billion of value annually.⁶ A small fraction of the exploitation occurs directly in New Zealand, where it often involves migrants. In 2020 in Napier, a man was sentenced to 11 years’ imprisonment for slavery, as well as human trafficking.⁷ Much more extensively, New Zealanders may buy the fruits of exploitation abroad and in this way indirectly (even if unwittingly) enable and stimulate it. That indirect involvement challenges traditional territorial limits on jurisdiction, and the scope of application of any one country’s law and policy.

³ *United Nations Sustainable Development Goals GA Res 70/1 (2015), Goal 8.7.*

⁴ *International Labour Office and Walk Free Foundation & International Organization for Migration Global estimates of modern slavery: Forced labour and forced marriage (2017).*

⁵ *Ministry of Business, Innovation and Employment Plan of action against forced labour, people trafficking and slavery (16 March 2021) (“Plan of Action”).*

⁶ *International Labour Office and Walk Free Foundation & International Organization for Migration Global estimates of modern slavery: Forced labour and forced marriage (2017).*

⁷ *On appeal, the sentence was increased, with a minimum period of imprisonment imposed. R v Matamata [2021] NZCA 372.*

Fighting modern slavery on the home front: domestic and domestic-overseas exploitation

Exploitation has been found in diverse industries in New Zealand,⁸ for example, fisheries,⁹ agriculture,¹⁰ hospitality,¹¹ retail,¹² horticulture,¹³ and construction.¹⁴ A review of the reported decisions, as well as research commissioned by MBIE,¹⁵ suggests that exploitative practices in the New Zealand context in recent years have included the following features:

- Targeting of migrant workers with poor mastering of English language and little knowledge of New Zealand employment laws or the confidence, knowledge, and resources to use them.¹⁶
- Leveraging the immigration status of employees to force them into exploitative conditions.¹⁷
- Failing to provide employment agreements.¹⁸
- Failing to pay minimum wage and/or holiday pay.¹⁹
- Charging of premiums in exchange for employment and/or assistance with migration.²⁰
- Requiring employees to perform unpaid domestic work.²¹
- Sexually exploiting people under the age of 18.²²

The Minister's foreword to the Plan of Action says such numbers "likely only reflect the tip of an iceberg". We agree.

Courts addressing modern slavery involving businesses overseas

Some courts abroad, including at the highest levels, have resoundingly acknowledged the reality of businesses' global accountability regarding human rights abuses that would fall within what we call modern slavery. Notably, they have done so even without relying on Modern Slavery Acts imposing obligations in respect of supply chains. Three recent cases show that extraterritorial involvement with modern slavery does not pose a barrier to liability.

First, in Canada (where a modern slavery bill is currently before the Senate but has not yet passed), in the case of *Nevsun v Araya*, the Supreme Court has held that private companies may be liable for human rights violations committed in other states. The Court invoked compelling basic moral and legal international norms. The *Nevsun* litigation involved, it said:

the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.²³

Second, in the United Kingdom, the Supreme Court has held that companies may be sued in England for violations of foreign law.²⁴ As we discuss in a [dedicated section](#), that country has the Modern Slavery Act 2015 (UK), but the Court did not rely on it.

Third, in the Netherlands in 2017, *Kiobel v Shell* involved Nigerian plaintiffs (living in the United States) who sued Shell for alleged complicity in human rights abuses. The lawsuit was initially pursued in the United States under the Alien Tort Statute. This was ultimately unsuccessful.²⁵ However, subsequent action was laid in the Dutch courts. The Hague District Court held that it had international jurisdiction to hear the claim.²⁶

While New Zealand's experience with various forms of exploitation has not (to date) manifested in such judicial expressions of principle, British and Canadian case law, in particular, influence New Zealand courts. So does the well of international norms from which all three decisions spring. These cases underscore the point that there may already be significant legal implications for businesses with forms of exploitation present in their supply chains when they face claims in overseas or potentially New Zealand courts.²⁷ In a trade-dependent nation, this poses a potential risk for New Zealand businesses operating internationally; more positively, it also suggests a trend toward increased recognition of the rights of vulnerable and exploited people globally.

Modern Slavery Acts can fight abuses in supply chains and consolidate domestic law

The judiciary can (and should) only do so much. While case law will always be essential, the legislation allows for customised and comprehensive targeting of modern slavery, notably in international supply chains. Businesses often object to legislated supply chain obligations as too complicated and burdensome; indeed, no international law currently obliges New Zealand to legislate transparency in supply chains. But civil society and many businesses themselves have urged such legislation. Again, we agree. There is good reason to believe that inspecting, reporting on, and cleaning supply chains could be a powerful weapon in the fight against modern slavery, both occurring within the home country and outside it. Parenthetically, we suggest that for New Zealand businesses, the greater risk is what occurs outside the home territory. In practice, it will often be the greater buying power and regulatory resources of, specifically, high-income/more-developed countries such as New Zealand that best combat relatively poor labour and human rights protection in less-developed countries.

⁸ Christina Stringer *Worker exploitation in New Zealand: A troubling landscape* (www.workerexploitation.co.nz, Auckland, 2016).

⁹ Christina Stringer, D. Hugh Whittaker and Glenn Simmons "New Zealand's turbulent waters: the use of forced labour in the fishing industry" (2016) 16 *Global Networks* 3.

¹⁰ O'Shea (*Labour Inspector v Pekanga O Te Awa Farms Ltd* (2016) 14 NZELR 1).

¹¹ *Nguyen v Hue Kim Thi Ta t/a Little Saigon Restaurant* [2014] NZERA Christchurch 173; *Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd* (2019) 17 NZELR 208.

¹² *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110; *Labour Inspector v Daleson Investment Ltd* (2019) 16 NZELR 346.

¹³ *Labour Inspector v Matangi Berry Farm Ltd* [2020] NZEMPC 43; *R v Matamata* [2020] NZHC 1829.

¹⁴ *Labour Inspector v Tech 5 Recruitment Ltd* (2016) 15 NZELR 571.

¹⁵ Francis Collins and Christina Stringer *Temporary Migrant Worker Exploitation in New Zealand* (Ministry of Business, Innovation and Employment, July 2019).

¹⁶ *Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd* (2019) 17 NZELR 208; *Leota v Parcel Express Ltd* (2020) 17 NZELR 395; *Sun v NZ Visionary Vanguard Ltd T/A. Shynday Kitchen and Bathroom* [2013] NZERA Auckland 374; *Labour Inspector v Matangi Berry Farm Ltd* [2020] NZEMPC 43.

¹⁷ *Labour Inspector v Parihar (in partnership with Kuldip Kaur Parihar) (t/as Super Liquor Flagstaff and Super Liquor Hillcrest)* [2019] NZEMPC 145.

¹⁸ *Labour Inspector v Matangi Berry Farm Ltd* [2020] NZEMPC 43; *Sun v NZ Visionary Vanguard Ltd T/A Shynday Kitchen and Bathroom* [2013] NZERA Auckland 374.

¹⁹ *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110; *Labour Inspector v Matangi Berry Farm Ltd* [2020] NZEMPC 43; *Labour Inspector v Parihar (in partnership with Kuldip Kaur Parihar) (t/as Super Liquor Flagstaff and Super Liquor Hillcrest)* [2019] NZEMPC 145; *Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd* (2019) 17 NZELR 208.

²⁰ *Labour Inspector v Tech 5 Recruitment Ltd* (2016) 15 NZELR 571; *Tan v Yang* (2014) 12 NZELR 32; *Kazemi v RightWay Ltd* (2019) 16 NZELR 522; *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451.

²¹ *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110.

²² *R v R* [2018] NZHC 2766; *R v Beach* [2018] NZDC 3256; *R v Greer* [2013] NZHC 3025.

²³ *Nevsun Resources Ltd v Araya* [2020] SCC 5, at [1] (Can), per Abella J.

²⁴ *Vedanta Resources plc v Lungowe* [2019] UKSC 20.

²⁵ *Kiobel v. Royal Dutch Petroleum Co.* 621 F.3d 111 at 14, per Roberts J.

²⁶ *Case C-09-540972-HA ZA 17-1048*. Decision available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670> at [4.23].

²⁷ A 2020 report for the European Commission noted the role of case law in filling legislative and other gaps: "As there is currently no general duty on companies to undertake due diligence for their human rights and environmental harms in most EU jurisdictions, case law has developed various possible avenues to bring claims for adverse human rights and environmental harms in indirect ways, including in tort, criminal law, and consumer protection laws." "Study on due diligence requirements through the supply chain Final Report" Directorate General for Justice and Consumers, European Commission; by British Institute of International and Comparative Law (lead), Civic Consulting and LSE Consulting; Brussels, January 2020, at 19.

Modern Slavery Acts have different requirements

Modern Slavery Acts can take several forms. In scope they can either target supply chains exclusively, as Australia's Modern Slavery Act 2018 (Cth) does, or else address supply chains but also consolidate a wider regime against other abuses in the home country or which the home country is a party to by other transnational connections like human trafficking – the United Kingdom's approach. Moreover, some initiatives that combat social or human rights abuses also embrace environment and governance, a much broader scope again. The degrees of responsibility which Acts impose on businesses for their supply chains also vary.

For the purposes of this White Paper, we group them into two types. Although nomenclatures among countries and sources can vary, what we define in [section 9: Legislative Initiatives by Other Jurisdictions](#) as “transparency reporting” legislation requires entities to publish an annual statement outlining steps taken to prevent modern slavery in their supply chains. However, because they are not required to change their behaviour, under such law, entities can simply state, as in the United Kingdom, that they have not taken any steps and have fulfilled their obligations. Under more exacting due diligence legislation, companies must undertake responsible business and report their human rights activities in supply chains. Further distinctions concern, for instance, the threshold size of business subject to the Act and the degree of any compulsion and penalties for non-compliance.

The common theme in modern slavery is abuse of the vulnerable, exploitation of people for profit

Both modern slavery legislation and the domestic examples of exploitative behaviour we cited from New Zealand reveal a common theme: abuse of vulnerability – this typically tends to be the economic, social, and/or migration statuses of victims.²⁸ Usually, the context is work: the abusers appropriate the value created by the abused. Human rights recognised by international instruments such as the Universal Declaration of Human Rights and domestic law such as the Human Rights Act 1993 are characteristically violated. Modern slavery thus characteristically involves the exploitation of people for profit. This exists on a continuum of gravity. At the lowest end, one can imagine underpayment of agreed wages in a contractual employment relationship. At the other end of the spectrum is overt slavery: ownership and complete control of a person.

The common theme is exploitation of people for profit: human rights abusers appropriating value created by vulnerable victims.

Both legal and policy responses are necessary

Either civil or criminal law is engaged, depending on the severity of the exploitation. For example, human trafficking for forced labour is a criminal offence; underpayment of an employee is a civil matter. We highlight the fact that the issues are complex and do not respond neatly to categorization. So, while supply chain reporting transparency obligations might be classified as a mechanism of civil law, the underlying intent of transparency laws is to target and respond to criminal behaviour. It is a trite observation that the criminal law is reactive – no one can be punished for an offence which they have not yet committed.

Policy, on the other hand, takes a proactive approach. The Foreword to the Plan of Action states: “Our Plan of Action sets out our approach through the internationally recognised pillars of prevention, protection and enforcement.” How then to describe the relationship between the two? The international law governing transnational criminal offences such as human trafficking creates obligations on states that must be implemented in law and policy. The purpose is suppression of the offence. Laws and policies must complement one another domestically, and harmonise with the laws and policies of other jurisdictions.

Mapping the legislative landscape to elevate New Zealand's need for a Modern Slavery Act

By mapping the legislative landscape of modern slavery in New Zealand, we aim to locate where New Zealand's response to the issue sits and where it should sit. As we go on to discuss, a legal response can take several forms: *ex-ante* (preventive) or *ex-post* (remedial) obligations, arising from so-called soft or hard law, and criminal or civil in their scope. As we explore, modern slavery legislation in other jurisdictions typically goes beyond criminal sanction, extending to the creation of reporting obligations on business. While also summarising further-reaching initiatives elsewhere, we focus on the Australian and United Kingdom legislation because these are two countries New Zealand typically compares itself with socially and legally and trades with and because both have recent Acts on their books.

Although it has been adapted to dovetail with the Plan of Action and highlights applications for the Minister and policymakers in furthering that Plan, the paper provides a background to, and starting point for, a broader and deeper conversation about the shape and form of any domestic modern slavery legislation in New Zealand, while also making concrete recommendations. Along with targeted reforms, we recommend a Modern Slavery Act going beyond the transparency reporting approach of either the Australian or United Kingdom statutes and instead emulating due diligence legislation but tailored to New Zealand. Discussion of modern slavery legislation regarding supply chains in New Zealand is not new. Responding to a 2007 Trade Aid petition, in 2009, the Customs and Excise (Prohibition of Imports Made by Slave Labour) Amendment Bill was introduced.²⁹ Relying on the international legal definition of “slavery” itself, the Bill proposed to ban the import of products made in whole or in part by slave labour. That Bill did not become law – eventually being defeated in Parliament in August 2016 after an attempted re-introduction of effectively the same Bill that year. Following and indeed extending the Plan of Action, we argue that the time has come for a similarly inspired but updated, stronger, and more bespoke statute.

Structure of the White Paper

The White Paper's structure is cumulative, laying the groundwork and setting out the existing international and New Zealand frameworks before building on comparisons overseas to culminate in a Gap Analysis that informs the Recommendations. Next below, [section 2](#) sets out conceptual and some legal definitions. [Section 3](#) turns to the international legal framework that New Zealand needs to honour and work within. Coverage progresses to the current domestic frameworks, first legal in [section 4](#), then policy in [section 5](#). [Sections 6](#) and [7](#) outline recent Modern Slavery Acts in two comparator countries, the United Kingdom and Australia respectively, leading in [section 8](#) to a comparison between those countries and bullet-pointed criticisms of both. [Section 9](#) broadens coverage to other overseas legislative initiatives on supply chains, many being of the due diligence type rather than purely requiring reporting transparency. Based primarily on our natural comparators the United Kingdom and Australia, but with reference also to due diligence examples, [section 10](#) outlines paths forward and the recommendations we suggest.

²⁸ Francis Collins and Christina Stringer *Temporary Migrant Worker Exploitation in New Zealand* (Ministry of Business, Innovation and Employment, July 2019).

²⁹ Foreign Affairs, Defence and Trade Committee *Petition 2005/151 by Geoff White on behalf of Trade Aid and 17,000 others* (2008).



2. Definitions: Forms of Modern Slavery, Transparency and Due Diligence

Modern slavery as an umbrella term

The problem of defining modern slavery is complicated but not intractable. While there are strong arguments that the term is amorphous, vague, and of little legal benefit,³⁰ it has persuasive rhetorical value, and it is certainly in use among key groups, including MBIE (see the Plan of Action). Moreover, it encapsulates serious wrongdoing of kinds sufficiently unified that a concerted and bespoke New Zealand approach can address it. Definitional problems should not be a bar to action.

To map the legislative topography, or landscape, this section outlines some broad concepts and definitions of modern slavery and particularly of its components in a New Zealand context. We delineate these components and others in finer detail when turning to section 4 of this paper: the [domestic legal framework](#). The purpose of our definitions is discussion in this paper of the current topography. They are not ready to go as definitions in any New Zealand Modern Slavery Act. It is one of the recommendations of this paper that, just as a New Zealand Act should be bespoke, this should include a definition of modern slavery tailored to the New Zealand context, although still in harmony with international perspectives.

