UNSHACKLING LAWS AGAINST SLAVERY

LEGAL OPTIONS FOR ADDRESSING GOODS PRODUCED WITH TRAFFICKED AND SLAVE LABOUR

STOP THE TRAFFIK
PEOPLE SHOULDN'T BE BOUGHT & SOLD

Uniting Church in Australia
SYNOD OF VICTORIA AND TASMANIA

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SECTION ONE: INTRODUCTION

1. EXECUTIVE SUMMARY

There can be no doubt there are goods entering Australia that are produced using slavery or trafficked labour.

While not specifically on slavery and trafficked labour, the US Department of Labor has identified a wide range of goods that involved the use of forced labour and exploited child labour that are imported into the US. The most common agricultural products identified were: cotton, sugarcane, tobacco, coffee, rice and cocoa.[1]

Many of the same goods from the same countries are imported into Australia. For those goods where trade figures exist, over $600 million of goods in categories where there is a risk forced labour or exploited child labour were used in the production were imported into Australia in the 2009 – 2010 financial year. Goods imported into Australia where forced labour may have been used in the production of the goods include cocoa, bricks, pavers, cotton clothing and fabric, carpets, rice, palm oil, and embroidered textiles. Forced labour is a wider category than slavery and trafficked labour, but will include instances of both.

Slavery, Human Trafficking, the Law and International Treaties

While the Australian Government has made it an offence for any Australian individual or company to engage in any financial transaction involving a slave, regardless of where it occurs in the world, no effort is currently made to identify Australian companies importing goods that involve the use slavery in their production. The result is that no Australian company has been prosecuted for being associated with slavery in the production of goods they have imported and sold.

Slavery is recognised internationally as a serious criminal offence, and human trafficking is achieving similar recognition. Other countries around the world, especially the US, are taking slavery and human trafficking in the supply chains of companies with growing seriousness and introducing measures to address the problem.

Goods produced with the involvement of slavery or trafficked labour meet the international definition for the proceeds of crime. Australia is a State Party to the *UN Convention against Transnational Organised Crime* (UNTOC) and the *UN Convention Against Corruption* (UNCAC). Article 2 of UNTOC and Article 2 of UNCAC defines "Proceeds of Crime" as "any property derived from or obtained, directly or indirectly, through the commission of an offence". By this definition, goods produced through the use of slavery and trafficked labour and any revenue generated from the sale of such goods are proceeds of crime

International treaties that Australia has signed up to create an obligation for Australia to take reasonable steps to prevent companies from profiting from these crimes through the sale of goods that have involved slave labour or trafficked labour in their production. Furthermore, these treaties justify the Australian Government requiring companies to take steps to ensure their products are free of slave and trafficked labour.

One of the reasons Australia needs to act is law enforcement is inadequate in combating slavery and human trafficking in a number of countries that Australia imports goods from. While many of these countries have made commendable efforts to combat slave and trafficked labour, support from the demand side of the equation by consumer countries like Australia would assist in eradicating these abuses.

One of the arguments against taking action in relation to the importation or sale of goods produced using slavery and human trafficking, is the fear of breaching World Trade Organisation (WTO) requirements. However, article XX paragraphs (a), (b) and/or (e) of

1 US Department of Labor, Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, 'The Department of Labor's List of Goods Produced by Child Labor or Forced Labor', 2009 and US Department of Labor's Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, 'US Department of Labor's List of Goods Produced by Child Labor or Forced Labor', 2011.

the General Agreement on Tariffs and Trade (GATT) constitutes an exception to WTO rule. Decisions by the World Trade Organisation (WTO) panel and WTO Appellate Body (WTOAB) indicate that article XX is a sufficiently broad exception to allow legislation to be adopted that restricts the importation of goods on the grounds of slavery and human trafficking. This applies even in circumstances that involve the labour practices outside a state's jurisdiction, provided the restrictions are applied in a non-discriminatory manner.

Measures to Combat Slavery and Human Trafficking involved in Goods Imported to Australia

Legislation requiring Corporate Engagement

The Federal Government could introduce legislation that requires it to engage with companies and work with them towards the elimination of slavery and human trafficking within their supply chains. This would include assisting industries to establish mechanisms to achieve this end. This type of legislation already exists in the US.

The *Trafficking Victims Protection Reauthorization Act (2005)* directs the US Government to work with the industries involved in the production, importation and sale of products, identified by the International Labor Affairs Bureau (ILAB), to "create a standard set of practices that will reduce the likelihood that such persons [industry] will produce goods using forced or child labor". Furthermore, it directs the U.S. Government to "consult with other departments and agencies of the US Government to reduce forced and child labor internationally and ensure that products made by forced and child labor in violation of international standards, are not imported into the US".

The US *Food and Energy Security Act 2007* required the establishment of a Consultative Group to Eliminate the Use of Child Labor in Imported Agriculture, that is made up of representatives of industry, academics and non-government organisations with expertise in combating child labour.

Corporate Codes and Reporting

Voluntary codes do not appear to have resulted in Australian companies and businesses identifying the risk that products they are importing may contain human trafficking or slavery in their production. There is concern that voluntary codes allow companies too much flexibility in when they report, how much they report and what indicators are used. In some cases, voluntary reporting has become a public relations strategy, more concerned with improving a company's image rather than facilitating any real sense of transparency. Voluntary initiatives lack monitoring, accountability or enforcement mechanisms.

ASX listing rule 4.10.3 requires companies to provide a statement in their annual report disclosing the extent to which they have followed the 28 ASX Council Recommendations, framed under eight Principles of Good Governance. These principles mean that corporations are expected to report on company impacts on stakeholders. Reputational concerns, such as the presence of slavery or human trafficking in a supply chain, should be linked to investor confidence and thus there should be an expectation of disclosure of the risk of such abuses. However, in reality the ASX mechanism does not require disclosure of such human rights abuses in a corporation's supply chain.

The *Corporations Act 2001* contains no explicit obligations for companies and their directors to report on the risks of slavery or human trafficking in their supply chains. Although the provisions of the Act have been interpreted to be permissive of corporate social responsibility, the maximisation of shareholder wealth remains the major consideration for directors. Directors may only take human rights concerns into account if they are relevant to the ongoing success of the business. It is therefore open to directors to address issues of human trafficking and slavery in the supply chain of their businesses if it will enhance the business.

Aside from small proprietary companies, all Australian corporations are obliged to lodge annual reports with the Australian Securities and Investment Commission, which could provide an avenue through which reporting on the risks of slavery and human trafficking in supply chains could be required.

One step to help combat trafficking and slavery in supply chains would be to require those industries where there is substantial risk of slavery or human trafficking in the supply chain, to mandatorily report on what steps they are taking to mitigate the risk of these human rights abuses. For mandatory reporting to have any impact on slavery and human trafficking, the system would require reporting on the whole supply chain, rather than just the corporation itself.

In September 2010, California signed into law the *Supply Chain Transparency Act (SB657)* that requires retailers and manufacturers operating in California and having annual worldwide gross receipts that exceed US$100 million in annual revenue to publicly report on voluntary efforts they are taking to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. The information must be made easily accessible on the company's website. The law takes effect from 1 January 2012.

Denmark's *Act amending the Danish Financial Statements Act (Accounting for CSR in large businesses)* of December 2008 has made it mandatory for the country's 1,100 largest businesses and state-owned companies to report on their corporate social responsibility actions.

Mandatory Codes of Conduct

A mandatory code of conduct could be used to require industry to meet certain standards that seek to eliminate slavery and human trafficking from the supply chains of goods imported into Australia. Such a code could vary from simply requiring a company to develop its own code that addresses principles required in the legislation, to a highly proscriptive code that outlines exactly what a company must do.

The *Competition and Consumer Act 2010* allows for the introduction of prescribed mandatory industry codes of conduct and prescribed voluntary industry codes of conduct. A mandatory code under the *Competition and Consumer Act* would be appropriate where an industry, or significant parts of the industry, have resisted 'light-handed' approaches that seek to have them address slave labour or trafficked labour in their supply chain.