For the purposes of this Paper, we take the view that “modern slavery” may be used as an umbrella term to refer to a wide range of exploitative behaviour – either in isolation or together. This is not a legal term of art – it is not found in the Crimes Act 1961 or other New Zealand law. Similarly, in international legal discourse, modern slavery is not a distinct legal category in itself but increasingly conflates crimes of human trafficking, debt bondage, serfdom, forced marriage, slavery, forced labour, and child labour, so *modern* slavery encompasses slavery (reducing persons to property) and other abuses that constrain a worker’s freedom to exit their employment relationship. This dovetails with the description in MBIE’s Plan of Action. MBIE states that the term “is increasingly being used internationally and within New Zealand to describe a range of exploitative practices commonly including forced labour, debt bondage, forced marriage, other slavery and slavery-like practices, and people trafficking” and notes that the word “modern” distinguishes it from historic practices.³¹

Like domestic law, international law does not treat modern slavery as a legal category per se.

³⁰ See for example Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) at 191; Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2013), at 272-289; Janie Chuang “Exploitation Creep and the Unmaking of Human Trafficking Law” (2014) 108 *American Journal of International Law* 609; Janie Chuang “The Challenges and Perils of Reframing Trafficking as ‘Modern-Day Slavery’” (2015) 5 *Anti-Trafficking Review* 146.

³¹ We note that this is the approach found in the Australian Modern Slavery Act 2018.



A common theme of modern slavery exploitation is an abuse of vulnerability – typically the victims’ economic, social, and/or migration statuses.³² A clear example of this is found in the context of orphanage tourism in developing countries, where interaction with children forms a key component of an overseas visitor’s itinerary. As many as 80 percent of children in some of these orphanages are not orphans, but are instead trafficked to for-profit institutions for exploitation.³³ In response to public concern around child-abuse a number of volunteer-placement operators in New Zealand have ended their orphanage “voluntourism” programmes. Modern slavery legislation assigning legal duties to local businesses with respect to the violation of human rights in their supply chains could act as a further disincentive to participation in this industry. However, the vulnerable individuals more obviously implicated in modern slavery, and the focus of current report, are encountered in the context of an employment relationship in which abusers appropriate the value created by the abused. Human rights recognised by international instruments such as the Universal Declaration of Human Rights, and domestic law such as the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 are violated. Modern slavery thus characteristically involves the exploitation of people for profit, along a continuum of gravity.

Although the term modern slavery itself lacks precise definition, terms under its umbrella are either closely defined in law in New Zealand, or their potential application by New Zealand courts is predictable. To clarify and refine what we mean by modern slavery, we adopt the three definitions below with reference to the New Zealand Crimes Act 1961 and the international legal instruments to which its legislative provisions refer. The three components we choose are the same as those in the Plan of Action, namely human trafficking, slavery, and forced labour.

Human trafficking

As the Plan of Action notes, this is also commonly called people trafficking or trafficking in persons. In the early twentieth century, trafficking referred to the practice of forced prostitution – the offence to be suppressed was the movement of women or girls between states, for the purposes of prostitution. During the late 1990s, the concept widened significantly, to encompass a broader range of acts by which a person could be trafficked; a broader range of means by which that exploitation could be facilitated; and a wider range of exploitative end purposes.³⁴

Pre-empting the discussion in a later section of this paper, we note that in New Zealand law, section 98D of the Crimes Act 1961 echoes this tripartite definition. Human trafficking is defined as:

arranging, organising, or procuring the entry into, or exit out of, New Zealand or any other state, or the reception, recruitment, transport,

transfer, concealment, or harbouring of a person in New Zealand or any other state, for the purpose of exploiting or facilitating the exploitation of the person, knowing that it involved an act of coercion or an act of deception or both.

This is consistent with the definition set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“Trafficking Protocol”).³⁵

Slavery

The Crimes Act uses this term (especially in section 98: Dealing in slaves) but does not provide a conceptual definition of slavery per se. Instead, a broad approach is set out, which offers examples of exploitation that may be considered slavery. This includes (without limitation) debt bondage, serfdom,³⁶ and forced marriage.³⁷ This approach is consistent with the international legal regime.

Echoing historic slavery, at international law, the 1926 Slavery Convention defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.³⁸ The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery expanded on this definition by reference to debt bondage (“the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”), serfdom (“the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status”), and forced marriage (“Any institution or practice whereby (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person”).³⁹

In a 2021 decision, in an appeal against conviction and sentence, New Zealand’s Court of Appeal held “the essence of slavery is control over another person so as to significantly deprive them of individual liberty, with the aim of exploiting them through use profit or transfer. It is tantamount to possession. It can be understood as powers the exercise of which does not depend on the consent of the person concerned”.⁴⁰

³² Francis Collins and Christina Stringer *Temporary Migrant Worker Exploitation in New Zealand* (Ministry of Business, Innovation and Employment, July 2019).

³³ Kate van Doore, Andrea Nave and Emmalene Travers “Voluntourism and child trafficking into orphanages: Forget Me Not Australia” (2017) <<https://www.ecpat.org/wp-content/uploads/2016/10/Voluntourism-and-child-trafficking-into-orphanages.pdf>>.

³⁴ For a useful history of the concept of human trafficking, see Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) at 13.

³⁵ *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* GA Res 55/25 (2000) art 3(a). Provides a definition of human trafficking.

³⁶ Crimes Act 1961, s 98(2).

³⁷ Section 98(1)(g), (h).

³⁸ Convention to Suppress the Slave Trade and Slavery 1926 60 LNTS 1414 (25 September 1927), art 1.

³⁹ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* 266 UNTS 3 (30 April 1957), art 1.

⁴⁰ *R v Matamata* [2021] NZCA 372, at [36].



Forced labour

The term forced labour is used in the Crimes Act (especially section 98AA) but is not defined in New Zealand legislation. However, New Zealand courts are likely to adopt the definition in the Forced Labour Convention (to which New Zealand has been a party since 1938): “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁴¹

Forced labour – and the international regime mandating its prohibition – has been overseen by the ILO. In the Forced Labour Convention, states parties are required to criminalise forced labour as defined.⁴² In 2014, the Protocol of 2014 to the Forced Labour Convention, 1930 was developed.⁴³ That Protocol expands the ambit of forced labour, and creates a significant normative intersection with the international law of human trafficking.⁴⁴ The Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No 182,⁴⁵ responds to child labour specifically.⁴⁶ Human trafficking, slavery, and forced labour do not represent the full ambit of exploitative practices falling under the umbrella of modern slavery; are not equally common (slavery is less common, forced labour more); and, as we foreshadowed, sometimes overlap each other and/or occur together or with other wrongdoing.

Transparency legislation

For the purposes of this White Paper, under a transparency reporting system, entities are required to publish an annual statement outlining steps they have taken to prevent modern slavery in their supply chains. They are not required to change their behaviour; hence, entities can state they have not taken any steps and still have fulfilled their obligations.

Due diligence legislation

Due diligence legislation requires companies to undertake responsible business activity and report on their human rights activities. However, that terms may differ in other sources. For instance, in a report titled Study on Due Diligence Requirements through the Supply Chain for the European Commission⁴⁷ the distinction corresponding to our distinction between transparency and due diligence appears to be that between “due diligence reporting” and “mandatory due diligence as a duty of care” respectively (their Options 3 and 4).

⁴¹ Forced Labour Convention (opened for signature 28 June 1930, entered into force 1 May 1932) (Forced Labour Convention), art 2. See for example *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143, at [111].

⁴² Forced Labour Convention, art 2(1): “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” Exceptions are contained in art 2(2). Art 25: “The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.”

⁴³ Protocol of 2014 to the Forced Labour Convention 1930 (opened for signature 11 June 2014, entered into force 9 November 2016). New Zealand ratified this instrument on 13 December 2019.

⁴⁴ Important provisions in that instrument include:

Art 2: “The measures to be taken for the prevention of forced or compulsory labour shall include: (a) educating and informing people, especially those considered to be particularly vulnerable, in order to prevent their becoming victims of forced or compulsory labour; (b) educating and informing employers, in order to prevent their becoming involved in forced or compulsory labour practices; (c) undertaking efforts to ensure that: (i) the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and (ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened; (d) protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process; (e) supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour; and (f) addressing the root causes and factors that heighten the risks of forced or compulsory labour.”

Art 3: “Each Member shall take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.”

Art 4(1): “1. Each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.”

Art 4(2): “Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.”

⁴⁵ *Worst Forms of Child Labour Convention*, 1999 (ILO No 182) (opened for signature 17 June 1999, entered into force 19 November 2000). New Zealand Ratified 14 June 2001.

⁴⁶ Defined as: Art 3(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”

Art 7(1): “Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.”

⁴⁷ European Commission Directorate-General for Justice and Consumers “Study on due diligence requirements through the supply chain, Final report”. <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>> at 20.



3. International Legal Framework

Two types emerge: transnational criminal law, and business and human rights law

As the Plan of Action states “New Zealand’s actions and approach to addressing forced labour, people trafficking and slavery are underpinned by a range of international agreements that we are a signatory to and which signal our commitment to ending these practices.”⁴⁸ However, there is no simple international legal framework for New Zealand policymakers or legislators to fall back on. It is a complex system. The international law addressing offences associated with modern slavery is not consolidated in a single treaty or convention, nor does governance fall within the purview of any single intergovernmental organisation. The relevant norms are expressed in sources concerned with a wide range of abuses inflicted on individuals as they are used to create value appropriated by their abuser. Two main bodies of international law may be discerned, differentiated by the actors attributed with remedial responsibility. Transnational criminal law obliges states to enact and enforce domestic law defining criminal offences covering contexts in which modern slavery arises. In contrast, business and human rights law encourages non-state actors, principally multinational enterprises (MNEs - also called multinational corporations or transnational corporations) to respect non-binding responsibilities in the treatment of labour in their operations and supply chains.

Transnational criminal law commits states parties to legislate

The international legal framework currently in effect in respect of offences of modern slavery might be described as “transnational criminal law”. Offences are defined at the international level, and given effect by the domestic penal legislation of states parties.⁴⁹ The normative pillars of this transnational criminal law are cooperation, criminalisation, establishing jurisdiction, and extradition. Each pillar comprises binding international legal obligations, requiring states to give effect to the ultimate aim of the transnational criminal regime: harmonisation. By this, we mean achieving a degree of parity between the various legal systems of different states to ensure effective suppression of the relevant criminal behaviour. In the international criminal regime, states parties make binding commitments to enact laws that allow law enforcement agencies to effectively investigate and prosecute offending.

Transnational criminal law uses modern slavery as an umbrella term

As has been noted under the [Definitions](#) section above, and consistent with our umbrella approach, the crimes of human trafficking, debt bondage, serfdom, forced marriage, slavery, forced labour, and child labour are increasingly conflated as “modern slavery” in international legal discourse, but modern slavery is not a distinct legal category in itself. That is, as is the case in municipal law, criminal responsibility is not legally defined in terms of “modern slavery”. Slavery itself remains understood as reducing a person to the status of property, whereas *modern* slavery encompasses slavery and other forms of abuses conditional on the constraint of a worker’s freedom to exit their employment relationship.

Human trafficking versus enslavement

As a transnational crime, human trafficking involves actors subject to the jurisdiction of different states and organisations spanning national borders. The Protocol imposes obligations on ratifying states to enact domestic criminal law and enforcement mechanisms that facilitate international cooperation in investigation and prosecution. Enslavement, by contrast, is considered a crime against humanity, implying it must occur in the context of an attack on a civilian population and will be investigated and tried in the International Criminal Court (ICC) (which New Zealand recognises by having ratified the Rome Statute of the International Criminal Court in 2000). Persons charged with enslavement are likely to be directing or engaging in the performance of military or paramilitary duties. The ICC has yet to make a ruling in respect of enslavement, but the International Law Commission (ILC) defines enslavement in an expansive manner reminiscent of the concept of modern slavery:

Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognised standards of international law such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour).⁵⁰

⁴⁸ Plan of Action, at 8.

⁴⁹ Neil Boister and Robert Currie (eds) *Routledge Handbook of Transnational Criminal Law* (Routledge, 2015).

⁵⁰ *International Law Commission Yearbook* [1996] 39 ILC 1996 Draft Code of Crimes, II (2).

The inclusion of “servitude” enhances the breadth of the enslavement concept. This term is not defined in international law, but has been treated by the ILC as shorthand for the several “institutions and practices similar to slavery” enumerated in the 1957 Supplement to the League of Nations’ Slavery Convention of 1926. These included but were not confined to debt bondage, serfdom, servile marriage, and child exploitation. It remains unclear whether trafficking in persons might qualify as enslavement and, therefore, a crime against humanity.⁵¹ The ILC is not itself a source of international law, however. Hence, it remains for the ICC to engage with this area of law and establish an authoritative definition of enslavement.

New Zealand’s ratification of relevant ILO Conventions is partial

The ILC makes reference to the ILO Convention No. 29, one of a number of ILO Conventions addressing harms associated with modern slavery. New Zealand has ratified No. 29 and several other relevant Conventions, including the 2014 Protocol to the Forced Labour Convention and the Worst Forms of Child Labour Convention (No. 182). However, New Zealand has yet to ratify a number of ILO Conventions that, taken collectively, ensure states take comprehensive measures to minimize the potential for domestic modern slavery offences. These include the Freedom of Association and Protection of the Right to Organise Convention (No.87), the Minimum Age Convention (No. 138), the Labour Inspection (Agriculture) Convention (No. 129), Protection of Wages Convention (No. 95), Private Employment Agencies Convention, 1997 (No. 181), Work in Fishing Convention, 2007 (No. 188), Domestic Workers Convention, 2011 (No. 189), Violence and Harassment Convention, 2019 (No. 190) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).

International business and human rights law creates non-binding obligations

At this time, there is no binding international legal instrument creating obligations on states or corporations concerning transparency in supply chains or human rights due diligence. For instance, states are not obligated to legislate to set minimum due diligence standards on companies or for government procurement, nor are they required to impose international trade restrictions on the grounds of human rights violations. International trade and investment agreements, although prolific, are concerned with protecting the international operating privileges of corporations and do not impose duties on private actors. However, there is significant activity in the domain of business and human rights, and this situation is likely to change.

In contrast to the obligations contained in the transnational criminal legal regime, the area of business and human rights is addressed by a body of “soft” international law, creating non-binding, aspirational principles regarding the conduct and regulation of non-state actors in respect of issues of modern slavery. No multilateral treaty is in force to establish legal duties on non-state actors through a transnational regime, or to directly impose obligations on multinational corporations as subjects of international law, but several codes of conduct and guidelines agree that corporations should exert themselves to ensure human rights are not violated in consequence of their business activities.

The UN’s Guiding Principles articulate supply chain responsibility

The Preamble of the United Nations’ Universal Declaration of Human Rights 1948 calls on every organ of society to promote and respect human rights.⁵² This, however, has only muddied the waters of the legal responsibilities of corporations, as it does not attribute distinctive accountability in their case.

MNEs resist any suggestion that the Declaration imposes a standard of care higher than that established by the domestic law of the countries in which they do business.

Both the OECD and World Bank have sought to promote corporate social responsibility by publishing guidelines on international business conduct. Still, there is scepticism that these initiatives carry dissuasive force when it matters. For two decades, the UN attempted to design an international code of conduct for transnational corporations; it abandoned the project in the early 1990s. In 1999, the then UN Secretary-General launched the succinctly named Global Compact, a “voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals”⁵³ to counter civil society accusations that the organisation was neglecting the social responsibilities of international business. The Global Compact encouraged corporations to voluntarily adhere to principles concerning human rights, labour standards, and environmental protection, but it did not secure any obvious improvement in the compliance of business with international norms. At the moment, the UN’s Guiding Principles on Business and Human Rights (UNGPs)⁵⁴ represent the most concrete articulation of the international community’s position on the subject. The UNGPs started life in 2003 as Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.⁵⁵ These included prohibitions on genocide and torture and, controversially,⁵⁶ duties to facilitate the realisation of economic and social rights, including access to health, housing, education, food, and water.

The Draft Norms did not muster sufficient endorsement from international business or UN member states to form the basis of a binding convention. In response, the UN Commission on Human Rights recommended that the Secretary-General appoint a Special Representative on business and human rights, who declared the Draft Norms unworkable due to the legal complexity of holding multinational enterprises to account under international law. The UNGPs, endorsed by the Human Rights Council in 2011, represent a practicable alternative. They assert that international human rights law protects individuals from the abuse of state power and is only binding on states. However, the paradigm of corporate social responsibility provides an ideational foundation on which to foster respect for human rights in corporations. Accordingly, a Protect, Respect, and Remedy Framework was formulated, such that states protect individuals from human rights violations and provide remedies where violations occur, leaving business to respect those rights. States are subject to a duty to protect individuals against human rights abuses by third parties, including business enterprises. The UNGPs note that states may breach their international human rights obligations “where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse”.⁵⁷ The UNGPs further recommend that states implement measures to set out clearly the expectation that business enterprises domiciled in their territory respect human rights throughout their operations.⁵⁸

Human rights due diligence is the emerging standard of care in international law

In the UNGPs, corporate due diligence means to “identify, prevent, mitigate and account for” adverse impacts on human rights, not only in their own operations but through their supply chains. The OECD has incorporated this formulation of due diligence in its Guidelines for Multinational Enterprises, and it is also included in the ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. Currently, the European Parliament is actively considering a legal framework imposing a duty on business entities to exercise due diligence for human rights and environmental harms. It intends to base this framework on the UNGP’s concept of due diligence.

⁵¹ See Nicole Siller ““Modern Slavery”: Does International Law Distinguish between Slavery, Enslavement and Trafficking?” (2016) 14 *Journal of International Criminal Justice* 405.

⁵² *Universal Declaration of Human Rights* GA Res 217 (1948).

⁵³ United Nations “United Nations Global Compact” (26 July 2000) <<https://www.unglobalcompact.org/about>>.

⁵⁴ *Guiding Principles on Business and Human Rights: Implementing the United Nations’ ‘Protect, Respect and Remedy’ Framework* UN Doc A/HRC/17/31 (2011).

⁵⁵ *Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Sub-Comm’n Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.1.1, at 52 (2003).

⁵⁶ David Weissbrodt, Muria Kruger “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (2003) 97 *American Journal of International Law* 901.

⁵⁷ *Guiding Principles on Business and Human Rights* (16 June 2011) at 8.

⁵⁸ At 8-10.



The UNGPs stipulate that a company detecting actual or potential negative human rights impacts arising from its activities should take action consistent with its degree of involvement. Involvement is described in three forms in terms of proximity to the impact: the company may cause, contribute to, or be directly linked to a human rights impact. If a company causes an adverse impact, it should do what is necessary to stop it.⁵⁹ If the adverse impact is exacerbated by the company's contribution, that enterprise should not only cease that contribution, it should do what lies within its power to mitigate any remaining impact. The final scenario is of particular importance in the context of modern slavery in supply chains, as it contemplates adverse impacts caused by a business relationship connected to the company's operations, products or services. Here, the implicated company should use its leverage to mitigate the adverse impact. Critically, in the event that the company lacks effective leverage over the entity causing a human rights violation, it is obligated to try to increase that leverage, and only terminate the relationship if that proves impossible.

This typology of involvement and remediation offers a template for a domestic legal regime defining the liability of domestic business enterprises for extraterritorial instances of modern slavery. Bare conformity with statutory due diligence requirements in respect of identifying, preventing, mitigating, and accounting may not amount to a defense against causing or contributing to an abuse of labour rights in a foreign jurisdiction. The UNGPs make clear that human rights due diligence is not exhausted by completion of a checklist, but requires respect for human rights in all aspects of business conduct.⁶⁰ While due diligence helps a company attenuate the risk of legal claims against it, as noted in the commentary to Principle 17, its function is to ensure human rights are not compromised. In the context of modern slavery, a risk-based compliance approach shifts the risk of harmful business practices onto vulnerable workers.

The commentary to the Principle 17 likens contribution, the second type of involvement in a human rights impact, to complicity in a crime, which carries clear implications of legal liability. The commentary is silent with respect to potential legal liability for direct linkage to an abusive business partner, a form of involvement with particular resonance in the context of modern slavery in the extraterritorial segments of supply chains. By making no reference to this third type of involvement, the Special Representative

might be inferred to have taken no position on civil or criminal liability. Problematically, a follow-up elaboration from the Office of the United Nations High Commission for Human Rights (OHCHR),⁶¹ discussed liability for impacts in a company's supply chain with reference only to cause and contribution, suggesting that linkage to an adverse impact on human rights ought not attract legal liability. However, a more recent OHCHR report has clarified that legal liability may arise from any deficiency in the exercise of human rights due diligence.⁶²

The UN is reviving the concept of binding international legal duties for MNEs

In 2014, the United Nations Human Rights Council signaled its intention to advance from the UNGPs and revisit an idea first proposed in the 1970s, when the non-abandoned Code of Conduct for Transnational Corporations was promoted as an international legal instrument binding on both states and MNEs. The Council resolved to establish a working group (OEIWG) to develop an international legally binding instrument to regulate transnational corporations and other companies with respect to human rights (Binding Instrument).⁶³ The working group reported on its sixth session in January 2021, where the second revised draft of the Binding Instrument was reviewed, and progress is ongoing.⁶⁴

The international legal regime with respect to human rights gives victims of corporate violations little recourse to remedy. The Binding Instrument is intended to place direct obligations on companies and impose clearer and more prescriptive duties on States to perform their protective role, as ascribed in the UNGPs. The proposed treaty is a progression of the approach taken in the Draft Norms and potentially a significant forward step in business and human rights law. In particular, the binding instrument seeks to enhance victims' access to remedies by holding multinational corporations responsible for human rights violations at the international level. This is augmented procedurally by seeking to provide victims of abuse more immediate and less expensive access to institutions of justice.

Significant differences among negotiating parties create uncertainty around the final form and entry into force of the Binding Instrument. Notably, the Second Revised Draft does not refer to direct obligations for business

⁵⁹ At 18-19.

⁶⁰ At 17.

⁶¹ OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, UN Doc A/HRC/32/19, Annex: Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-Related Human Rights Abuse (10 May 2016).

⁶² OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, UN Doc /HRC/38/20/Add.2 (1 June 2018).

⁶³ Resolution A/HRC/26/9 created the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.

⁶⁴ Second Revised Draft of the Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations and Other Business Enterprises, (6 September 2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>.



entities necessitating the creation of international judicial mechanisms at the international level to address human rights violations by corporations. This, however, only increases the importance of comprehensive and effective national measures to secure corporate respect for with human rights. In this regard, the Second Revised Draft is unambiguous. Article 6 stipulates that states shall take all necessary legal measures to ensure that business enterprises subject to their jurisdiction respect human rights and prevent and mitigate human rights abuses throughout their operations by undertaking human rights due diligence “proportionate to their size, risk of severe human rights impacts and the nature and context of their operations”.

The revised Binding Instrument requires states to ensure that business disrespect for human rights is subject to legal liability in domestic law.⁶⁵ In terms of a human rights abuse linked to a company through its supply chain, liability attaches when the company controls or supervises the person or activity causing that abuses or when the abuse was foreseeable but inadequately guarded against.⁶⁶ In the context of modern slavery law it is highly salient that criminal and civil sanctions for failure to prevent human rights violations in the supply chain, even where due diligence might be undertaken, are the subject of serious consideration by the Human Rights Council.

Australian and United Kingdom Modern Slavery Acts take inspiration from soft international law

It is apparent from a review of the [Australian](#) and [United Kingdom](#) modern slavery legislation that these governments have chosen to incorporate aspects of the extant soft law regime into their approach to modern slavery. In the case of the United Kingdom legislation, there is dissonant concatenation of the two distinct bodies of international law: the transnational criminal law (requiring states parties to criminalise conduct) and a diluted due diligence law (seeking to impose reporting duties on non-state actors).

Corporate codes of self-regulation have substituted for state inaction

In the domain of what is termed “private international law”, corporations self-regulate through firm- or industry-level codes of conduct. These are designed to prevent MNEs from becoming entangled in human rights abuses and to direct their response should prevention fail. Three basic types of code are discernible: prohibitions on the use of forced and child labour in value-chains; commitments to support civil and political rights, such as freedom of association or freedom from indoctrination; and investment criteria that preclude engagement in countries with poor human rights records.⁶⁷ In one estimate, by 2010, over 3,000 firms regularly issued reports on their social and environmental practices, “many of which have developed their own codes and/or subscribe to one or more industry or cross-industry codes”.⁶⁸ According to one commentator such codes of conduct

are undoubtedly *more* effective than the labor, human rights, and environmental regulations of many developing countries. For some developing countries, they constitute the only effective form of business regulation. The environmental, social, and human rights practices of firms in developing countries that either produce for global supply chains or are directly owned by Western [multinational corporations] are frequently better than those of domestic producers and this is in part due to the impact of global civil regulations.⁶⁹

Current legislative initiatives with respect to supply chain transparency accelerate the adoption of responsible business self-regulation. As we discuss below, in light of the civil and criminal sanctions now contemplated by the UN and EU, it would be out of step for New Zealand to retain this light-touch approach to legislation.

⁶⁵ Article 8(1), Second Revised Draft.

⁶⁶ Article 8(7), Second Revised Draft.

⁶⁷ Barbara A. Frey “The legal and ethical responsibilities of transnational corporations in the protection of international human rights” (1997) 6 *Minnesota Journal of Global Trade* 153.

⁶⁸ David Vogel “The private regulation of global corporate conduct: Achievements and limitations” (2010) 49 *Business & Society* 68, at 72

⁶⁹ At 80.



4. Domestic Legal Framework

As we observed in the Introduction, exploitation exists on a continuum – and the law responds accordingly. In accordance with international legal obligations, New Zealand has (to date) maintained a predominantly criminological and penal focus on this issue. So far it does not have legislation on supply chain transparency. Still, key action 16 of the Plan of Action, whose status in that document is listed as “planned”, is to “[c]onsider introducing legislation requiring businesses to report publicly on transparency in supply chains, to help eliminate practices of modern slavery”.⁷⁰ In this section, we provide an overview of New Zealand’s criminal and civil provisions relating to issues of modern slavery. This includes developing some of the offences outlined in the [Definitions](#) section. Many of these topics are themselves the subject of a considerable body of jurisprudence and academic literature. We do not propose to provide a comprehensive discussion but rather highlight the key points.

Criminal law

In order to ratify the United Nations Convention Against Transnational Organised Crime (and its Protocols), in 2002 the New Zealand government passed the Crimes Amendment Act.⁷¹ This Act introduced specific crimes of human trafficking, migrant smuggling,⁷² participation in an organised criminal group, and corruption into New Zealand law to ensure compliance with the relevant international penal standards. By international anti-trafficking standards, New Zealand appears to be successfully meeting its international legal obligations.⁷³

The Crimes Act 1961 criminalises certain behaviour involving serious exploitation, including dealing in slaves,⁷⁴ child slavery,⁷⁵ human trafficking,⁷⁶ smuggling migrants,⁷⁷ human tissue trafficking,⁷⁸ child sex tourism,⁷⁹ and forced marriage.⁸⁰ Forced labour is not criminalised in a general sense. Rather, it is only explicitly prohibited against people under the age of 18.⁸¹

Despite some conceptual overlap, there is a degree of inconsistency between the provisions. For example, a decision by a prosecutor to lay charges under one section over another could lead to discrepancies in sentencing results. Slavery, for example, attracts a maximum penalty of 14 years’ imprisonment, while human trafficking attracts a maximum term of 20 years.

It is apparent that the offence of human trafficking can be complete without actual exploitation. An intention to exploit will be sufficient. In this sense, human trafficking is a precursor to exploitation – various forms of which (such as slavery, forced marriage, and forced labour) are criminalised in and of themselves. Cases of exploitation are likely to encompass situations of human trafficking. However, cases of human trafficking do not necessarily involve exploitation.

Notably, the degree of actual exploitation is to be taken into account by a court as an aggravating factor at sentencing: section 98E(2)(a) lists exploitation (such as the removal of organs) in a list of aggravating factors concerning smuggling migrants and trafficking in persons.

Extraterritoriality in New Zealand’s criminal law

New Zealand’s laws recognise that this kind of exploitation often occurs between countries. Section 7A of the Crimes Act allows for extraterritorial jurisdiction to be adopted in certain cases. The section states that with respect to certain offences (including human trafficking and dealing in people under the age of 18 for exploitative purposes), proceedings can be brought even when the offending occurred entirely outside of New Zealand, so long as the offender is a resident or citizen of New Zealand, or has been found in New Zealand. This creates a wide jurisdictional net. In respect of human trafficking, New Zealand courts will be able to claim jurisdiction in cases where the material elements of the offending took place entirely outside New Zealand’s borders, so long as the aim of the alleged conduct was the unlawful entry of a person into New Zealand.⁸²

⁷⁰ At 14. Action 17, also with the status “planned”, is to “[w]ork towards implementing the United Nations Guiding Principles on Business and Human Rights”, discussed [in the previous section of his White Paper](#).

⁷¹ Crimes Amendment Act 2002 (subsequently amended by Crimes Amendment Act 2015 (2015 No 95) (NZ)).

⁷² We emphasise here that migrant smuggling is conceptually distinct from human trafficking. Human trafficking involves the negation of consent by a variety of means; migrant smuggling involves a willing participant. We note that incidences of migrant smuggling may – in many cases – transform into cases of human trafficking.

⁷³ New Zealand is ranked as a “Tier 2 country in the United States Department of State 2021 Trafficking in Persons report – a drop in level from the 2020 (and indeed all previous years) report. See United States Department of State *2021 Trafficking in Persons Report* (July 2021) at 416.

⁷⁴ Section 98. This section derives from the Slave Trade Act 1824 (UK), and gives effect to New Zealand’s international legal obligations. See for commentary generally *Garrow and Turkington’s Criminal Law in New Zealand* (online ed) at [CRI98.3]. This provision has been considered by the Courts in *R v Decha-lamsakun* [1993] 1 NZLR 141, (1992) 8 CRNZ 470 (CA); *R v Matamata* [2020] NZHC 1829; *R v Matamata* [2021] NZCA 372.

⁷⁵ Section 98(i). See *R v Lata* [2018] NZCA 615.

⁷⁶ Section 98D. For legislative history of this and migrant smuggling, see *R v Chechelnitski* CA160/04, 1 September 2004 at [3]–[12]; *R v Ali* HC Auckland CRI-2015-092-6886, 20 September 2016.

⁷⁷ Section 98C. For application, see *R v Konsaijan* [2012] NZHC 2293.

⁷⁸ Section 98AA, 98D(4)(c). See *R v Sehgal* [2018] NZHC 1145.

⁷⁹ Sections 144A, 144B, 144C.

⁸⁰ Sections 207A, 208

⁸¹ Section 98AA.

⁸² Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [CA7A.01].

Civil law: immigration and employment

Outside of the criminal law, the Immigration Act 2009 contains several provisions that allow for sanctions to be imposed in situations that may relate to the exploitation of migrants.

The Employment Relations Act 2000 governs the legal relationships between employers and employees. Section 135 provides that penalties may be imposed for breaches of the Employment Relations Act. Penalties are capped at NZ\$10,000 for individuals and NZ\$20,000 for a company or other corporation. Section 228 mandates actions by a Labour Inspector: “A Labour Inspector may commence an action on behalf of an employee to recover any wages or holiday pay or other money payable by an employer to that employee under the Minimum Wage Act 1983 or the Holidays Act 2003.”