Labelling Products at Risk of Slavery in their Supply Chain
The Commonwealth Government could require products at risk of slavery or trafficked labour in their supply chains to carry labels. Such labelling could either be:

- Labelling that indicates that a product meets a specified level of certification to ensure it is free of slavery and trafficked labour in its supply chain, which by implication indicates that products of the same type (for example chocolate) that do not bear the label have a much greater risk of such abuses having occurred in their production; or
- Labelling that bears a warning to consumers that slavery or trafficked labour may have been involved in the production of the product in question. A company can avoid having to include such a label on its packaging if it can demonstrate it has taken certain steps to ensure slavery and trafficked labour are not involved in the production of its product.

An example of government managed labelling related to socially responsible production and respect for international labour standards in producing countries is the Belgian Social Label. In order to be awarded the label, companies must demonstrate compliance with core ILO standards, including the prohibition of forced labour, the right to freedom of association, and the prohibition of child labour.

There are three key reasons why such a compulsory labelling system should exist for products involving slave labour. First, voluntary schemes are ineffective, as only a small amount of product so far has been certified as free from slave and trafficked labour through voluntary schemes even where there is a significant risk of these abuses existing in the supply chain. Secondly, it is likely many Australian consumers would like to avoid purchasing products where there is a significant risk slavery is involved in the supply chain without having to do detailed research of their own. Third, there is Australian precedent for a compulsory labelling system that responds to ethical consumer concerns.

However, mandatory labelling measures may be considered to be "technical regulations" and would thus need to comply with elements of the WTO Agreement on Technical Barriers to Trade, such as being no more trade restrictive than necessary to fulfil a legitimate objective.

Mandatory Certification of Products
The strongest regulatory response that can be made with regards to a product in which slavery or trafficked labour may have been involved in its production would be to legislate a certification process or require a certification process that meets certain characteristics in order for the goods to be permitted to be sold in Australia. For example, legislation might require certain goods are subject to an independent audited certification process with regular unannounced inspections of the places of production to ensure slavery and human trafficking are not used in the production of the goods. Such mandatory certification schemes have been required by Australia for specific goods, such as diamonds and timber coming from conflict zones in Africa. The Gillard Government has promised a legislated certification requirement for timber and wood products to ensure they are not illegally sourced. There are numerous examples of legislated certification required on products in response to human rights and environmental concerns in other countries around the world. These include the US *Lacey Act* that ensures that timber and wood products imported into the US are not illegally sourced and the Kimberley Process to combat the trade in conflict diamonds.

Commonwealth Procurement
A very direct way the Australian Government can withdraw its support from companies failing to demonstrate adequate action to address the possibility of slavery or human trafficking in their supply chain is through excluding such companies from government procurement. Although the Australian Government currently has ethical standards in place for procurement, no specific standard is in place which addresses trafficked or slave labour in the production of goods.

The principle Act governing procurement at the Commonwealth level is the *Financial Management and Accountability Act 1997* (FMA Act). S 44(1) of the FMA Act requires Chief Executives of Federal agencies to promote 'efficient, effective and ethical use' of Commonwealth resources 'that is not inconsistent with the policies of the Commonwealth'.

Paragraph 6.22 of the 'Commonwealth Procurement Guidelines' states that:

> *Agencies must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.*

However, STOP THE TRAFFIK believes the Federal Government should provide guidance and leadership in implementing policies designed to ensure public resources do not support companies that have trafficked or slave labour in their supply chains. The requirement should be for companies to demonstrate they have taken reasonable steps to ensure their products are free of slavery and trafficked labour, rather than requiring a government agency to have to gather evidence that the company has such human rights violations in its supply chain. The latter option is likely to be highly ineffective, as most government agencies will only have the resources to detect the most obvious cases of trafficking and slavery in the supply chains of their suppliers.

US Executive Order (EO) 13126 on the 'Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor' provides an example of what an Australian Government procurement process could be modelled on. It applies to purchases made by the US Federal Government, and is designed to ensure 'executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by forced or indentured child labor'.2 Contractors are required to certify a product to be sold to the US Government is free of forced or indentured child labour where the product is on a list of goods identified as being at risk of having such abuses in its supply chain.

2 *Executive Order 13126 of June 12, 1999*, § 1. In particular, the laws listed in Section 1 are the *Tariff Act of 1930*, 19 USC § 1307, the *Fair Labor Standards Act*, 29 USC § 201 *et seq*, and the *Walsh-Healey Public Contracts Act*, 41 USC § 35 *et seq*.

Civil and Criminal Litigation

STOP THE TRAFFIK Australia doubts that enhancement of the ability to prosecute companies through civil or criminal cases in the courts would be an effective mechanism to curb the importation of goods into Australia involving slavery or human trafficking in their production. The barriers to mounting such cases are significant. First, laws would need to hold corporations accountable for their entire supply chain, which will often include suppliers that are not directly under the corporation's control. Such laws would need to make companies vicariously liable where it has not taken reasonable action to ensure its supply chain is free of slavery and human trafficking. This could be done by enhancing the offence of aiding and abetting the crimes of slavery or human trafficking.

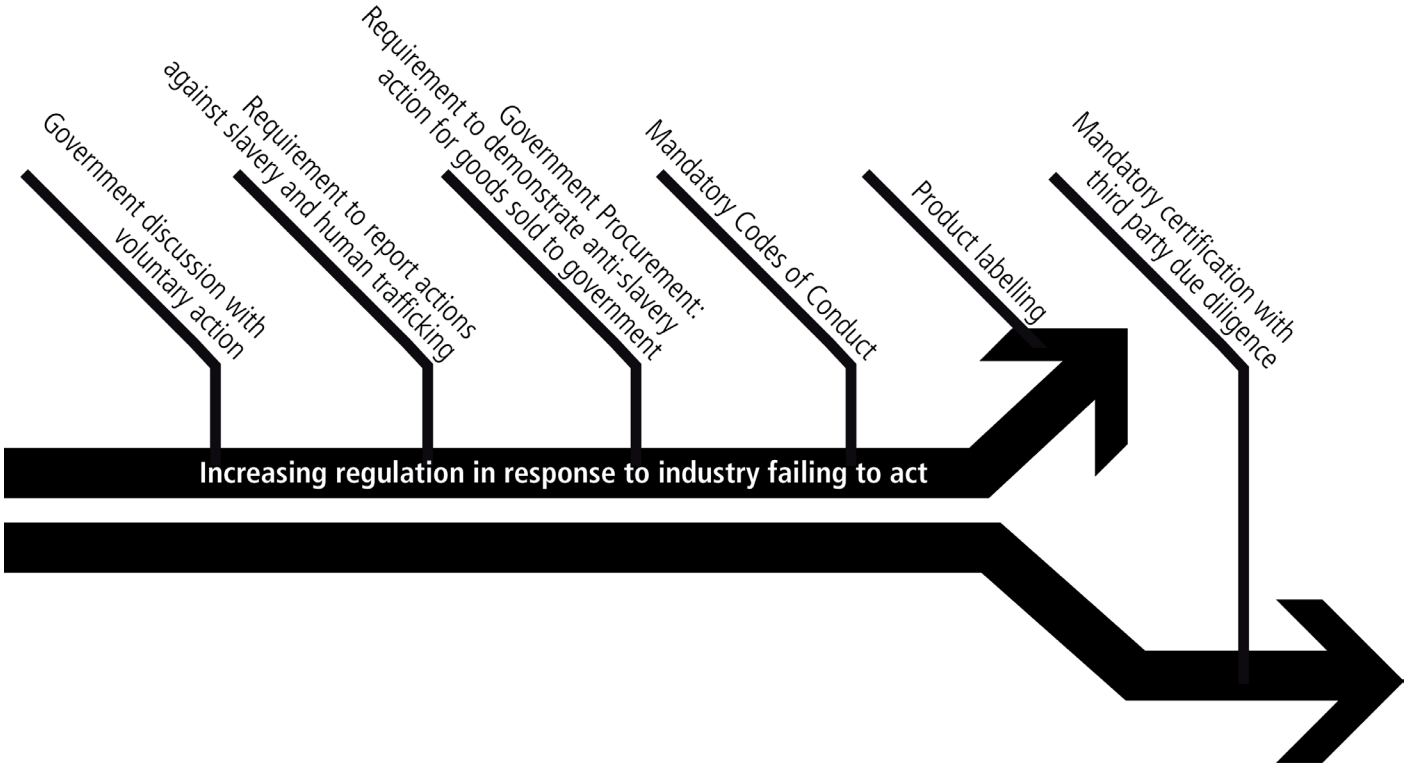
Nevertheless, even if the law allows for liability, there will be problems with gathering evidence of the offence which will have taken place in another country, and significant costs are likely in prosecuting such cases.