An (all but) missing piece is mandatory supply chain transparency or due diligence

New Zealand’s legal framework does not provide for reporting transparency in supply chain obligations of the same kind as those found in the Australian and United Kingdom legal systems, let alone due diligence. However, an interesting exception is found in the Customs and Excise Act 2018/Customs Import Prohibition (Goods Produced by Prison Labour) Order 2019. This is an Order in Council which bans the import of goods manufactured or produced wholly or in part by prison labour; or in connection with prison labour.⁸³ While the Customs and Excise Act does not specifically criminalise the import of goods subject to this Order, any such goods would be forfeit to the Crown once received. Arguably, the effect of this may be viewed as a form of due diligence legislation: importers must be content that the goods are not a prohibited product, at the risk of having their goods seized.

In this way, there is a class of good (those products produced by prison labour) which cannot be imported into New Zealand. The implication for importers is that they must themselves take care to ensure that their imports are not the product of prison labour – in effect requiring a form of supply chain analysis, albeit one which does not require formal reporting statements as is the case in the United Kingdom or Australia.

There have been attempts over time to broaden the scope of this prohibition. In 2007, Trade Aid presented a petition to Parliament seeking an expansion of this prohibition on imports in respect of goods made by slave labour.⁸⁴

This petition was considered by the Foreign Affairs and Trade Select Committee, which took the view that there would be legal difficulties with the implementation of such a prohibition.⁸⁵ In particular, the Committee received advice that the General Agreement on Tariffs and Trade may not allow a ban on importing goods made by slave labour. The Committee noted: “there is no international consensus on which to base trade restrictions on goods produced using slave labour. New Zealand would need to prove that such a trade ban was not a disguised restriction on trade.”⁸⁶ The Committee also received advice that enforcement of the ban on importing prohibited goods (such as those made by prison labour) was difficult because “it is hard to obtain evidence without the cooperation of the government or manufacturer involved”.⁸⁷ Ultimately, the Committee endorsed an approach that would see the private sector voluntarily ensure the cleanliness of their supply chains.⁸⁸ To date, this has not eventuated.

In response to the 2007 Trade Aid petition, in 2009 MP and former and subsequent Minister Maryan Street introduced a member’s Bill seeking to amend the Customs and Excise Act to prohibit the import of goods produced in whole or in part by slave labour.⁸⁹ This Bill was introduced prior to the widespread usage of modern slavery rhetoric. That Bill defined slave labour as “labour by persons over whom any or all of the powers attaching to the right of ownership are exercised”.⁹⁰ Speaking in support of her Bill, the Hon Maryan Street referred to equivalent legislation in the United States (which prohibits the import of goods produced by forced labour⁹¹) and Belgium, which since 2002 has had a legislative regime enabling manufacturers (who meet certain criteria) to label their products as being made in compliance with core ILO standards.⁹²

The Bill was voted down at first reading. In 2015, a member’s Bill of MP Peeni Henare was introduced to Parliament again.⁹³ The Bill – in all material respects identical to the earlier member’s Bill – was again voted down at its first reading. The majority opposition to both Bills accepted the general proposition that slavery is “abhorrent”, but did not accept that the Bills went far enough with respect to issues of definition.⁹⁴ In 2017, MP Dr Liz Craig introduced a Transparency in Supply Chains member’s Bill – the Bill was withdrawn in March 2018.

There may be a lesson here for legislators: If a Modern Slavery Bill is again introduced, this reinforces the case for a careful definition, and a cautious approach to obligations imposed on companies.

⁸³ Customs Import Prohibition (Goods Produced by Prison Labour) Order 2019, s 3.

⁸⁴ Foreign Affairs, Defence and Trade Committee *Petition 2005/151 of Geoff White on behalf of Trade Aid and 17,000 others* (12 February 2009). Available at <https://www.parliament.nz/resource/en-nz/49DBSCH_SCR4242_1/133822bfa9779240d496c980394c1dd37646df38>.

⁸⁵ Foreign Affairs, Defence and Trade Committee *Petition 2005/151 of Geoff White on behalf of Trade Aid and 17,000 others* (12 February 2009). Available at <https://www.parliament.nz/resource/en-nz/49DBSCH_SCR4242_1/133822bfa9779240d496c980394c1dd37646df38>.

⁸⁶ At 2.

⁸⁷ At 3.

⁸⁸ At 3.

⁸⁹ Customs and Excise (Prohibition of Imports Made by Slave Labour) Amendment Bill 2009 (57-1).

⁹⁰ Cl 5.

⁹¹ 656 NZPD 5286 (29 July 2009). The United States’ legislation referred to is the Tariff Act of 1930, §1307: Convict-made goods; importation prohibited: “All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. “Forced labor”, as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term “forced labor or/and indentured labor” includes forced or indentured child labor.”

⁹² See for a summary: Bruno Melckmans, “Strengths and Weaknesses of Belgium’s Social Label” <<https://library.fes.de/pdf-files/gurn/00097.pdf>>; Anne Peeters “The Belgian Social Label: A Pilot Project for Involving Governments in CSR” (2004) 10(3) *Transfer* 393.

⁹³ Customs and Excise (Prohibition of Imports Made by Slave Labour) Amendment Bill 2015 (110-1).

⁹⁴ See call of the Hon Tim Groser in respect of the 2009 Bill (656 NZPD 5286 (29 July 2009)); call of Mark Mitchell in respect of the 2016 Bill (716 NZPD 2480 (10 August 2016)).



5. Domestic Policy Framework

In New Zealand, MBIE holds a key mandate to consider issues of modern slavery. As we have discussed, the core is the Plan of Action, which identified 28 key actions.⁹⁵ Notably this sets out an all-of-government response, with MBIE playing a coordinating role.⁹⁶

Plan of Action is central

Immigration New Zealand (INZ) have supplemented the work of MBIE through a special visa regime for victims of human trafficking. Victims of people trafficking identified by the New Zealand Police may be granted a work visa valid for 12 months.⁹⁷ This visa can be extended beyond the initial 12 month period if: “the Police or INZ determines the applicant’s continued presence in New Zealand is required; and the applicant has not obstructed a Police or INZ investigation; and an immigration officer determines that the applicant has personal circumstances that warrant the grant of a further work visa”. Children certified as suspected victims who wish to study at primary or secondary school may be granted a student or visitor visa for 12 months.^{98, 99}

Victims of trafficking who meet specific criteria may be granted a New Zealand resident visa. They require a special temporary visa for victims of people trafficking as well as being certified by the Police as suspected victims of people trafficking. They must also have certification from the Police that they are not able to return to their home country and have not obstructed the police investigation of their case while on a special visa. Applicants must provide evidence that, as a consequence of being trafficked, they would be in danger; or be subject to re-victimisation; or at risk of significant social stigma and financial hardship.¹⁰⁰ On the face of it, this policy approach appears to forge a connection between protection of victims (via the granting of visas) and prosecution of offenders (via assistance to police). This is consistent with the scheme of the international transnational criminal regime. In the box below, we highlight some recent policy shifts made by the New Zealand government, toward the protection of temporary migrant workers in New Zealand.

Addressing temporary migrant worker exploitation

In 2017, the New Zealand government tasked MBIE with addressing the exploitation of migrant workers in New Zealand. This was in response to increasing evidence of exploitation occurring in different sectors. The government committed \$NZ50 million to implementing changes. In 2020, nine policy proposals were agreed to by Cabinet:¹⁰¹

1. “Introduce a duty on third parties with significant control or influence over an employer to take reasonable steps to prevent a breach of employment standards occurring.
2. Require franchisees to meet higher accreditation standards under the proposed employer-assisted visa gateway system.
3. Disqualify people convicted of migrant exploitation and people trafficking from managing or directing a company.
4. Establish a dedicated migrant exploitation 0800 phone line and online reporting tool, and establish a specialised migrant worker exploitation-focused reporting and triaging function.
5. Create a new visa for exploited migrant workers.
6. Establish three new immigration infringement offences targeting non-compliant employer behaviour, and a power for immigration officers to compel employers to provide relevant documents.
7. Allow Labour Inspectors to issue an infringement notice where employers fail to provide requested documents in a reasonable timeframe.
8. Expand the stand-down list to cover existing Immigration Act offences where a fine was issued and, in future, immigration infringement offences, and clarify that employers with certain serious convictions cannot support visa applications for migrant workers.
9. Notify affected migrant workers that their employer has been stood down.”

The New Zealand Government has committed \$NZ50 million dollars over the next four years for the implementation of policy, legislative and operational changes.¹⁰² MBIE’s work is continuing in this space.

⁹⁵ Ministry of Business, Innovation and Employment *Plan of action against forced labour, people trafficking and slavery* (16 March 2021).

⁹⁶ At 7. “This Plan of Action should be seen in the context of, and complementary to, other related programmes and strategies underway”.

⁹⁷ New Zealand Immigration *Operational Manual 2021* at W116.1.

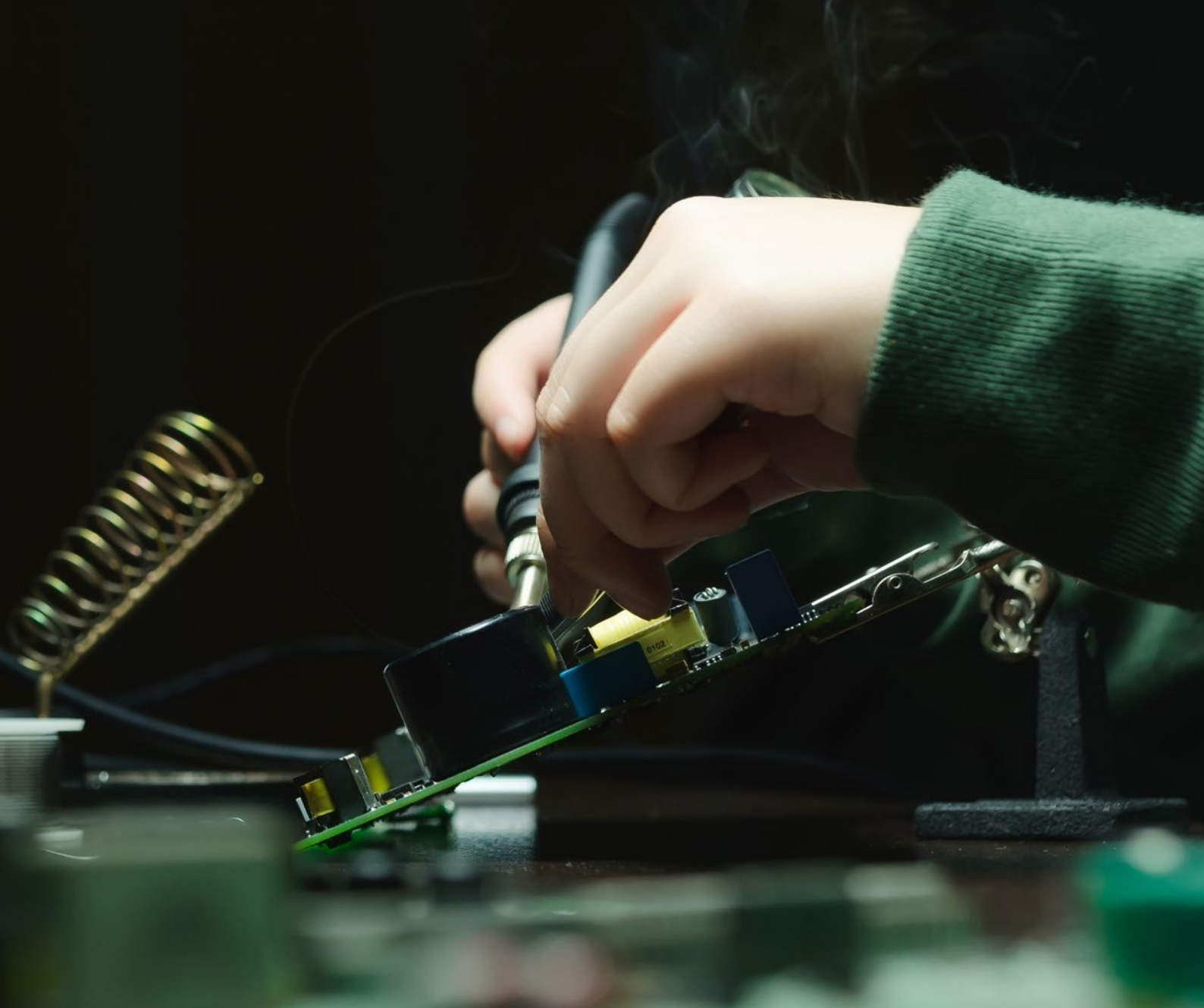
⁹⁸ At U10.5.

⁹⁹ At V3.135.

¹⁰⁰ At S4.15.1.

¹⁰¹ Cabinet Paper “Temporary migrant worker exploitation review – final proposals” (28 August 2020), at 2-3; Cabinet Minute of Decision “Temporary Migrant Worker Exploitation Review: Final Proposals” (28 August 2020) DEV-20-MIN-0034.

¹⁰² Ministry of Business, Innovation and Employment “Addressing temporary migrant worker exploitation” <<https://www.mbie.govt.nz/about/news/addressing-temporary-migrant-worker-exploitation/>>.



New Zealand Police goals around transnational organised crime

The New Zealand Police have created several strategic goals around transnational organised crime (TOC), including aspects of modern slavery.¹⁰³ They seek to establish a system-wide governance model; create a robust and sustainable model of leading and governing New Zealand's work to tackle TOC that will guide agencies towards a way of operating that is coordinated, cohesive and driven by outcomes; and identify when multiple sectors and organisations need to work together on an aspect of combatting TOC.

New Zealand's policy challenge concerns modern slavery in supply chains

While the Government has begun reform of visa regulations for migrant workers in order to reduce the vulnerability of these workers to exploitation, and has taken measures to prosecute New Zealanders engaged in human trafficking, it is still in the preliminary stages of formulating policy regarding modern slavery abroad. Labour and human rights abuses occurring in New Zealand are readily addressed using regulatory instruments common to criminal and administrative law. Modern slavery occurring beyond the jurisdiction of New Zealand, however, requires a degree of legal innovation

with respect to setting appropriate duties of care for New Zealand residents in respect of their commercial relationships with foreign persons.

Here, as we document elsewhere in this White Paper, the objective is to ensure New Zealanders engaged in business with overseas suppliers, or undertaking production of goods and services in offshore subsidiaries, do not help maintain conditions of modern slavery in those workplaces. There are different approaches available to the Government, including diplomatic intervention with foreign states where modern slavery is discerned and the imposition of trade sanctions on those states where diplomacy is unsuccessful. Alternatively, the Government may establish binding obligations for New Zealand business enterprises, private and state-owned, to verify their suppliers respect the fundamental rights of their employees, and potentially take reasonable measures to rectify abuses where they are detected.

In the subsequent sections, we examine the policy approach adopted in comparable common law jurisdictions.

¹⁰³ New Zealand Police *Transnational Organised Crime Strategy 2020-2025* (September 2020), at 19-21.



6. Comparator: United Kingdom's Modern Slavery Act

In 2015, the United Kingdom introduced legislation aimed at addressing and preventing modern slavery. Its passage was described as a “historic milestone” by then Home Secretary Theresa May. She argued that it was a vital step in the government’s plan to rid the United Kingdom of all forms of modern slavery and similar exploitation.¹⁰⁴

The Modern Slavery Act 2015¹⁰⁵ did not contain any new offences, since slavery, servitude, forced and compulsory labour and human trafficking were already designated as criminal offences. Instead, the Act increased punishments for these crimes and introduced several new legislative and governmental mechanisms for understanding and addressing the kinds of abuses associated with modern forms of slavery. Notably, for the first time in the United Kingdom it introduced supply chain reporting obligations. These apply to commercial organisations worldwide with a total annual turnover of £36 million that carry on a business or part of a business in the United Kingdom. This also catches New Zealand businesses operating in the United Kingdom that meet the criteria.

Legislative history

The legislative process began with the publication of a Draft Modern Slavery Bill in December 2013. The Bill was in response to a report by the Centre for Social Justice entitled “It Happens Here”¹⁰⁶. A Joint Committee on the Draft Modern Slavery Bill (hereafter Joint Committee) was established to hear public submissions and make recommendations to Parliament on the draft Bill.

Despite the recommendation from the Joint Committee that government and business work together, consult with each other, and raised awareness about these issues, the government was hesitant about taking decisive action as they were of the view that reporting would be burdensome for companies.¹⁰⁷ Hence, the draft Bill did not contain any obligations for companies to report on the likelihood of modern slavery in their supply chains.¹⁰⁸ The Joint Committee was of the opposite view. It said: “Legislation on supply chains does not have to be burdensome for reputable businesses to implement. Proportionate legislative action can ensure that firms no longer turn a blind eye to exploitation occurring in their names and can therefore stimulate

significant improvement. We welcome the support of major businesses for appropriate legislative measures.”¹⁰⁹

In October 2014, the government announced that large companies would need to make yearly public statements about what they are doing to ensure their supply chains are free from modern slavery.¹¹⁰

The view of companies on the draft modern slavery act as reported by the Joint Committee¹¹¹

“IKEA told us that ethical supply chains were ‘absolutely’ more profitable. Tesco said that a good reputation “more than pays for itself” in the long run, and Marks & Spencer told us that trust was ‘a key part of [their] competitive advantage’ [....]

We were repeatedly told legislation could serve to ‘level the playing field’ and raise the standards of companies that failed to tackle modern slavery in their supply chains voluntarily. This would ensure that companies who take eradication of modern slavery from their supply chains seriously would not be undercut by unscrupulous or ignorant competitors. Marks & Spencer told us ‘legislation could have a valuable role to play in encouraging more companies to take these issues more seriously.’”

¹⁰⁴ The United Kingdom Home Office, “Historic law to end Modern Slavery passed” (26 March 2015) < <https://www.gov.uk/government/news/historic-law-to-end-modern-slavery-passed> >.

¹⁰⁵ Modern Slavery Act 2015 (UK). Version as enacted available at < <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> >. An official overview published after it was passed is available at < <https://www.gov.uk/government/collections/modern-slavery-bill> >.

¹⁰⁶ Centre for Social Justice *It Happens Here: Equipping the United Kingdom to fight modern slavery* (March 2013) available at < https://www.centreforsocialjustice.org.uk/wp-content/uploads/2013/03/CSJ_Slavery_Full_Report_WEB5.pdf >.

¹⁰⁷ Virginia Mantouvalou “The UK Modern Slavery Act 2015 Three Years On” (2018) 81(6) *Modern Law Review* 1017, at 1017.

¹⁰⁸ Rowena Mason “Companies not asked to report slavery in supply chains under new laws” *The Guardian* (online ed, United Kingdom, 10 June 2014) < <https://www.theguardian.com/global-development/2014/jun/10/companies-slavery-forced-labour-supply-chains-new-laws> >.

¹⁰⁹ Joint Committee on the Draft Modern Slavery Bill (UK) *Report on the Draft Modern Slavery Bill* (3 April 2014) available at < <https://publications.parliament.uk/pa/jt201314/jtselect/jtselect/166/166.pdf> >, at 173.

¹¹⁰ The United Kingdom Home Office “Big Business to be held to account to keep supply chains slavery free” (press release, 13 October 2014) < <https://www.gov.uk/government/news/big-business-to-be-held-to-account-to-keep-supply-chains-slavery-free> >.

¹¹¹ At [171]; [172].



Effect of the Act

The United Kingdom's is "an act to make provision about slavery, servitude and forced or compulsory labour and about human trafficking, including provision for the protection of victims; to make provision for an independent Anti-slavery Commissioner; and for connected purposes." It created an independent Anti-slavery Commissioner;¹¹² however, the genuine independence of the Anti-slavery Commissioner was put into question as Kevin Hyland, the first Commissioner appointed, resigned over such concerns, saying: "[a]t times independence has felt somewhat discretionary from the Home Office, rather than legally bestowed".¹¹³

The Act also created a somewhat mixed but ultimately soft law reporting regime around transparency in supply chains.¹¹⁴ On the one hand, section 51(1) provides: "A commercial organisation within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organisation." On the other hand, section 54(5) uses the term "may" (rather than "must") when specifying what a slavery and human trafficking statement should include as content (such as business structure, policies on slavery and human trafficking, due diligence processes in its business and supply chains, risks of slavery in its business and supply chains, effectiveness and performance indicators, and training afforded to staff). The optional language "may" mean that reports do not have to include content on any of the things listed; there are no mandatory criteria to report against. Under section 54(4) (b), it is even possible for a company to make a statement simply saying that it has taken no steps on this matter in the last financial year.

Several authors have expressed concern about the lack of commitment by companies to filing modern slavery statements or, as they are called in the Act, slavery and human trafficking statements. According to Monciardini, Bernaz and Andhov, modern slavery statements filed by food and tobacco companies to the United Kingdom Modern Slavery Register are "mixed and rather disappointing".¹¹⁵ Rather starkly, a report on the effectiveness of section 54 published by the Modern Slavery and Human Rights Policy and Evidence Centre in 2021 stated that "compliance with the express requirements of section 54 has remained under 50 per cent for the past five years".¹¹⁶ In other words, even though the section does not require which criteria be reported on, and companies could comply by reporting that they simply took no steps in the last year, over half of companies still fail to comply with even this soft regime.

"compliance with the express requirements of section 54 has remained under 50 per cent for the past five years".

2018 Independent Review

Recommendations pursuant to the 2018 Independent Review of the Modern Slavery Act 2015 made several recommendations for improvement.¹¹⁷ Importantly, the review recommended that modern slavery reporting be embedded into business culture by tying it directly to existing company law reporting requirements and making it a company law offence to fail to report as required or – taking it to another level – to fail to act when slavery is found. However, the government did not accept the recommendation to amend the Companies Act 2006 or to create an offence.¹¹⁸

The six discretionary reporting criteria under s 54(5) of the Act should be made mandatory, according to the review, by changing the wording used from "may" to "must". It was also recommended that the reporting criteria should include due diligence actions that the company intends to implement in the future.¹¹⁹

The review recommended that the legislation be amended so that the entirety of an entity's supply chains is considered, whereas the legislation in its current state simply does not specify which parts of an entity's supply chain is covered. The government accepted this recommendation but opted to update the statutory guidelines to make clear that there was an expectation that entities would consider extending their due diligence measures along their supply chains over time.¹²⁰

It also recommended better monitoring and enforcement measures to ensure greater compliance. It took the view that the Independent Anti-slavery Commissioner should monitor compliance and the legislation be amended to take a gradual, escalating approach of initial warnings, fines, court summons and directors' disqualification.¹²¹ In its response, the government did not commit to the introduction of any new enforcement measures, but stressed that any enforcement measures introduced would have to take a very gradual approach in order to avoid unintended consequences.¹²² In January 2021, the government announced that organisations that failed to meet their statutory obligations under the Modern Slavery Act would face financial penalties.¹²³

¹¹² Modern Slavery Act 2015 (UK), s 40.

¹¹³ Sunil Rao *Modern Slavery Legislation* (Routledge, 2020) at 46; Lizzie Dearden "UK's first Independent Anti-Slavery Commissioner resigns citing government interference" *The Independent* (online ed, United Kingdom, 17 May 2018) <<https://www.independent.co.uk/news/uk/politics/modern-slavery-uk-commissioner-resigns-interference-kevin-hyland-government-a8356601.html>>.

¹¹⁴ Modern Slavery Act 2015 (UK), s 54.

¹¹⁵ David Monciardini, Nadia Bernaz and Alexandra Andhov "The Organizational Dynamics of Compliance With the UK Modern Slavery Act in the Food and Tobacco Sector" (2021) 60(2) *Business & Society* 288, at 290.

¹¹⁶ Modern Slavery and Human Rights Policy and Evidence Centre *Effectiveness of Section 54 of the Modern Slavery Act* (February 2021) <<https://modernslaverypec.org/assets/downloads/TISC-effectiveness-report.pdf>>, at 21.

¹¹⁷ Frank Field MP, Maria Miller MP and Baroness Butler-Sloss *Independent review of the Modern Slavery Act: final report* (United Kingdom Home Office, 22 May 2019), available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf>. A list of 80 recommendations is available at 22-29.

¹¹⁸ The Government of the United Kingdom *Government response to the independent review of the Modern Slavery Act* (United Kingdom Home Office, 9 July 2019), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815410/Government_Response_to_Independent_Review_of_MS_Act.pdf> at 10.

¹¹⁹ At 49.

¹²⁰ Sunil Rao *Modern Slavery Legislation* (Routledge, 2020) at 61.

¹²¹ At 46.

¹²² At 11.

¹²³ Foreign, Commonwealth & Development Office (UK) "UK Government announces business measures over Xinjiang human rights abuses" (press release, 12 January 2021) <<https://www.gov.uk/government/news/uk-government-announces-business-measures-over-xinjiang-human-rights-abuses>>.



7. Comparator: Australia's Modern Slavery Act

In 2017, the Australian federal government launched an inquiry into establishing a Modern Slavery Act. The inquiry findings – titled *Hidden in Plain Sight* – set out the final recommendations for an Australian Act.¹²⁴ The Modern Slavery Act was passed on 10 December 2018 and came into effect on 1 January 2019.

The Australian Modern Slavery Act 2018 (Cth) is solely about supply chains. When comparing New Zealand law with all pertinent Australian law, it is therefore all the more important to look outside the Act as well as inside, and we do so in [Section 10](#). The present section, however, considers just the Act. It applies to companies with annual revenue worldwide over AU\$100 million, thus impacting approximately 3,000 companies (Commonwealth of Australia, 2018). It also catches New Zealand businesses of that size operating there. Under the Act, companies must release a statement every 12 months on the risks of modern slavery occurring within their supply chains globally and the actions a company has taken to assess those risks (Commonwealth of Australia, 2018; Ernst & Young, 2018). The statement must be publicly available.

Legislative history

The legislative process began in February 2017 when the Attorney-General referred the matter to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT). They then tasked the Foreign Affairs and Aid Sub-Committee with conducting an inquiry. Terms of reference included considering best practice in preventing modern slavery in global supply chains and whether Australia should introduce a Modern Slavery Act.¹²⁵

In August 2017, the government released its *Modern Slavery in Supply Chains Reporting Requirement* paper. This outlined three options for the government: 1. do nothing (“business as usual”), 2. encourage business without regulating, and 3. encourage business with minimal regulation.¹²⁶ The federal government ruled out a high regulatory impact option. Like in the United Kingdom, the government preferred not to include penalties for non-compliance, as it argued that public opprobrium and pressure would be enough.¹²⁷

The report recommended penalties and compliance measures for entities that fail to report.¹²⁸ Ultimately, the Bill did not incorporate the recommendations for non-compliance penalties.¹²⁹

On 28 June 2018, the Senate Legal and Constitutional Affairs Legislation Committee was tasked with conducting an inquiry on the Modern Slavery Bill and receive public submissions.¹³⁰ The Senate Committee reported to Parliament in August and made six recommendations.¹³¹ Recommendation 4 was that a three-year review be undertaken to ensure compliance thresholds are met. The government responded by saying that a review in three years’ time would determine if compliance rates proved to be inadequate without penalties. The government also noted JSCFADT’s recommendation 3 for an Anti-slavery Commissioner but was of the view that an internal Business Unit within the Department of Home Affairs would suffice.¹³² At the second reading of the Bill, Labor MPs pressed for a penalty regime and an independent Anti-Slavery Commissioner. All such amendments were voted down.¹³³

Labor MPs were disappointed that Australia had not learnt from the example of a lack of compliance measures in the United Kingdom. The government’s position was to allow market forces to exert pressure rather than over-regulate businesses. As one expert put it, despite the “please explain” and “naming and shaming” powers of the Minister, “big business was being left to police itself, and that was not a good idea, despite the fact that some in business and the broader community had genuine passion to fight slavery.”¹³⁴

Effect of the Act

The purpose of the Act was: “to require some entities to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and [...] related purposes.” Section 16 contains mandatory criteria for modern slavery statements. The required criteria include describing the entity’s structure/operations/supply chain and the risks of modern slavery within the entity’s operations and supply chains. The reporting entity must describe what actions they have taken to assess and address those risks, including due diligence and remediation. Further, it must describe the process for determining the effectiveness of its actions and the process of consultation with subservient entities.

Explanations for failure to comply are outlined in section 16A. In the case when an entity does not issue a modern slavery statement, the Minister can request an explanation and/or request that the entity take remedial action (the “please explain” alluded to above). If the entity still refuses to comply,

¹²⁴ Joint Standing Committee on Foreign Affairs, Defence and Trade (Aus) *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (December 2017), <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf>.

¹²⁵ Sunil Rao, *Modern Slavery Legislation* (Routledge, 2020) at 62.

¹²⁶ Attorney-General’s Department (Aus) *Modern Slavery in Supply Chains Reporting Requirement* (August 2017), available at <<https://apo.org.au/sites/default/files/resource-files/2017-08/apo-nid102711.pdf>>, at 11.

¹²⁷ Sunil Rao, *Modern Slavery Legislation* (Routledge, 2020) at 70.

¹²⁸ Sunil Rao, *Modern Slavery Legislation* (Routledge, 2020) at 71.

¹²⁹ At 71.

¹³⁰ At 75.

¹³¹ Australia Legal and Constitutional Affairs Legislation Committee *Modern Slavery Bill 2018 [Provisions]* (24 August 2018).

¹³² Sunil Rao, *Modern Slavery Legislation* (Routledge, 2020) at 79-80.

¹³³ At 82.

¹³⁴ At 89.



then the Minister can publish the name of that entity (the “naming and shaming”).

Section 24 outlines the requirement for a three-year review. The review will occur as soon as practicable after 1 January 2022. As part of the review, consideration will be given to “whether additional measures to improve compliance with this Act and any rules are necessary or desirable, such as civil penalties for failure to comply with the requirements of this Act”.¹³⁵

New South Wales Modern Slavery Act

Introduction

New South Wales (NSW) was the first State in Australia to pass a modern slavery legislation. Its effect falls into three categories. First, it created an office of the Anti-Slavery Commissioner. Second, it implemented modern slavery reporting requirements for companies. Finally, it created new criminal offences relating to modern slavery.

Under the legislation, the Anti-Slavery Commissioner will be an independent office, not subject to the control of the Premier or any other Ministers in the exercise of its functions under section 9 of the Act. The Commissioner will be required to, among other things, produce an annual report which includes, inter alia, “an evaluation of the response of relevant government agencies to the recommendations of the Commissioner”; any recommendations for changes in state legislation or policy; a review of mandatory training on modern slavery provided by the NSW government to front-line government agencies, workers in non-government agencies, and the general public; and a review of NSW government policies to prohibit the viewing of child abuse material.¹³⁶ The Anti-Slavery Commissioner will be monitored and reviewed by a Modern Slavery Committee, comprising four members of the Legislative Council and four members of the Legislative Assembly.¹³⁷

The reporting requirements will apply to companies with an annual turnover exceeding AUD\$50 million. Reporting entities will be required to produce annual transparency in supply chain reports, and failure to do so may incur penalties of up to 10,000 penalty units.¹³⁸ The Anti-Slavery Commissioner is also required to publish an online register of all reports. However, it is uncertain what these annual reports will be required to include. Section 24(3) of the Act simply provides that annual reports must be prepared in accordance with the regulations, and s 34 of the Act provides that the Governor may make resolutions as is necessary to give effect to the Act. As of July 2021, no regulations have been enacted.