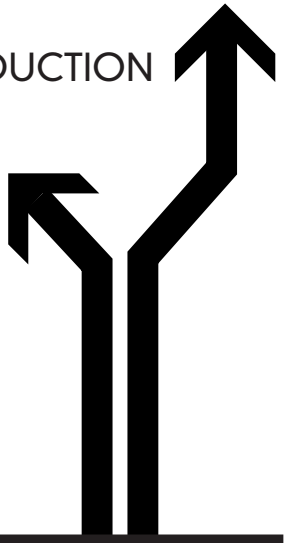
In the case of civil action, victims of slavery and trafficking will almost certainly lack the resources to mount a civil action and are likely to be left dependent on the ability of a non-government organization to take up their case. However, as Australian law allows for the awarding of costs against an unsuccessful plaintiff, few Australian non-government organizations would be likely to risk being involved in such a case.

Summary of Options Available to the Australian Government

In summary, the options available to the Australian Government to take action to deal with slavery and human trafficking involved in the production of goods imported into Australia include:

- Conducting research and publicly reporting on goods where there is a reasonable risk that slavery or human trafficking may have been involved in the production of the goods;
- Establishing a consultative committee of academics, non-government organisations and relevant industry bodies to advise government on actions needed to combat slavery and human trafficking involved in the production of goods imported into Australia;
- Introducing legislation that requires Government to engage with industries to create a standard set of practices that reduce the likelihood that slavery or human trafficking is involved in the production of imported goods, for goods where there is a reasonable risk of these abuses being present;
- Denying the services of the Export Finance and Insurance Corporation (EFIC) where a company fails to meet the required standard of demonstrating they have taken reasonable action to ensure their supply chain is free of slavery and human trafficking;
- Requiring companies to mandatorily report on what steps they are taking to mitigate the risk of human rights abuses, where there is substantial risk of slavery or trafficking being in the supply chain;
- Introducing mandatory codes of conduct that require action to reduce abuses where an industry fails to take adequate action to address serious risks of slavery and human trafficking in the supply chain;
- Requiring products to be labelled, either to indicate a product meets a certain standard in ensuring its supply chain is free of slavery and human trafficking, or warning labels for products where there is a significant risk slavery or human trafficking was involved in the supply chain;
- Legislating mandatory certification schemes for products where there is a high risk of slavery or human trafficking being present in their supply chains and where the industry has failed to take adequate and reasonable action to significantly address the abuses; and
- Amending the *Financial Management and Accountability Act 1997* and the 'Commonwealth Procurement Guidelines' to require suppliers to provide guarantees their supply chains are free of slavery and human trafficking.





2. INTRODUCTION TO THE REPORT

There can be no doubt there are goods entering Australia that are produced using slavery or trafficked labour.

While not specifically on slavery and trafficked labour, the US Department of Labor has identified a wide range of goods that involved the use of forced labour and exploited child labour that are imported into the US. By sector, agricultural crops comprise the largest category, followed by manufactured goods and mined or quarried goods. The most common agricultural goods listed are cotton, sugarcane, tobacco, coffee and cattle; the most common manufactured goods listed are bricks, garments, carpets and footwear; and the most common mined goods listed are gold, diamonds and coal.[3]

While the Australian Government has made it an offence for any Australian individual or company to engage in any financial transaction involving a slave regardless of where it occurs in the world, no effort is currently made to identify Australian companies importing goods that involve the use of slavery in their production. The result is that no Australian company has been prosecuted from being associated with slavery in the production of goods they have imported and sold.

Slavery is recognised internationally as a serious criminal offence, and human trafficking is achieving similar recognition. Other countries around the world, especially the US, are taking slavery and human trafficking in the supply chains of companies with growing seriousness and introducing measures to address the problem.

This report outlines why the Australian Government needs to take action if it wishes to limit goods involving slavery and human trafficking coming into Australia. It points out the inadequacy of the existing measures currently in place. Finally, this report provides a series of options and considerations that the Australian Government could implement in order to curb the amount of goods being imported involving slavery and trafficking in their production.

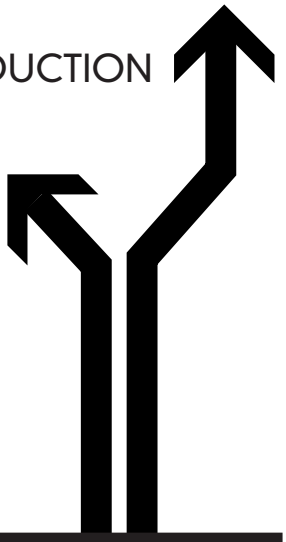
3 US Department of Labor's Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, 'US Department of Labor's List of Goods Produced by Child Labor or Forced Labor', 2011, xi.

STOP THE TRAFFIK Australia is part of the global STOP THE TRAFFIK movement that was formed in the UK around the 200th anniversary of the abolition of the slave trade in the Britain.

STOP THE TRAFFIK advocates for action to:
- Prevent the Sale of People,
- Prosecute the Traffickers, and
- Protect the Victims.

STOP THE TRAFFIK Australia also works to end slavery and slavery-like practices.

In Australia the organisations that are members of STOP THE TRAFFIK currently are:
- The Salvation Army;
- Synod of Victoria and Tasmania, Uniting Church in Australia;
- Good Shepherd Australia New Zealand;
- Anti-Slavery Society;
- Australian Catholic Religious Against Trafficking of Humans (ACRATH);
- Oaktree Foundation;
- Project Respect;
- Baptist World Aid Australia;
- UN Association of Australia;
- Caritas Australia;
- National Council of Jewish Women of Australia (Vic);
- The A21 Campaign;
- ChildWise;
- Starfish Ministries Australia;
- TEAR Australia;
- YGAP;
- Sisters of St Joseph. Josephite Counter-Trafficking Project;
- The Freedom Project;
- Hagar International
- Compassion Australia; and
- Victorian Trades Hall.



3. TRAFFICKING AND SLAVERY IN THE PRODUCTION OF GOODS AND SOURCE COUNTRIES

Chapter 3 establishes that goods are being imported into Australia that are tainted by trafficked and slave labour and that insufficient action is being taken by source countries to address this problem. Chapter 4 will address Australia's obligation to act to address this problem.

3.1 Goods being Imported into Australia

There can be no doubt there are goods entering Australia that are produced using slavery or trafficked labour. The US Department of Labor has identified a number of goods imported into the US from specific countries as at risk of involving forced labour and/or child labour in their production.4 Many of these goods from the same countries are also imported into Australia. These goods are outlined in Table 1 below, with reported values of imports into Australia of these goods in 2009 -2010 financial year.

The countries and goods listed in Table 1 (over page) are far from exhaustive in terms of goods imported into Australia that are likely to involve slave labour or trafficked labour in the production of the goods. For example, Uzbekistan is the third largest exporter of cotton globally. Forced child labour is used extensively in the harvesting of the cotton and this practice may meet the threshold of slave labour.[5] Of the cotton exported from Uzbekistan to developing countries, 99.5% is exported to Asia, including 52% to China and 35% to Bangladesh.6 Most of these countries then mill the cotton and the fabric is converted into textiles and garments for export to countries like Australia.

3.2 Law and Law Enforcement in Source Countries is Inadequate

One of the reasons Australia needs to act is law and, especially, law enforcement is inadequate in combating slavery and human trafficking in a number countries that Australia imports goods from. For example, in a 2009 assessment by UNICEF stated:[7]

> *….child trafficking persists across East and South-East Asia. Although most countries have developed or amended laws and policies with gusto, implementation has generally been weak, whether due to shortfalls in statutory/policy provisions, insufficient resources, limited capacities, poor coordination, lack of leadership and ownership, or inadequate recognition of or respect for children's fundamental rights.*

This section examines the gaps in legislation and law enforcement in a number of selected countries listed in Table 1 above. While many of these countries have made commendable efforts to combat slave labour and trafficked labour, support from the demand side of the equation by consumer countries like Australia would assist in eradicating these abuses.

4 US Department of Labor, Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, 'The Department of Labor's List of Goods Produced by Child Labor or Forced Labor', (2009) xiii.

5 International Labor Rights Forum, *Pick All the Cotton: Update on Uzbekistan's Use of Forced Child Labor in 2009 Harvest* (2009).

6 Correspondence from South and Central Asia Branch, Department of Foreign Affairs, 15 June 2010.

7 UNICEF East Asia and Pacific Regional Office, *Child Trafficking in East and South-East Asia: Reversing the Trend* (2009) 9.

Table 1. List of goods produced with high risk of forced labour or child labour by country[8] [9]

Country	Good	Child Labour	Forced Labour	Value of imports to Australia 2009-2010 ($ millions)
Bangladesh	Footwear	•		0.12
	Textiles	•		17.4
Côte d'Ivoire	Cocoa	•	•	
Ghana	Cocoa	•		2.9
India	Bricks	•	•	22 for all construction materials
	Carpets	•	•	40
	Footwear	•		25.9
	Garments	•	•	92
	Gems	•		142 gems and pearls
	Rice	•	•	24
	Silk Fabric	•		45 in textile yarn and fabrics
Malaysia	Garments		•	67
	Palm oil		•	66 for all animal and vegetable oils
Nepal	Bricks	•	•	
	Carpets	•	•	1.2

3.2.1 Bangladesh

3.2.1.1 Extent of the Problem

In Bangladesh people are most frequently trafficked into: the sex industry, domestic servitude, industrial work, hard labour, bonded labour,[10] beggar networks, and the fishing industry.11 A 2004 UNICEF report said that in Bangladesh approximately 400 women and children fall victim to trafficking each month. Most of them are between the ages of 12 and 16 and are trafficked into the sex industry.[12]

3.2.1.2 Legal Remedies Against Trafficking and Slavery

The Bangladesh Constitution contains several relevant provisions to deal with human trafficking and slavery, including:

- prohibition against forced labour (Article 34); and
- prohibition of torture and cruel, inhuman or degrading treatment (Article 35)

The Bangladesh Penal Code of 1860 (following several amendments) contains provisions penalising crimes related to abduction, kidnapping, slavery, keeping in confinement, buying or disposing of any person as slave, unlawful compulsory labour, procuring of a minor girl and selling for the purpose of prostitution which are consequences of trafficking. The punishment of these crimes ranges from imprisonment for seven years to death sentence.

The *Prevention of Oppression against Women and Children Act 2000* is the most relevant law dealing with prohibiting human trafficking. Section 18 of the Act requires the investigation of any trafficking incident to be completed within 60 days of the day when the offence took place (this period can be extended, for special reasons, up to 30 days more). Section 20 of the Act requires such an offence to be tried in Special Tribunal for Prevention of Repression against Women and Children set up under Section 26 of the Act. Section 31 of the Act provides for safe custody of the victim of trafficking during trial period. The Act does not recognise men as victims of human trafficking.

3.2.1.3 Enforcement

While there is some anti-human trafficking legislation in place there are several barriers to enforcement. Primarily, the Bangladeshi judicial system's handling of sex trafficking cases is 'plagued by a large backlog and delays caused by procedural loopholes.'

8 Ibid. 13-20 and US Department of Labor's Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, 'US Department of Labor's List of Goods Produced by Child Labor or Forced Labor', (2011) 7-23.

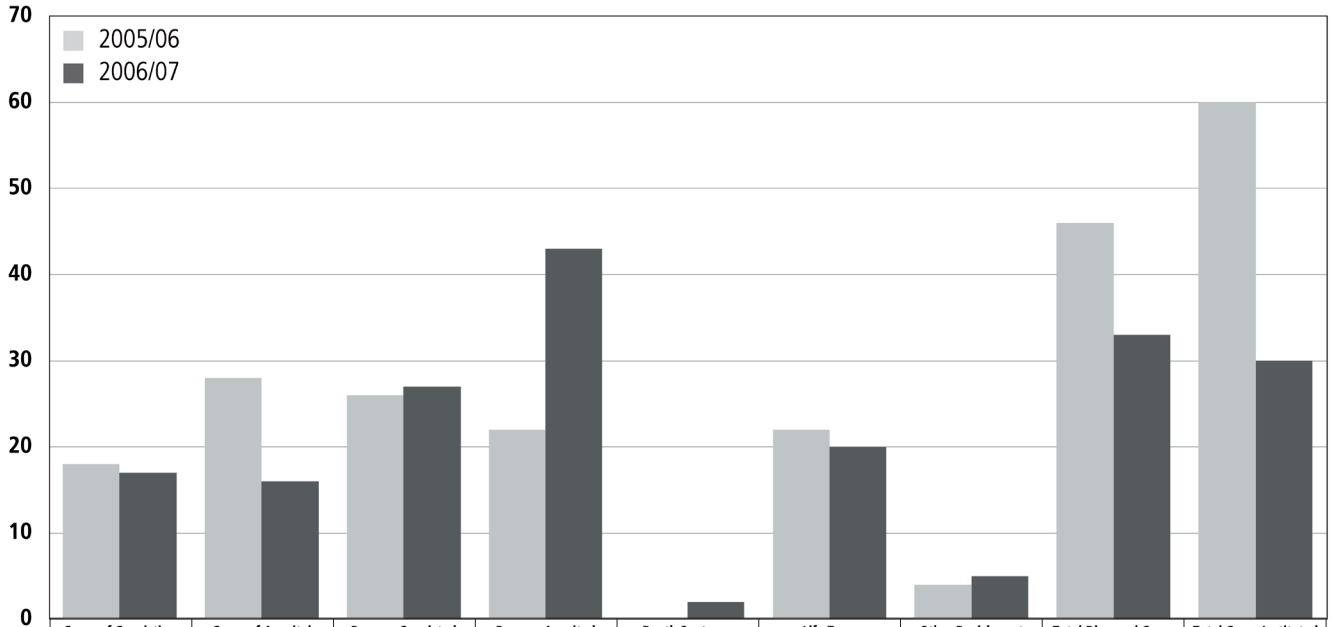
9 Australian Department of Foreign Affairs and Trade, Composition of Trade to Australia 2009-2010 (2010).

10 The United States Department of State's 2008 Human Rights Report on Bangladesh found that since 2005, cooperative effort among NGOs, the government, and the United Arab Emirates (the destination country of many trafficked Bangladeshi boys) resulted in the repatriation of 199 camel jockeys, 198 of whom were reunited with their biological parents. Furthermore, all camel jockeys received 104,000 taka ($1,700AUD) as compensation. See U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *2008 Country Reports on Human Rights Practice: Bangladesh <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119132.htm>* at 12 March 2010.

11 The Bangladesh Thematic Group on Trafficking, *Revisiting The Human Trafficking Paradigm: The Bangladesh Experience (Part I: Trafficking of Adults)* (2004).