Six new criminal offences were created, making it an offence to use children in the production of child abuse material; administer or encourage the use of

a digital platform used to deal with child abuse material; provide information about avoiding detection of the administration or encouragement to use of such a digital platform; engage in slavery, servitude, or child forced labour; and engage in child forced marriage.¹³⁹

Legislative History

The Modern Slavery Bill was first introduced to the Legislative Council as a private member’s bill by Paul Green on 8 March 2018. It was amended on 3 May 2018, the key effect of which was to create the Modern Slavery Committee (discussed above), create an offence of trading in human tissue, prohibit government agencies from procuring products of modern slavery, and empower the Attorney-General to perform modern slavery audits of government agencies.¹⁴⁰ The Bill passed with amendments in the Legislative Council on 3 May 2018.¹⁴¹

It was then carried to the Legislative Assembly by the Hon Gladys Berejiklian MP on 16 May 2018. It was amended on 6 June 2018, the key effect of which was to limit the power and independence of the Anti-Slavery Commissioner. The Commissioner would now be independent only in the exercise of its functions under section 9 of the Act, rather than the whole Act. This may affect its independence in its other statutory functions, such as referral of potential victims to the police and other agencies, and its annual reports to Parliament. The amendments also removed the power of the Commissioner to recommend that its annual report be made public immediately. Further, the amendments significantly reduced the specificity of functions of the Modern Slavery Committee and added an exception to the transparency in supply chain requirements such that entities that are required to produce reports under the legislation of the Commonwealth or another state will not be required to produce reports under the NSW legislation.¹⁴² The Bill was passed by both Houses on 6 June 2018.¹⁴³

Effect of the Act

As of July 2021, the Act has not commenced. It is uncertain when the Act will come into force, as this is entirely at the discretion of the New South Wales government.¹⁴⁴ Amendments are needed in order to harmonise the Act with the federal legislation, and it will most likely come into force only after this harmonising work has been completed.¹⁴⁵

¹³⁵ Modern Slavery Act 2018 (Cth), s 24(1)(ab).

¹³⁶ Modern Slavery Act 2018 (NSW), s 19.

¹³⁷ Section 23.

¹³⁸ A penalty unit is defined in New South Wales as AUD\$110: Crimes (Sentencing Procedure) Act 1999 (NSW), s 17.

¹³⁹ Modern Slavery Act 2018 (NSW), Schedule 4.

¹⁴⁰ Modern Slavery Bill 2018 (NSW), Schedule of Amendments, <<https://www.parliament.nsw.gov.au/bill/files/3488/Schedule%20of%20amendments.pdf>>.

¹⁴¹ Parliament of New South Wales “Modern Slavery Bill 2018” <<https://www.parliament.nsw.gov.au/bills/Pages/Profiles/modern-slavery-bill-2018.aspx>>.

¹⁴² Modern Slavery Bill 2018 (NSW), Schedule of Amendments (LA), <<https://www.parliament.nsw.gov.au/bill/files/3488/Schedule%20of%20amendments%20LA.pdf>>.

¹⁴³ Parliament of New South Wales “Modern Slavery Bill 2018” <<https://www.parliament.nsw.gov.au/bills/Pages/Profiles/modern-slavery-bill-2018.aspx>>.

¹⁴⁴ Section 2 of the Act provides that the “Act commences on a day or days to be appointed by proclamation”.

¹⁴⁵ New South Wales Government “Modern slavery” <<https://www.nsw.gov.au/modern-slavery>>.



8. Comparison between the United Kingdom and Australian Acts, and Criticisms

Scope: Unlike United Kingdom, Australian Act addresses only supply chains

The most obvious difference between the Acts is scope. Whereas the United Kingdom has consolidated and tightened some law about other issues associated with modern slavery as well as introducing a supply chain reporting provision, Australia's Act is solely about supply chains.

Key differences on supply chains

As regards supply chains, the key differences between the United Kingdom and Australian Modern Slavery Acts concern their monetary thresholds and whether the criteria to be reported on are mandatory. The United Kingdom's Act applies to commercial organisations with a total annual turnover of £36 million that carry on a business or part of a business in the United Kingdom. The Australian Act applies to either Australian entities or entities carrying on business in Australia and which have an annual consolidated revenue of AU\$100 million.

On a basic currency conversion at the time of this writing, the Australian scheme applies a considerably higher threshold to reporting. For companies operating between the two countries, including New Zealand companies that operate in both the relevant threshold would be the lower United Kingdom amount.

While the United Kingdom has discretionary supply chain reporting criteria, Australia has mandatory reporting criteria. The United Kingdom legislation states that "an organisation's slavery and human trafficking statement may include" the specified information that it goes on to list. By contrast, the Australian legislation states that "a modern slavery statement must, in relation to each reporting entity covered by the statement" provide the specified information that it goes on to list. In terms of statutory language, the distinction between "may" and "must" is a significant point of departure. However, even in Australia, where the reporting criteria are mandatory, there is no civil or criminal penalty for non-compliance. The discretionary approach adopted by the United Kingdom represents a standard for compliance.

The common denominator between the United Kingdom and Australian Acts is that the reporting criteria are essentially the same in their content (with minor differences).

Section 54(7) of the United Kingdom Modern Slavery Act requires a company to publish its slavery and human trafficking statement in a prominent position on its website homepage. This is a good measure which the Australian legislation does not have. Further, section 54(11) has an enforceability mechanism whereby the Home Secretary can apply to the High Court for an injunction to compel a company to submit a report. While this is still quite a meek provision (and arguably ineffective if the figure of under 50 percent compliance continues to be accurate), at least there is an enforcement mechanism. In contrast, Australia just has a name and shame policy but no legal consequences for failing to comply.

Both Acts legislate only for transparency, not due diligence

In sum, neither Act is stronger or weaker in all aspects, and their scopes and structures differ. Both, of course, use the term modern slavery, although the United Kingdom does so only in the title. The Australian Act covers only supply chains. It sets a more lenient monetary threshold but imposes mandatory criteria, whereas the United Kingdom combines mandatory reporting with optional criteria. So far neither Act imposes civil or criminal sanctions for failure to report and therefore both acts are soft laws, but the United Kingdom has said financial penalties will apply and already provides for the Secretary of State to compel a report. The United Kingdom Act requires prominent publication on companies' website homepages. In both statutes, there seems to be some ambivalence, and certainly caution, gradualness and restraint, in placing obligations on companies, and considerable reliance on the power of consumer sovereignty and civil society to identify and punish companies that either fail to report or report a poor state of affairs. Much of the statutes' relative effectiveness will depend on enforcement.

Perhaps most importantly, both Acts aim only at supply chain transparency, not the more exacting level of due diligence. This is a distinction we address in section 9: [Legislative initiative by other jurisdictions](#).



Criticisms of both pieces of legislation

The modern slavery legislations adopted in the United Kingdom and Australia have both been subject to several criticisms:

1. No **definitions** of “operations” or “supply chain”.¹⁴⁶ These should include provision of credit, trading and brokerage, insurance, banking, and other such activities.¹⁴⁷ They should also make clear that supply chain applies to the whole of a company’s supply chain, not just Tier 1 and Tier 2 suppliers, for example. Much modern slavery is hidden in the labour-intensive bottommost tiers.
2. No **human rights due diligence** provisions (either as a defence to liability or as a positive obligation) which would help address broader issues of corporate behaviour and exploitation in a more general sense.¹⁴⁸ This goes to the basic shortcoming of transparency versus due diligence legislation.
3. No change in **immigration policy**, which is a major factor in sustaining modern slavery by exacerbating conditions of vulnerability, both domestically and abroad.¹⁴⁹
4. No **published list of reporting entities** that should be submitting supply chain reports, which makes it harder for NGOs, civil society, and the media to apply pressure on companies.¹⁵⁰
5. No **obligation on companies to report** the details of any modern slavery practices that are uncovered in a company’s supply chain to the relevant authorities in the jurisdiction in which the exploitation is occurring.¹⁵¹
6. No **mandatory standardised forms** which the government provides to ensure companies include all the relevant and specified content. (for example) reporting criteria.¹⁵²
7. No **effective reporting mechanisms** because supplier-provided information to firms is likely to be unreliable unless the firm independently verifies this information, for example by “[engaging] with other key stakeholders, such as frontline workers and other labour groups.”¹⁵³
8. No **sanctions** for failure to produce a modern slavery statement, failure to meet minimum reporting requirements, failure to outline steps to address modern slavery risks, or for identified cases of exploitation.¹⁵⁴
9. No **trade sanctions** on the import or use of goods or services that were produced using forced labour, slave labour, child labour, human trafficking, etc.¹⁵⁵
10. No **gender-sensitive** due diligence processes or any requirement to collect gender-disaggregated data.¹⁵⁶ New Zealand’s Plan of Action states: “It is well recognised that women and children are particularly vulnerable to being trafficked, with children making up a major share of those trafficked and women accounting for 71 per cent of all victims of modern slavery.”¹⁵⁷ [Age could therefore also be a useful disaggregate.]
11. Not enough **public procurement** regulation in 1. requiring government agencies to take steps to ensure they are not getting goods and services from modern slavery, and 2. excluding non-compliant companies from government contracts.¹⁵⁸ Government is a major purchaser.
12. Not enough **adequate remedies or compensation for victims** of modern slavery and not enough of an increase in **criminal prosecutions** of perpetrators of modern slavery (United Kingdom).¹⁵⁹
13. Not enough **independence** of the United Kingdom’s Anti-Slavery Commissioner (because in the United Kingdom the first Commissioner resigned, saying that the Home Office effectively treated the independence of the role as optional). It is also concerning that the Commissioner’s reports and strategies are subject to Home Office approval.¹⁶⁰

¹⁴⁶ Justine Nolan and Gregory Bott “Global Supply Chains and Human Rights” (2018) 24 *Australian Journal of Human Rights* 44 at 52-53.

¹⁴⁷ Olivia Dean and Shelley Marshall “A Race to the Middle of the Pack: An Analysis of Slavery and Human Trafficking Statements Submitted by Australian Banks Under the UK Modern Slavery Act” (2020) 26 *Australian Journal of Human Rights* 46 at 67.

¹⁴⁸ Justine Nolan and Gregory Bott “Global Supply Chains and Human Rights” (2018) 24 *Australian Journal of Human Rights* 44 at 44; Paul Redmond “Regulating Through Reporting” (2020) 26 *Australian Journal of Human Rights* 5 at 19-20.

¹⁴⁹ David Gadd and Rose Broad “Troubling recognitions in British responses to modern slavery” (2018) 58(6) *The British Journal of Criminology* 1440 at 1455-1456.

¹⁵⁰ Paul Redmond “Regulating Through Reporting” (2020) 26 *Australian Journal of Human Rights* 5 at 18.

¹⁵¹ Ryan Turner “Transnational Supply Chain Regulation” 17(1) *Melbourne Journal of International Law* 188 at 209.

¹⁵² Olivia Dean and Shelley Marshall “A Race to the Middle of the Pack: An Analysis of Slavery and Human Trafficking Statements Submitted by Australian Banks Under the UK Modern Slavery Act” (2020) 26 *Australian Journal of Human Rights* 46 at 67; Paul Redmond “Regulating Through Reporting” (2020) 26 *Australian Journal of Human Rights* 5 at 22.

¹⁵³ Jamie Fellows and Mark Chong “Australia’s Modern Slavery Act” (2020) 45(3) *Alternative Law Journal* 209 at 213.

¹⁵⁴ Ramona Vijayarasa “A Missed Opportunity: How Australia Failed to Make Its Modern Slavery Act a Global Example of Good Practice” (2019) 40(3) *Adelaide Law Review* 857 at 863-864.

¹⁵⁵ At 865.

¹⁵⁶ At 865.

¹⁵⁷ Plan of Action, at 2.

¹⁵⁸ Paul Redmond “Regulating Through Reporting” (2020) 26 *Australian Journal of Human Rights* 5 at 19.

¹⁵⁹ Virginia Mantouvalou “The UK Modern Slavery Act 2015 Three Years On” (2018) 81(6) *Modern Law Review* 1017 at 1017.

¹⁶⁰ At 1045.



9. Legislative Initiatives by Other Jurisdictions on Modern Slavery in Supply Chains

Recent growth in legislation driven by civil society

In recent years, civil society (and a significant number of businesses themselves) has increased pressure for governments to hold businesses to account for modern slavery practices in their supply chains. Supply chains, by their nature, are complex. Partly because compliance has been objected to as burdensome due particularly to this complexity, a legislative response has been slow in materialising; but it has now gained much momentum. The initiatives we consider are all by fellow OECD jurisdictions (and the European Union).

In addition to the United Kingdom and Australia, other governments have introduced (see Table 1) or are considering (see Appendix) legislation requiring companies to assess human rights violations in their supply chains. Many go further and address environmental and governance as well as social problems, so they are not only about modern slavery.

Key difference in terminology: “transparency” versus “due diligence”

Nomenclatures vary, but this brings us to an important distinction: between what we call respectively (reporting) transparency legislation and – more exacting – due diligence legislation – see Section 2.

The Australian and United Kingdom’s supply chains legislation is of the transparency kind. It does not sufficiently require reporting entities to assess modern slavery risks identified in their statements. Although the Acts require implementing an effective plan to assess identified modern slavery risks, aside from injunctive relief and “name and shame” provisions, there are no substantial penalties for failure to publish modern slavery statements.

For example, the European Union in 2021 adopted a proposal for the EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence. The European Commission is scheduled to draft a formal legislative proposal to the European Parliament, mid-2021. This is expected to introduce mandatory due diligence obligations. Member states would then be required to transpose the directive into national law.¹⁶¹

¹⁶¹ Gabriela Da Costa, Jennifer Marsh, Annette Mutschler-Siebert, Helene Gerhardt, and Catherine Adam “European Union Moves Towards Mandatory Supply Chain Due Diligence: Start Gearing up For New Directive” *National Law Review* (29 April 2021) <<https://www.natlawreview.com/article/european-union-moves-towards-mandatory-supply-chain-due-diligence-start-gearing-up>>.

¹⁶² “German parliament passes mandatory human rights due diligence law” (21 June 2021) Business & Human Rights Resource Centre <<https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/>>.

¹⁶³ Flora Southey “Germany outlaws human rights violations in global supply chains, but is it enough?” *Food Navigator* (online ed, 11 June 2021), <<https://www.foodnavigator.com/Article/2021/06/11/Germany-adopts-Supply-Chain-Act-but-is-it-enough>>.

¹⁶⁴ Business & Human Rights Resource Centre “Analysis & statement by German ‘Supply Chain Law Initiative’: “Not there yet, but finally at the start”” (11 June 2021) <<https://www.business-humanrights.org/en/latest-news/analysis-statement-by-german-initiative-lieferkettengesetz-not-there-yet-but-finally-at-the-start/>>.