12 Concern Universal, *Bangladesh & India: Cross Border Anti-Trafficking Programme <http://www.concernuniversal.org/images/uploads/File/Bangladesh/CU%20Anti-Trafficking%20On%20a%20Page.pdf>* at 12 March 2010.

Figure 1: Cases relating to trafficking in women and children in Bangladesh 2005-2007

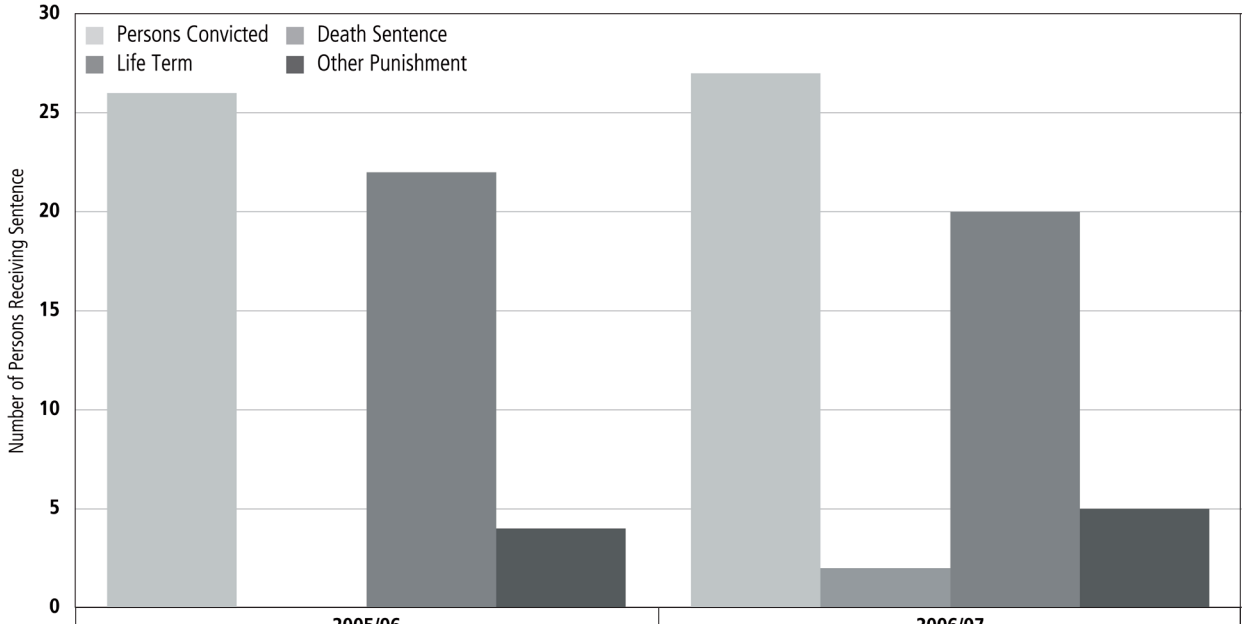


	Cases of Conviction	Cases of Acquital	Persons Convicted	Persons Acquited	Death Sentence	Life Term	Other Punishment	Total Disposed Cases	Total Cases Instituted
2005/06	18	28	26	22	0	22	4	46	60
2006/07	17	16	27	43	2	20	5	33	30

Source: Bangladesh Bureau of Statistics, Statistical Yearbook-2008

The following figure shows the types of sentence received for persons convicted of human trafficking offences.

Figure 2: Punishment received for convictions of human trafficking in Bangladesh 2005 - 2007



	2005/06	2006/07
Persons Convicted	26	27
Death Sentence	0	2
Life Term	22	20
Other Punishment	4	5

Source: Bangladesh Bureau of Statistics, Statistical Yearbook-2008

While both court delays and regional cooperation are significant impediments to the enforcement of anti-human trafficking legislation, police corruption is has often been alleged as the most significant barrier to enforcement of the law. A report from 2000 commented on the seriousness of this impediment stating:

Occasionally, the news media publish reports about trafficked women or about agents of traffickers who have been arrested by police or the border security forces of Bangladesh. But these reports are not to be used to estimate the magnitude of trafficking in women and girls from Bangladesh. In most cases, arrests indicate a breakdown of negotiations between the police and the traffickers over the form and/or the amount of bribes.[13]

The Bangladeshi government has begun to address the issues of police corruption. Education of relevant law enforcement officers has started to increase awareness of human trafficking within the police force, which will hopefully see increased enforcement and prosecution under the *Prevention of Oppression against Women and Children Act 2000*. The country's National Police Academy provided anti-trafficking training to 2,827 police officers during 2008.14 Furthermore, in mid-2008, the government created a 12-member police anti-trafficking investigative unit that complements an existing police anti-trafficking monitoring cell.15

3.2.2 Côte d'Ivoire

3.2.2.1 Extent of the Problem

Côte d'Ivoire is the leading supplier of cocoa, producing more than 40% of global production. In a 2008 report, the US Department of State estimated that more than 109,000 children in Côte d'Ivoire's cocoa industry worked under "the worst forms of child labour", and that approximately 10,000 are victims of human trafficking or enslavement.[16]

3.2.2.2 Legal Remedies Against Trafficking and Slavery

There are provisions within the Constitution and Penal Code that prohibit different elements of trafficking.

Penal Code Article 378 prohibits forced labour, incriminating servitude for debt and bondage. The penalty is one to five years' imprisonment and a fine of $800 to $2,200.

Penal Code Article 376 criminalises entering contracts that deny freedom to a third person, whether with payment or without, with a penalty of five to 10 years' imprisonment and a fine. Article 376 covers one of the characteristics of forced labour and trafficking which involves entering into a contract that denies a third person freedom. For example, a family member enters a contract with a trafficker to sell their child.

Penal Code Article 377 criminalises receiving a person as security.

Under Penal Code Article 370 any person who, by means of fraud or violence, abducts minors from where they have been placed by those in authority or under whose direction they have been consigned shall be liable to sanctions. If the abducted minor is under 15 years of age, the maximum penalty is imposed.

Article 370 covers some, but not all of the elements of trafficking as defined in the Palermo Protocol, the main international treaty dealing directly with human trafficking. The Article fails to consider the "actions" of trafficking including recruitment, transportation and transfer or the exploitative purposes of trafficking.

Penal Code Article 371 makes the abduction or attempted abduction of a young person under 18 years of age is an offence.

Article 370 and 371 only apply to minors excluding adults from the application and thus protection of these articles.

Law No. 97 – 613 prohibits the abduction of minors, an important component of trafficking.

In September 2010 a law was passed to criminalise child trafficking and the worst forms of child labour. The law has the aim to identify, prevent, suppress trafficking and hazardous child labour as well as to support victims.[17]

A National action plan on child trafficking and child labour was adopted in 2007.[18] The government allocated $4.3 million toward implementing all aspects of the national action plan against child trafficking and the worst forms of child labour, but none of these funds were disbursed by 2009.[19]

Côte d'Ivoire is one of the nine West African countries, in addition to Benin, Burkina Faso, Cameroon, Gabon, Ghana, Mali, Nigeria and Togo, which are participating in the Subregional Programme Combating the Trafficking in Children for Labour Exploitation in West and Central Africa (LUTRENA), which commenced in July 2001 with the collaboration of the ILO. One of the objectives of the LUTRENA programme is to strengthen national legislation to combat the trafficking of children with a view to the effective harmonization of legislation prohibiting trafficking.

3.2.2.3 Prosecution and enforcement

Financial constraints and a lack of knowledge of the laws are cited as inhibiting efforts to eliminate slave labour and trafficking in Cote d'Ivoire. Of the few alleged traffickers that have been investigated, most have been released without charge.[20]

- From April to July 2008 Ivorian police investigated three trafficking cases and sent one suspected trafficker to a tribunal for prosecution who was released without charge.[21]

13 Bimal Kanti Paul and Syed Abu Hasnath, 'Trafficking in Bangladeshi Women and Girls', (2000) 19 (2) *Geographical Review* 268.

14 U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *2008 Country Reports on Human Rights Practice: Bangladesh*.

15 Ibid.

16 International Labor Rights Forum, The Cocoa Protocol: Success or Failure? (2008) 1 <http://www.laborrights.org/stop-child-labor/cocoa-campaign/resources/10719> at 12 March 2010.

17 Payson Centre for International Development and Technology Transfer, Tulane University, *Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labor in the Cocoa Sector in Côte d'Ivoire and Ghana,* (31 March 2011) 18, 21.

18 U.S. Department of State, *Trafficking in Person Report* (2009) 96.

19 Ibid.

20 U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, 2008 Country Reports on Human Rights Practice: Ghana <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119004.htm> at 12 March 2010.

21 U.S. Department of State, *Trafficking in Person Report* (2009).

- A suspected trafficker of two Beninese children was arrested in April 2008 and was released without being formally charged.[22]
- There were no reports of any prosecutions of individuals trafficking in the cocoa sector.[23]
- 29 men were investigated for forced labour from 2005 – 2007.
- Two convictions were recorded in 2005.
- Between 2005 and 2006 there were 193 victims identified.[24]

The inspectorate of work and social laws is the authority responsible for compliance to work and social laws under Ivorian legislation. Inspectors of work are assisted by work supervisors and attaches. Tasks include checking worker's identity including age and depending on the seriousness of the violations, can inform the competent judicial authorities directly or can take the necessary measures in his or her own capacity. However, the inspectorates of work are unevenly distributed throughout Cote d'Ivoire, primarily located in Abidjan and Bouake.

3.2.3 Ghana

3.2.3.1 Extent of the Problem

According to the Ministry of Manpower, Youth and Employment (MMYE) nearly 20% of children (about 1.27 million) were engaged in activities classified as child labour in 2006.[25]

3.2.3.2 Legal Remedies Against Trafficking and Slavery

The Constitution of the Republic of Ghana 1992 states "no person shall be held in slavery or servitude (or) be required to perform forced labour."

The Children's Act 1998, Act 560, states "no person shall engage a child in exploitative labour."

The Labour Act 2003, Act 651, Part VII, Sections 58 – 61 contain various provisions relating to child employment. These include the protection of young persons (18 – 21 years of age) from engaging in hazardous work. It does not regulate the employment conditions for legally employed children between 15 – 17 years of age. Part XIV, Sections 116 and 117 prohibit the use of forced labour.

Ghana prohibits all forms of trafficking through the *Human Trafficking Act 2005*, Act 694. "Forced labour or services" is not defined in the *Human Trafficking Act*. Including such a definition as contained within ILO Convention No. 29 Concerning Forced Labour and No. 105 on the Abolition of Forced Labour may increase the ease with which the legislation is interpreted and applied in prosecuting traffickers.

It is not clear in the Human Trafficking Act whether the obligations under the Act can be enforced against corporations. There is no express provision in the Human Trafficking Act that provides for the application of Constitutional rights in the context of corporate activity.

The Human Trafficking Board was established in July 2007 met eight times in 2008. It is the central vehicle for the implementation of Act 694. The Board has now drafted a National Plan of Action, to guide the implementation of the Act. A major problem is that the Board's Secretariat lacks manpower. The secretariat is only manned by one person, who is also responsible for other matters within government.[26]

3.2.3.3 Prosecution and enforcement

Prosecution and enforcement efforts in Ghana have been constrained by limited financial and logistical resources.[27]

From December 2005, when Act 694 was passed, to 2008, five traffickers have been convicted and imprisoned. A lack of witnesses, or witnesses reluctance to give evidence is cited as a major inhibiting factor on there being few prosecutions.[28]

Interpol-Ghana had on record only one conviction of a trafficker in 2007. The trafficker was convicted to six years imprisonment.

The US State Department Trafficking in Persons Report 2009 reported there were 16 reported arrests of suspected traffickers during 2008. A woman was convicted for trafficking a Togolese girl for forced labour and was sentenced to eight years' imprisonment. Eleven suspected traffickers remained under investigation.[29]

In June 2009 three Chinese traffickers were sentenced to a total of 41 years in prison.

The Ministry of Manpower, Youth and Employment (MMYE) acknowledged that "there is a need to strengthen enforcement mechanisms"[30] as there is currently a "weak law enforcement capacity."[31] The MMYE stated a need for there to be a "strengthening of the legal framework for dealing with WFCL [Worst Forms of Child Labour] in cocoa growing areas, with the main emphasis on the enforcement of existing laws and regulations"[32]. This is a major objective of the National Cocoa Child Labour Elimination Programme 2006 – 2011.

According to the MMYE, "primary legislation such as the Children's Act, the Human Trafficking Act and the Domestic Violence Bill need to be translated into subsidiary regulations and by-laws for enforcement purposes. The population also needs to become aware of the intents and contents of the law and the provisions and procedures for obtaining remedies. But perhaps an even greater challenge concerns the capacity of the law enforcement bodies, including the Departments of Labour and Social Welfare, the District Education Departments, the District Assembly Child Rights Panels, the Police, CHRAJ and the courts. Issues of staff strengths

22 Ibid.

23 Ibid.

24 United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (2009) 96.

25 Government of Ghana, Ministry of Manpower, Youth and Employment, *National Programme for the Elimination of the Worst Forms of Child Labor in Cocoa* (2006) vi.

26 Danish Immigration Service, Protection of Victims of Trafficking in Ghana (Report 2/2008).

27 U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *2008 Country Reports on Human Rights Practice: Ghana*.

28 Danish Immigration Service, Protection of Victims of Trafficking in Ghana (Report 2/2008).

29 U.S. Department of State, *Trafficking in Person Report* (2009).

30 Government of Ghana, Ministry of Manpower, Youth and Employment *'National Cocoa Child Labour Elimination Programme'* (2006) vii.

31 Ibid.

32 Ibid 15.

and competencies are paramount in this regard."[33]

In 2006, the Government of Ghana established the National Programme for the Elimination of Worst Forms of Child Labour in Cocoa as a public program under the Ministry of Employment and Social Welfare.[34]

The ILO, in collaboration with the Ministry of Employment and Social Welfare, launched two projects in Ghana to combat the worst forms of child labour in the country's cocoa and fishing sectors in support of the National Plan of Action for the Elimination of the Worst Forms of Child Labor (2009-2015). The first project, named "Support for the Elimination of the Worst Forms of Child Labor in the Coca Sector in 15 communities of the Bia, Juaboso and Aowin/ Suaman Districts" was launched in Juaboso in the Western Region on 21 January 2011. This activity targets 500 children working in cocoa production with social programming, community awareness raising, and a pilot child labour monitoring system. The second project named "Support to the National Plan of Action (NPA) for the Elimination of Worst Forms of Child Labour (WFCL) in the Fishing Industry in Ghana" was launched in Kpando, Volta Region, on 28 January 2011.[35]

Mr Kan-Dapaah, the Minister for Interior observed that human trafficking is seen by law enforcement agencies as a criminal process rather than a criminal event. He believes there is a difficulty in obtaining evidence from victims, witnesses and complainants that makes it difficult to identify the crime and the criminals and harder still to convict traffickers.[36]

In 2008 the Public Prosecutor's Office opened an anti-trafficking desk staffed with three prosecutors trained about trafficking.