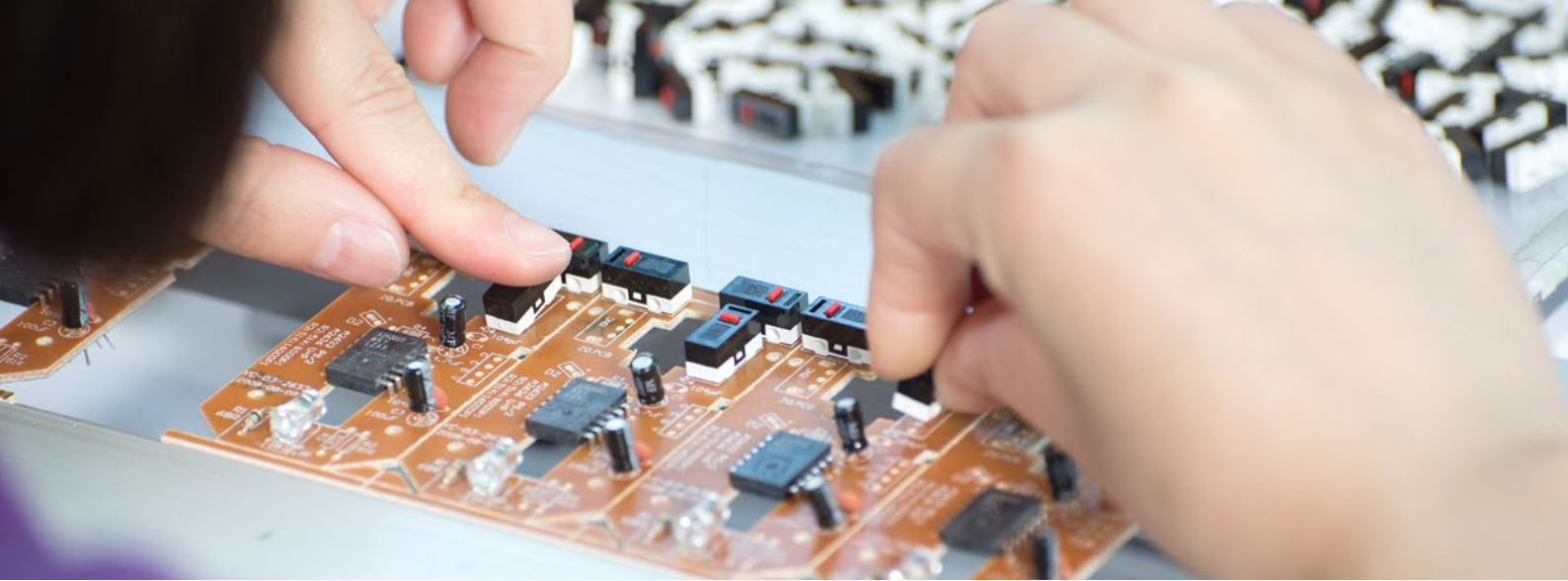
¹⁶⁵ Diego Foss “ForUMs reactions to the Norwegian due diligence law” (14 June 2021) Norwegian Forum for Development and Environment <<http://forumfor.no/en/news/2021/forums-reactions-to-the-norwegian-due-diligence-law>>.

Germany’s 2021 statute imposes fines of up to €8 million or 2% of turnover

In June 2021, the German Parliament adopted the Act on Corporate Due Diligence in Supply Chains, which comes into force in 2023. In its first year, companies with 3,000 or more employees must identify human rights violations (and risks thereof) in their direct and indirect supply chains. In 2024, the threshold lowers to companies with 1,000 employees or more.¹⁶² Civil society was a major force behind the law; however, the law was seen by some as weakened through negotiations with business associations. If companies do not meet their due diligence obligations, they can face fines of up to €8 million or 2% of their annual average turnover.¹⁶³ The Act has been described as “Not there yet, but finally at the start”.¹⁶⁴

Norway’s Transparency Act 2021 applies to 8,800 companies in a country New Zealand’s size

In June 2021, the Norwegian government passed the Transparency Act. The government began exploring the possibility of legislation requiring companies to undertake human rights responsibilities in 2017. The Transparency Act requires mid-size to large companies to undertake due diligence of their supply chains and to document their efforts to prevent or limit the risk of modern slavery. Companies are required to report on their efforts and to make this information publicly available. The Norwegian government estimated that the law would impact 8,800 companies¹⁶⁵. Norway’s population is 5.33 million, just above New Zealand’s. We suggest that in terms of the numbers of companies captured by this legislation, Norway may be considered progressive.



France stands out as a due diligence law in our terms

In contrast, the French Corporate Duty of Vigilance Law is an example of what we call due diligence legislation. It makes reporting entities liable for any harm that the effective implementation of due diligence would have prevented. Thus, it requires entities to identify and prevent modern slavery in their supply chains and provides that the “measures must be adequate and effectively implemented”.¹⁶⁶ This legal requirement applies to all an entity’s activities, including the operations of subcontractors and suppliers. Under the provisions of the French Act, an administrative liability will be imposed on the entity for failure to abide by its due diligence requirements and civil liability imposed to remedy any harm. However, the damaged parties (who are often individuals) still bear the onus of proving that there was a fault by the company; and a causative link between the fault and the damage suffered by them.¹⁶⁷

The European Coalition for Corporate Justice views the French Corporate Duty of Vigilance Law as representing “the most effective response to date to the existing business and human rights governance gaps”.¹⁶⁸ Notwithstanding, there has been criticism that French companies do not “fully recognise their legal responsibility”.¹⁶⁹

Proposed European Parliament law would go further still

According to a company advising on corporate social responsibility solutions, the proposed European Parliament legislation would go much further than even the French law:

Several EU member states, including France, Germany and the Netherlands, already operate under national policies for supply chain due diligence and ethical sourcing. None of those, however, come close to the impact of a new proposed directive adopted by the European Parliament in March. If ratified, the EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence would substantially redraw the scope of due diligence oversight with material sanctioning powers spanning EU and non-EU businesses and their supply chains.¹⁷⁰

Its language will explicitly require member countries to “ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions”.¹⁷¹ On identifying risk, a company must implement a due diligence strategy. Note here that some initiatives are taking the opportunity to go beyond issues of modern slavery to include environmental responsibility and good governance, a much broader remit.

Since neither the German Act nor the Norwegian Transparency Act addresses civil liability, they are not aligned with the French Corporate Duty of Vigilance Law (2017) and the draft legislation proposed by the European Parliament. Elsewhere in Europe, other governments are considering ways to regulate due diligence. This is not necessarily a straightforward process – in December 2020, the Swiss Responsible Business Initiative was rejected in a public referendum. Nevertheless, momentum is growing across Europe.

Uyghur Forced Labor Prevention Act

In July 2021, the United States Senate passed the Uyghur Forced Labor Prevention Act which bans the importing of products from the Xinjiang region in China due to an alleged genocide against Uyghurs and other Muslim minority groups. As at the time of writing, the bill is before the House of Representatives. If passed, responsibility would be placed on importers for ensuring their goods are not produced by forced labour.

¹⁶⁶ Sandra Cossart “What lessons does France’s Duty of Vigilance law have for other national initiatives?” (27 June 2019) Business & Human Rights Resource Centre <<https://www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives/>>.

¹⁶⁷ European Coalition for Corporate Justice “French Corporate Duty of Vigilance Law (English Translation)” (October 2017) <<https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>>; European Coalition for Corporate Justice “FAQs: French Corporate Duty of Vigilance Law” (23 February 2017) <<http://corporatejustice.org/wp-content/uploads/2021/04/french-corporate-duty-of-vigilance-law-faq.pdf>>.

¹⁶⁸ “FAQs: French Corporate Duty of Vigilance Law” (23 February 2017) European Coalition for Corporate Justice <<http://corporatejustice.org/wp-content/uploads/2021/04/french-corporate-duty-of-vigilance-law-faq.pdf>>.

¹⁶⁹ Amnesty International France “Report on first year of implementation of French duty of vigilance law finds companies must do more” (18 June 2019) Business & Human Rights Resource Centre <<https://www.business-humanrights.org/en/latest-news/report-on-first-year-of-implementation-of-french-duty-of-vigilance-law-finds-companies-must-do-more/>>.

¹⁷⁰ Ethixbase “EU Moves Toward Mandatory Supply Chain Due Diligence” (16 June 2021) <<https://ethixbase.com/eu-moves-toward-mandatory-supply-chain-due-diligence/>>.

¹⁷¹ Resolution European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), available at <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html>, at cl 8.

Table 1: Comparison of selected existing modern slavery legislation on supply chains

Country	Name of legislation	Whether modern slavery statements required	Reporting threshold	Consequences for failure to produce statements	Consequences for failure to address modern slavery risks
Australia	Modern Slavery Act 2018 (Cth)	Statement must be in a prescribed form, approved by the entity (or entities), signed by an appropriate person within the reporting entity, and filed within 6 months of the end of the reporting period.	Entities based or operating in Australia with consolidated revenue exceeding AU\$100 million.	The relevant Minister can request an explanation and/or request that remedial action is undertaken. If the entity refuses to comply, the name of the entity can be published.	No legal consequences. Public/consumer scrutiny may result.
France	Devoir de vigilance des entreprises donneuses d'ordre (Corporate Duty of Vigilance) Enacted in 2017.	Reporting entities must publish and implement an effective due diligence plan. The plan as well as a report on the implementation must be publicly available and published in the company's annual report.	All companies headquartered in France and employing more than 5,000 employees in France, or headquartered in France or abroad and employing more than 10,000 employees worldwide.	Companies can be fined up to: <ul style="list-style-type: none"> • €10 million if they do not publish their plan. • €30 million if non publication of plans resulted in damages that otherwise would have been preventable. 	Reporting entities may be liable for any harm that would have been prevented by effective implementation of due diligence.
Germany ¹⁷²	Act on Corporate Due Diligence in Supply Chains Passed 11 June 2021. Comes into effect 2023.		Companies with 3,000 or more employees must report. From 2024, the threshold is lowered to 1,000 or more employees.	A fine of up to €800,000 for non-compliant companies. Companies with average annual sales of over €500 million, will be fined up to 2% of average annual sales.	
Norway ¹⁷³	The Transparency Act Passed in June 2021.	The law will cover approximately 8,000 companies. It requires a company to undertake due diligence of the entire supply chain.	Large companies located in Norway and foreign companies selling products and services in Norway. Companies meeting two out of three criteria are covered by the Act: <ol style="list-style-type: none"> 1. At least 50 person-years 2. Turnover of at least 70 million NOK (approximately \$NZ11.8 million) 3. Balance of at least 35 million NOK 		
United Kingdom	Modern Slavery Act 2015	Statements must be: <ul style="list-style-type: none"> • approved by a board of directors • signed by a director (or equivalent) • published in a prominent position on the organisation's website. 	Commercial organisations that carry on business or part of a business in the United Kingdom. Annual turnover exceeding £36 million.	The Secretary of State can apply to the High Court for an injunction to compel a company to submit a report.	No legal consequences. Public/consumer scrutiny may result.
United States (California)	The California Transparency in Supply Chains Act 2010	Statements must be posted on the business' website with a conspicuous link to the required information placed on the business' homepage.	Retail sellers and manufacturers doing business in California with worldwide gross receipts exceeding US\$100 million.	An action brought by the Attorney-General for injunctive relief.	No legal consequences. Public/consumer scrutiny may result.

¹⁷² UNI Global Union “Human rights value chain legislation makes progress in German and Norway” (11 June 2021) <<https://uniglobalunion.org/news/human-rights-value-chain-legislation-makes-progress-german-and-norway>>.

¹⁷³ Diego Foss “ForUMs reactions to the Norwegian due diligence law” (14 June 2021) Norwegian Forum for Development and Environment <<http://forumfor.no/en/news/2021/forums-reactions-to-the-norwegian-due-diligence-law>>.



10. Legislative Status Quo and Recommendations

Based on the previous sections in this White Paper, we summarise a few important features of the legislative status quo, followed by recommendations.

Legislative key features at present

Having presented a broad overview of the international framework, New Zealand's own legal and policy framework, United Kingdom and Australian Modern Slavery Acts, and selected other countries' initiatives, we now turn to consider the areas in which New Zealand may be said to require targeted legislative and policy action.

New Zealand lags behind United Kingdom and Australia, but should prefer due diligence

At the outset, we emphasise the important limitation that the identified gaps are based largely on comparison with initiatives in Australia and the United Kingdom. As we have observed, other countries are taking significant legislative steps to address issue associated with modern slavery. It may be that due diligence legislation that goes beyond the transparency sought by both the United Kingdom and Australia is an appropriate outcome. We do not comment on this – further investigation on this may be necessary and would be warranted. In New Zealand, we consider enhancing existing legislation aimed mostly at domestic responses but with extraterritorial extensions, particularly so-far-absent measures about supply chains. The latter mainly target offending by offshore suppliers. A New Zealand Modern Slavery Act could comprehend both supply chains and wider initiatives, as the United Kingdom one does, or target just supply chains, as Australia's does. Notably, there is no international legal obligation requiring New Zealand to legislate for reporting transparency in supply chains legislation of the kind seen in Australia and the United Kingdom, nor due diligence. We are in uncharted waters, mapping transnational issues without the compass of international law.

New Zealand, Australia and United Kingdom cover mainly the same offences, but in different ways

The United Kingdom and Australian legislative frameworks are structured differently from one another. Australia's approach contains a larger number of criminal offences specific to modern slavery. In terms of criminalisation, it appears that United Kingdom, Australian and existing New Zealand legislation all cover the same offences, just in different ways. New Zealand's sentences for such offences are lower than the United Kingdom and Australian legislation. For example, the offence of slavery incurs a maximum penalty of life imprisonment in the United Kingdom legislation and 25 years' imprisonment in the Australian legislation. By comparison, the same offence in New Zealand carries a maximum penalty of 14 years' imprisonment.

Unlike Australia and United Kingdom, New Zealand regime omits supply chains

Criminalisation aside, where the current legislative framework in New Zealand primarily differs from that in the United Kingdom and Australia is that it does not contain any requirements for transparency in supply chains. Both the United Kingdom and Australian legislation provide (albeit in permissive language) that companies should produce regular reports that set out the company's exposure to risks of modern slavery within its supply chain and any actions taken to manage those risks. At the time of writing, at least 35 New Zealand companies are already reporting under the Australian Act and a lesser number under the United Kingdom statute, while statutes in other trading partners will increasingly catch the edges of New Zealand business. Otherwise, New Zealand firms are not covered by reporting requirements, prompting many large New Zealand businesses to call for domestic supply chain legislation.

Robust modern slavery legislation provides an alternative to sanctions and trade measures

In recent months a number of countries including the United Kingdom, the United States, and Canada, together with the European Union, have sanctioned officials and state institutions implicated in promoting modern slavery.¹⁷⁴ In January 2021, responding to reports of forced labour in northwest China, the United States banned imports of cotton and tomato products originating in Xinjiang. In July this year, a bill prohibiting the import of all products from Xinjiang not proved to be forced-labour free was unanimously approved by the Senate and will proceed to consideration by Congress later this year.¹⁷⁵ Similarly, in Australia, a private member's bill banning the importation of products incorporating slave labour was very recently passed by the Senate and awaits passage through Parliament's lower house.¹⁷⁶ Measures of this kind present significant economic and diplomatic challenges to a small open economy like New Zealand. It goes beyond the remit of the current report to evaluate economic sanctions or trade policy instruments adopted in comparator jurisdictions. However, the authors observe that state-of-the-art modern slavery legislation establishing clear and binding obligations on private enterprise with respect to their business relationships reduces the need for New Zealand to resort to similar interventions.

¹⁷⁴ Under relevant national sanctions regimes asset freezes and travel bans are imposed on several Chinese government officials and the Xinjiang Production and Construction Corps Public Security Bureau.

¹⁷⁵ H.R. 1155, Uyghur Forced Labor Prevention Act.

¹⁷⁶ Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2021.

Recommendations

Introducing modern slavery legislation

Background

A central theme connecting most of the recommendations we put forward is a preference for the development of bespoke legislation as opposed to a transference of Australian (or other) legislation. Along with common features, there are significant differences and specificities characteristic for each country/jurisdiction and we emphasise that the latter need to be paid careful due attention to.

We recommend a bespoke approach is required when implementing modern slavery legislation in New Zealand. Relatively speaking, New Zealand is a geographically isolated trading nation. It holds a special place, and enjoys close connections to the Asia-Pacific (one of the worst areas in the world in terms of modern slavery statistics). Its business landscape is dominated by SMEs, not by large companies and/or multinational corporations. Furthermore, New Zealand's national market is small by international standards and accounts for a fraction of the revenues of our largest companies. It is not clear to what extent domestic consumer awareness of offences in supply chains will act as a stimulant to remedial action. Thus, to simply graft even the "best" of international initiatives and practices onto New Zealand law would be simplistic and would not guarantee fitness for purpose. Instead, the objective should be to take into serious consideration the distinct features of the New Zealand context and fit in with the rest of our law, however, that might be different and ensure how this fit with the goals of harmonisation.