Corruption remains an obstacle to the fight against trafficking in Ghana. Aremeyaro Anas exposed 14 GIS officers in the Kotoka International Airport in Accra as cooperating with traffickers. Whilst pretending to be a trafficker, Anas requested a GIS officer to assist him in bringing seven girls to Europe. The GIS officer demanded US$1,500 for each victim to leave Ghana through the airport. According to Aremeyaro Anas there has been no action against these 14 immigration officers, but he was informed by the Director of the GIS that a team would investigate the case.[37]

3.2.4 India

3.2.4.1 Extent of the Problem

The US State Department Trafficking in Persons Report 2009 stated that internal forced labour posed one of the biggest trafficking problems in India. This forced labour involves men, women and children in debt bondage in brick kilns, rice mills, agriculture and embroidery factories.[38]

> *In Tamil Nadu, labour agents (maistries) pay substantial wage advances to brick kiln workers at the start of a season, often equivalent to three to seven months of a family's earnings. Work days can last up to 16 hours and there is a six-day week. At the end of the season, when piece rate wages are calculated, these often do not cover the advance, obliging workers to return to the same kiln the following season. Meanwhile, labour agents receive a commission from kiln owners on every thousand bricks produced.*

The Indian Government's 2004 national survey estimated the number of working children in the age group of five to 14 at 16.4 million. However, NGOs consider the number to be between 55 and 87 million.[39]

3.2.4.2 Legal Remedies Against Trafficking and Slavery

The Indian Constitution prohibits human trafficking and forced labour. It also prohibits children below the age of 14 from being employed in factories, mines or any other hazardous forms of employment.

The *Immoral Traffic (Prevention) Act 1956 No 104* deals with trafficking of women and girls for sexual exploitation. The Act fails to adequately distinguish trafficking in persons from the offence of prostitution, meaning that victims of sexual exploitation may potentially be criminally liable for prostitution.

The *Protection of Human Rights Act 1993* established the National Human Rights Commission, formed with judges or former judges of the Supreme and High Courts, as well as two members with knowledge in human rights matters. The Commission is able to undertake investigations and issue directions in response to instances of bonded labour. For example, following receipt of a complaint that 20 people were being kept as bonded labour in a stone quarry in Haryana, the Commission investigated the matter and found that 19 adults and 10 children, members of the Banjara Tribe, had been forcibly confined and forced to work in the quarry without pay, in contravention of the *Bonded Labour System (Abolition) Act* and the *Indian Penal Code.* Following the release of these persons, the Commission requested that the relevant district officials issue Release Certificates to the adult bonded labourers and to organise rehabilitation and welfare services as required. The Commission also followed the progress of rehabilitation of the workers, including allocation of State housing, allotment of cultivable land and organisation of employment.

The *Bonded Labour System (Abolition) Act 1976* prohibits bonded labour and abetting in bonded labour, with a penalty of up to three years imprisonment. The law holds those in charge of a company responsible for any bonded labour offence committed by the company. The *Bonded Labour System (Abolition) Act 1976* aims to abolish all debt agreements and obligations arising out

33 Ibid 14.

34 Payson Centre for International Development and Technology Transfer, Tulane University, *Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labor in the Cocoa Sector in Côte d'Ivoire and Ghana,* (31 March 2011) 191.

35 Ibid 16.

36 Gilbert Boyefio, 'Ghana's Human Trafficking Act needs fine tuning' *The Statesman,* Accra, Ghana, 30 January 2007, <http://www.thestatesmanonline.com/pages/news_detail.php?section=1&newsid=2289> at 12 March 2010.

37 *Danish Immigration Service, Protection of Victims of Trafficking in Ghana* (Report 2/2008).

38 U.S. Department of State, Trafficking in Person Report (2009).

39 U.S. Department of State, Bureau of Democracy, Human Rights, and Labor *2008 Country Reports on Human Rights Practice: India* (2009) *<http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119134.htm>* at 12 March 2010. International Trade Union Confederation, *Internationally Recognised Core Labour Standards in India* (2011) 8.

of India's longstanding bonded labour system. It frees all bonded labourers, cancels any outstanding debts against them, prohibits the creation of new bondage agreements, and orders the economic rehabilitation of freed bonded labourers by the state.[40]

The *Child Labour (Prohibition and Regulation) Act 1986 Act No 61* makes no reference to bonded or slave labour. Whilst regulating the age and types of occupations that can be worked in, the Act fails to make reference to remuneration at all, dealing only with the conditions of work and applicable hours of work. Further, it appears that there may be exemptions under Section 3 applying to family or school working situations.

The Act seeks to ban employment of children working in certain hazardous occupations; the hazardous occupations are identified and reviewed by the expert committee from time to time. It also regulates the work of children in certain other industries.[41]

The *Indian Penal Code 1860* contains more than 20 provisions relevant to trafficking, imposing criminal penalties for kidnapping, abducting, buying or selling a person for labour or to place them in slavery. Section 11 of the Indian Penal Code extends the coverage of the Code to "any company or association or body of persons, whether incorporated or not." Where the primary offender is a corporation, directors and officers may still be liable, in addition to the criminal liability of the corporation, if their own participation in the offence amounts to abetting the offence within the meanings of sections 107 and 108 of the Penal Code. Foreign corporations may also be found criminally liable but are subject to numerous limitations as seen in the Bhopal case in 1996.

3.2.4.3 Prosecution and enforcement

In India, the government's "centrally sponsored scheme" provides financial or in-kind grants to released bonded labourers and their family members; over 285,000 people have benefited to date. According to official statistics, as of mid-2008, 5,893 prosecutions and 1,289 convictions had been reported by the states under the 1976 *Bonded Labour System (Abolition) Act.*[42]

According to the United Nations Office on Drugs and Crimes (UNODC) from January 2007 to June:[43]

- 920 cases of human trafficking were registered;
- 371 rescue operations were conducted;
- 1,606 victims were rescued, including 266 minors;
- 1,919 victims were arrested;
- 801 customers/clients were arrested;
- 30 traffickers were convicted;
- 33 places of exploitation were closed; and
- 863 victims began the process of rehabilitation.

In 2009 federal authorities rescued 40,000 working children and state authorities provided welfare to half a million rescued children.[44]

Under the *Child Labour (Prohibition and Regulation) Act 1986 Act*

40 Sudhandshu Joshi, Bupinder Zutshi and Alok Vajpeyi, 'Review of Child Labour, Education and Poverty Agenda India Country Report 2006', *Global March Against Child Labour*, 16.

41 Ibid 16.

42 Statement by the representative of the Government of India to the International Labour Conference, Geneva, June 2008.

43 U.S. Department of State, *2008 Country Reports on Human Rights Practice: India* (2009).

44 International Trade Union Confederation, *Internationally Recognised Core Labour Standards in India* (2011) 9.

No 61 there have been 1,543 prosecutions registered, out of which 278 people were convicted and 181 cases were acquitted.[45]

The lack of a national system for collecting arrest and prosecution data makes it difficult to assess the effectiveness of law enforcement. The US Department of State *Trafficking in Persons Report 2009* stated that "many police officials preferred to use India Penal Code (IPC) provisions rather than anti-trafficking laws to arrest traffickers, both because they claimed to have more success in getting convictions and because many IPC provisions were not subject to bail." The report also noted that the Indian government significantly increased police training and modestly improved interstate coordination of anti-trafficking efforts, cooperated with NGOs and supported awareness campaigns.

The central government has allocated $18 million to the Ministry of Home Affairs to create 297 anti-human trafficking units across the nation to train and sensitize law enforcement officials.

Despite there being progress in law enforcement efforts against forced labour, little progress has been made in addressing bonded labour. There has been a failure to punish traffickers.46

Some of the problems with enforcing laws against forced labour and trafficking are:

- Under the Indian Constitution states have the primary responsibility for law enforcement. While some states have increased their focus on enforcement, state-level authorities are limited in their abilities to effectively confront interstate and transnational trafficking crimes.
- Complicity in trafficking by many Indian law enforcement officials and overburdened courts impede effective prosecutions.
- Widespread poverty continues to provide a huge source of vulnerable people.

It is estimated that approximately 20% of traffickers are not prosecuted due to their political backing. The significant problem of public officials' complicity in sex trafficking and forced labour remains largely unaddressed by central and state governments.[47]

3.2.5 Malaysia

3.2.5.1 Extent of the Problem

Malaysia is a source, destination, and transit country for men, women, and children trafficked for the purposes of forced labour and commercial sexual exploitation.[48] Forced labour occurs primarily in domestic work, building/ construction and the fishing industry.