Recommendation 1: Introduce due diligence legislation, not United Kingdom- or Australia-style transparency

Commentary: Neither the United Kingdom nor the Australian legislation requires companies to take any direct action to remove modern slavery from their supply chains. Both aspire only to transparency. By contrast, for an existing model of due diligence legislation the previous section: [Legislative initiatives by other jurisdictions](#) has noted in particular the French 2017 Act, but, out of the legislation we have selected, eyes should be on the draft EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence discussed in the same section. Notably a 2020 report for the European Commission when contemplating the way forward found that reporting obligations would have only "minor positive social impacts".¹⁷⁷ By contrast, "[s]ocial impacts from [new regulation requiring mandatory due diligence as a legal duty of care] are expected to be most significant because the regulatory options require due diligence practices",¹⁷⁸ and "[s]imilarly, the human rights and environmental impacts from [new regulation requiring mandatory due diligence as a legal duty of care] are expected to be most significant".¹⁷⁹ The report nevertheless added: "However, the magnitude and the type of social impacts depends on the design and application of the new regulation, on the social issues which are addressed by the regulation, as well as on the effectiveness of the enforcement mechanisms"¹⁸⁰ and likewise positive human rights and environmental impacts would be "dependent on proper monitoring and enforcement".¹⁸¹

Existing legislation imposing supply chain reporting obligations on private enterprise apply only to larger companies, defined by a specified threshold. The next generation of legislation imposing duties on firms with respect to modern slavery is likely to apply to all firms, regardless of size. The due diligence principle recognises that what is reasonable to expect of a large MNE with respect to auditing, reporting, and remediation may be far beyond the means of an SME. Accordingly, a company defending itself against allegations of complicity in human rights abuses need not show that it has met or exceeded a standard set by global corporations, but has done what might be reasonably expected of an enterprise of its size, industry, and dominant business model.

¹⁷⁷ European Commission Directorate-General for Justice and Consumers "Study on due diligence requirements through the supply chain, Final report". <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>> at 23.

¹⁷⁸ At 23.

¹⁷⁹ At 23.

¹⁸⁰ At 23.

¹⁸¹ At 23.

¹⁸² This approach is consistent with academic literature. See for example: Robert Caruana and others "Modern Slavery in Business: The Sad and Sorry State of a Non-Field" (2021) 60(2) *Business & Society* 251; Nicole Siller "'Modern Slavery': Does International Law Distinguish between Slavery, Enslavement and Trafficking?" (2016) 14 *Journal of International Criminal Justice* 405.

¹⁸³ Ormiston "Holding Transnational Corporations to Account" at 167-168.

This recommendation goes further than MBIE's Plan of Action and consciously so.

Recommendation 2: Define "modern slavery" in the context of New Zealand and specify the core criteria of modern slavery legislation

Commentary: For the purposes of this White Paper, we have used modern slavery as an omnibus concept, referring to a range of exploitative activities attracting the sanction of the criminal law.¹⁸² We accept that there is rhetorical value in the term, that it is in common use among various key groups both domestically and internationally, and that it can be made sufficiently meaningful. We recommend that thorough consideration is given to defining this term in a New Zealand context to ensure it is fit for purpose. The definition must also capture the experience of temporary migrant workers, particularly those on employer-sponsored visas, which makes them vulnerable to exploitation.

We are cautious about advocating for the creation of a "gold standard" modern slavery act. This is an inherently transnational issue, with potentially vast economic and social impact across many countries. We suggest that a cautious, harmonised approach is what is needed. A "gold standard" may create further normative dislocation – and New Zealand should be wary of this.

Recommendation 2 is supported by the following sub-recommendations.

Recommendation 2a: Introduce disclosure obligations

Commentary: Create regular disclosure obligations on actions taken to eradicate modern slavery specifically, and human rights abuses more generally within a company's supply chain. Create regular reporting requirements reflecting on any potential detected for modern slavery.

Recommendation 2b: Define human rights abuses

Commentary: Broadly define human rights abuses to include not just slavery, human trafficking and forced labour but also employment rights abuses and immigration abuse.

Recommendation 2c: Introduce an extraterritorial penalty regime

Commentary: Introduction of an extraterritorial penalty regime similar to the Illegal Logging Prohibition Act 2012 (Cth) whereby the importation of goods into New Zealand through supply chains that contain human rights abuses is subject to sanction.¹⁸³

Recommendation 3: Consider the global context of modern slavery legislation

Commentary: In the absence of an international legal standard governing the modern slavery regime, certain common factors may be observed. These might be considered an indication as to state practice, and a suggestion of global normative trends. We suggest that common features can be found through an analysis of the Australian and United Kingdom experiences with modern slavery legislation, even though we advocate the stronger species of due diligence legislation rather than stopping at requiring reporting transparency. We recommend that close and cautious consideration be given to these trends.

New Zealand should investigate more

Background

The New Zealand legislative framework covers similar ground to the United Kingdom and Australia in terms of relevant criminal offences. Noting the difficulties inherent in comparing efforts toward prosecution between jurisdictions, we note that intuitively, New Zealand appears to investigate and prosecute a relatively low number of cases of trafficking. In 2019, New Zealand investigated eight potential cases of trafficking, initiated no new prosecutions,

and convicted two traffickers.¹⁸⁴ By comparison, in the same period, Australia investigated 213 possible cases of trafficking, initiated nine new prosecutions, and convicted three traffickers. The United Kingdom investigated 1,090 potential cases of trafficking, initiated 349 new prosecutions, and convicted 251 traffickers.¹⁸⁵ We observe that this issue is a live one in the mind of policy makers. The Plan of Action suggests: “Further research is needed to better understand the nature and prevalence of forced labour, people trafficking and slavery in New Zealand. Current estimates on the extent and nature of these hidden crimes are derived from overseas experience, which does not align with New Zealand’s experience to date.”¹⁸⁶

This disparity in the number of investigations raises questions – either there is significantly less modern slavery and human trafficking occurring in New Zealand; or potential cases of modern slavery and human trafficking are not being recognised and investigated as such. The prevalence of exploitative employment practices recorded in Employment Court decisions¹⁸⁷ suggests that the first possibility is unlikely to be correct. Indeed, the US Department of State Trafficking in Persons Report 2021 notes that “[t]he labor inspectorate investigated forced labor complaints but worked mainly within the civil legal system, contributing to the lack of criminal prosecution of forced labor crimes.”¹⁸⁸ Therefore, any progress in this regard may have to come from policy or operational changes rather than legislative changes. The Plan of Action states (as one of the goals behind its key actions) there is a need to “[e]fficiently and effectively enforce the law to disrupt and prosecute the people involved in forced labour, people trafficking and slavery, in a way that keeps victims at the centre of the response and deters future exploitation”.

Recommendation 4: New Zealand should criminalise forced labour more completely, like Australia and United Kingdom

Commentary: One aspect of modern slavery that New Zealand’s Crimes Act 1961 fails to sufficiently criminalise is forced labour. Despite the broad definition of slavery in section 98 Crimes Act and judicial consideration of the issue in *R v Matamata*, there are conceivable situations of forced labour that would not rise to the threshold under section 98, requiring an alternative pathway for prosecution (such as via the offence of human trafficking). By comparison, forced labour is explicitly prohibited in the United Kingdom and Australia. In the United Kingdom, section 1(1)(b) of the Modern Slavery Act 2015 states that it is an offence to “[require] another person to perform forced or compulsory labour”. Similarly, in Australia, section 270.6A of the Criminal Code Act 1995 states that it is an offence to “[cause] another person to enter into or remain in forced labour”, or to conduct any business involving the forced labour of another person.

Recommendation 5: New Zealand should emulate Australia in capturing transnational forms of debt bondage

Commentary: Current New Zealand legislation also differs from the Australian criminal code in that the New Zealand definition of debt bondage does not include as an independent qualifying criterion where the debt owed is manifestly excessive.¹⁸⁹ This seems to be a significant oversight because many instances of worker exploitation involve migrant workers who often enter into substantial debt to migrate to New Zealand. These workers are also not always protected under the Wages Protection Act 1983 (prohibiting premiums for employment), as in *Mehta v Elliott (Labour Inspector)* it was held that premiums paid outside New Zealand could not be recovered.¹⁹⁰

Recommendation 6: New Zealand should consider implementing a statutory defence of [being a victim] of human trafficking

Commentary: The New Zealand legislative framework may also fail to protect victims of human trafficking and modern slavery adequately. The United Kingdom legislation introduces a defence for victims of human trafficking who are compelled to commit offences of any kind.¹⁹¹ In contrast, the New Zealand legislative framework (and common law) has no such provisions, resulting in victims of human trafficking being prosecuted for offences committed as a result of their status as trafficked persons. For example, in *R v Setiadi*, the defendant Mr Deny Setiadi was sentenced for aiding in the trafficking of seven migrant workers. All of them entered New Zealand illegally on false photo substituted passports. Despite having acted as victims of trafficking, all seven migrants had been prosecuted and imprisoned for offences relating to those passports.¹⁹²

In addition to the legislation providing a defence for offences committed, the United Kingdom policy framework also requires that the Crown Prosecution Service first consider whether there is reason to believe that the person is a victim of trafficking/slavery. This may also assist in the identification of cases of human trafficking and/or modern slavery.¹⁹³ Notably, the Plan of Action “aims to take a victim-centred approach to its actions” and on the same page enunciates as one of the goals underlying those actions: to “[i]dentify, assist and support victims of forced labour, people trafficking and slavery”.¹⁹⁴

It is apparent that in some cases, victims of human trafficking are themselves being prosecuted for offences (of any kind) which they committed as a direct result of being trafficked. We recommend that either a defence be created, perhaps following the United Kingdom example, or that consideration be given to the introduction of legislative provisions requiring a prosecutor to give thought to whether a prosecution of a victim of trafficking is in the interests of justice.

Commitment to international obligations

Recommendation 7: Consider ratification of additional ILO instruments

Commentary: New Zealand has not yet ratified certain ILO instruments. New Zealand is not bound by these unratified Conventions, although in some instances its law may meet or exceed the standards set out therein. However, every ratification of these norms adds to their influence within the international community. Furthermore, ratification ensures that New Zealand adopts a vigilant position, minimizing the possibility even of labour rights abuses deemed unlikely to occur here. Recent cases of trafficking, modern slavery, and labour exploitation in New Zealand indicate that former complacency was misplaced. New Zealand should not risk becoming a haven for practices identified as tangible risks by the ILO’s Conventions. We recommend that in particular, the government consider ratification of ILO Convention 143 — Migrant Workers (Supplementary Provisions) Convention, 1975.

¹⁸⁴ United States Department of State 2020 *Trafficking in Persons Report* (June 2020) at 372.

¹⁸⁵ At 512.

¹⁸⁶ Plan of Action, at 16.

¹⁸⁷ Discussed above.

¹⁸⁸ United States Department of State 2021 *Trafficking in Persons Report* (June 2021) at 417.

¹⁸⁹ Criminal Code Act 1995 (Cth), s270.1A.

¹⁹⁰ *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451.

¹⁹¹ Modern Slavery Act 2015 (UK), s 45. See also *VCL and AN v The United Kingdom* (applications nos. 77587/12 and 74603/12), Council of Europe: European Court of Human Rights, 16 February 2021.

¹⁹² *R v Setiadi* (HC Napier, CRI 2005-041-002770, 1 June 2006). We note that there is no requirement in the Solicitor General’s Prosecution Guidelines to consider whether a person is a victim of trafficking.

¹⁹³ Crown Prosecution Service, “Human Trafficking, Smuggling and Slavery” (30 April 2020) <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>>.

¹⁹⁴ Plan of Action, at 8.

Appendix 1:

Selection of countries considering legislation to address modern slavery

Country	Is legislation being contemplated?	What form will this take?	Stage of legislation?	What will the reporting threshold be?	Penalties for failure to report
Belgium ¹⁹⁵	In 2021, Parliament voted in support of a due diligence bill proposal.	Companies operating in Belgium to address human rights violations and alleviate the risk of social and environment abuses in supply chains.			
Canada ¹⁹⁶	Bill S-216, An Act to enact the Modern Slavery Act and to amend the Customs Tariff (the Bill), was introduced to the Senate on October 29, 2020.	Entities must within 180 days after the end of the financial year, provide the Minister with a report. The report must also be published in a prominent place on the entity's website.	In progress – Second reading on 30 March 2021.	An entity that is listed on a stock exchange in Canada or does business in Canada, and meets at least two of the following conditions in one of its two most recent financial years: <ul style="list-style-type: none"> i. at least CA\$20 million in assets, ii. at least CA\$40 million in revenue, iii. employs an average of at least 250 employees. 	The Minister may require the entity to take necessary measures to ensure compliance. Failure to comply (or making a false or misleading statement) is an offence punishable, with a fine of up to CA\$250,000. Any officer, director or agent is liable if they have directed, authorised, agreed, or participated in any offence under the Act.
European Union ¹⁹⁷	In 2021, adopted a proposal for the EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence	Mandatory due diligence of supply chains.	Expected to be approved in 2022.	Applies to companies doing business in the EU.	
Netherlands ¹⁹⁸	Dutch Child Labour Due Diligence Law [Wet Zorgplicht Kinderarbeid]	Published in an online public registry.	Passed in May 2019 and will come into effect in mid-2022.	All companies that sell or supply goods or services to Dutch consumers, with no exemptions for legal form or size.	Failing to file a declaration can be fined a minimum of €4,350. Failure to comply can be subject to fines of up to €870,000, or 10% of total worldwide revenue. If a company receives two fines within five years, the responsible company director can be imprisoned for up to two years.
Netherlands ¹⁹⁹	Bill for Responsible and Sustainable International Business Conduct. Proposes replacing the Dutch Child Labour Due Diligence Law.			Due diligence on companies that meet two of three criteria: <ul style="list-style-type: none"> • 250 employees • €40 million net turnover • €20 million assets 	
United States (Federal)	A Business Supply Chain Transparency on Trafficking and Slavery Act has been introduced on several occasions, most recently in 2018.		Failed to pass as at 30 June 2021.	Any entity with annual worldwide global receipts in excess of US\$100,000,000.	To be determined by the Securities and Exchange Commission.

¹⁹⁵ Business and Human Rights Resource Centre, "Belgium: Parliament takes first steps towards due diligence legislation by voting in favour of law proposal" (22 April 2021), <<https://www.business-humanrights.org/en/latest-news/belgium-parliament-takes-first-steps-towards-due-diligence-legislation-by-voting-in-favour-of-law-proposal/>>.

¹⁹⁶ Gary Clark, David Price, Spencer Williams, "Canadian Modern Slavery Bill Would Cast a Wide Net on Supply Chain Transparency Practices" (Lexology, 9 June 2021) <<https://www.lexology.com/library/detail.aspx?g=a8d7e5a2-f872-43c8-a4aa-67754414b504>>.

¹⁹⁷ United Nations Office of the High Commissioner for Human Rights, "EU Mandatory Human Rights Due Diligence Directive: Recommendations to the European Commission" (2 July 2021) <<https://www.ohchr.org/Documents/Issues/Business/ohchr-recommendations-to-ec-on-mhrdd.pdf>>.

¹⁹⁸ "Mandatory human rights due diligence laws: the Netherlands led the way in addressing child labour and contemplates broader action" Allen & Overy (2 September 2020) <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/mandatory-human-rights-due-diligence-laws-the-netherlands-led-the-way-in-addressing-child-labour-and-contemplates-broader-action>>.

¹⁹⁹ Business and Human Rights Resource Centre, "Dutch Bill on Responsible and Sustainable International Business Conduct" <<https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/dutch-bill-on-responsible-and-sustainable-international-business-conduct/>>.