The majority of trafficking victims are foreign workers who migrate willingly to Malaysia from Indonesia, Nepal, India, Thailand, China, the Philippines, Burma, Cambodia, Bangladesh, Pakistan, and Vietnam in search of greater economic opportunities, some of whom subsequently encounter forced labour or debt bondage at the hands of their employers, employment agents, or informal labour recruiters. *Tenaganita*, in its work on migrant rights protection, reported that 65 per cent of the trafficked victims in Malaysia are in conditions of forced/ bonded labour.[49]

3.2.5.2 Legal Remedies Against Trafficking and Slavery

The Malaysian Constitution prohibits slavery and forced labour. It also enshrines a constitutional duty on the court to ensure equal protection of the law and that no person shall be deprived of his life and liberty. The Malaysian *Penal Code Act (Act 574)* contains several offences relevant to human trafficking including kidnapping, abduction, slavery and forced labour. The Malaysian Penal Code primarily addresses the issue of trafficking for the purpose of prostitution. Although the Penal Code provides for two offences relating to slavery, apart from habitual dealings, the penalties are relatively light.

The *Anti-Trafficking in Persons Act 2007* is generally consistent with the framework established by the Palermo Protocol.[50] 'Trafficking' is described in a broad way (both in harbouring a person and in moving a person). The definition includes both men and women, and goes beyond the purposes of sexual exploitation, to include trafficking by forced labour, slavery and forced organ donation.[51]

The Act criminalises trafficking in persons with the provision for higher penalties in cases of trafficking in children,[52] and trafficking by means of threat or use of force.[53] However, there are no provisions that specifically deal with the issue of labour trafficking. This raises concerns as to the effectiveness of the Act against labour trafficking.[54] With the prevailing culture of immigration officials that enforce stringent immigration laws and the lack of recognition of the issue of labour trafficking,[55] the Act may not effect the cultural change desired.

An amendment bill to the *Anti-Trafficking in Persons Act* has been passed by the Malaysian parliament.[56] It picks up much of the recommendations of the US *Trafficking In Persons* 2010 report – including, applying stringent criminal penalties to those involved in fraudulent labour recruitment or exploitation of forced labour,

45 Sudhandshu Joshi, Bupinder Zutshi and Alok Vajpeyi, 'Review of Child Labour, Education and Poverty Agenda India Country Report 2006', *Global March Against Child Labour*, citing Ministry of Labour, Question-Answer Session in Lok Sabha, 2003.

46 International Labour Organisation, *Global Report on Forced Labour in Asia: debt bondage, trafficking and state imposed forced labour* (2005) <*http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_075504/index.htm*>.

47 U.S. Department of State, *Trafficking in Person Report* (2009).

48 Ibid.

49 Tenaganita, *The Global Catch – Modern Day Slavery Fishermen* (2009) 45. This view receives support from SUHAKAM Officer that labour trafficking forms a large proportion of the cases – just that they have been not recognised to-date (recognition still at infancy stage).

50 Some key recommendations by SUHAKAM were not incorporated.

51 The Act recognises the fragmented nature of sex trafficking – drafted such that broad enough to capture whole chain - recruiter, transporter, buyer, seller, harbourer, brothel owner, and manager.

52 *Anti-Trafficking in Persons Act,* Act 270 2007, s. 14. The penalty is set as not less than 3 years, but not exceeding twenty years, and also liable to a fine.

53 *Anti-Trafficking in Persons Act,* Act 270 2007, s 13.

54 Amy Lim, Interview with Aegile Fernandez, Tenaganita (12 July 2010).

55 Human Rights Watch, *Help Wanted: Abuses against Female Migrant Workers in Indonesia and Malaysia*, July 2004, Vol 15, No. 9(B) 52.

56 The Star Online, 'Fighting human traffickers', *The Star Online* (Malaysia), 16 July 2010.

increase efforts to prosecute and convict public officials who profit from or are involved in trafficking, or who exploit victims.[57]. The key features of the amending bill are:

- Stiffer penalties. The amendments to the *Anti-Trafficking in Persons (ATIP) Act 2007* lead to human traffickers being fined between RM 500,000 and RM 1million, and/or imprisonment for up to 15 years.
- Fusing of trafficking and smuggling.[58] There is a debate as to whether combining trafficking and smuggling would be effective. According to Aegis, this approach may be useful given that trafficking and smuggling are generally carried out by the same groups of people and adopting similar routes.
- Broadening scope of the offence for trafficking to include 'transit country' – which may ultimately increase the effective of enforcement under the Act.
- Increased accountability by shifting the responsibility for enforcement and prosecution to higher ranked personnel (with more expertise). In particular, it amends the provisions relating to the recording of evidence after criminal prosecution, such that trials are initiated only by Public Prosecutor (instead of enforcement officer), and presided by a Sessions Court Judge (rather than Magistrates Court).[59]

3.2.5.3 Prosecution and enforcement

The National Council of Anti-Trafficking in Persons, in Ministry of Home Affairs started collating data on trafficking cases since the *Anti-Trafficking in Persons Act 2007* (Act 670) came into effect in February 2008. As at 11 July 2010, there were 240 cases of trafficking, with 344 criminals prosecuted.[60] The bulk of the cases relate to sex trafficking. However, more recently, there have been three labour-trafficking cases reported.[61]

Limited action has been taken by Malaysian enforcement agencies in prosecuting and convicting offenders of labour trafficking. In January 2010, authorities identified their first labour trafficking case in the fisheries industry when the Malaysian Maritime Enforcement Agency intercepted Thai fishing boats off the coast of Sarawak and arrested five Thai traffickers.[62] While NGOs reported several potential labour trafficking cases to the government, authorities did not report any related arrests or investigations.[63] The UN Office of Drugs and Crime reports that approximately 160 persons were convicted of 'trafficking and abduction of children' between 2003 and 2006.[64] Most of the persons convicted were involved in child trafficking for sexual exploitation, while two were for exploiting children for forced labour. Approximately 120 of the offenders received a sentence of detention, with approximately 30 received a sentence of one to five years, and four were sentenced to more than five years of detention.[65]

The Government also failed to report any criminal prosecutions of employers who subjected workers to conditions of forced labour or labour recruiters who used deceptive practices and debt bondage to compel migrant workers into involuntary servitude.[66] It continued to allow for the confiscation of passports by employers of migrant workers, and did not prosecute any employers who confiscated passports or travel documents of migrant workers or confined them to the workplace.[67]

The low volume of labour trafficking cases reported can largely be attributed to the policies that have been put in place by the Ministry of Home Affairs. One of the policies that are particularly problematic is that of outsourcing of labour. Since August 2006, companies who are hiring fewer than 50 foreign workers are required to use the services of labour outsourcing companies. These labour outsourcing companies are approved and regulated by the Ministry of Home Affairs. In August 2008, there were 277 such companies operating in Malaysia. This essentially shifts the responsibility for labour management from the employer to the outsourcing company. The Ministry lacks oversight over these companies. Licences are issued to agencies, which then provide the work permit for employees.[68] Although work permits are only good for one year (but renewable annually for up to three years), most recruiters would allow work permits to lapse so that workers can be retained 'off-the-books' and deployed in harsh circumstances without the risk of workers complaining to authorities.[69] Without the permit, the migrant worker becomes immediately subject to arrest and deportation.[70] They are at the mercy of the recruiters as to whether they are reported to the police.

There have been some credible reports of government officials' direct involvement in a human trafficking network along the Malaysia-Thailand border. Five immigration officials were arrested for alleged involvement in a trafficking ring that took Burmese migrants to Thailand for sale to trafficking syndicates. However, officials have only lodged criminal charges under the Anti-Trafficking Act against one of the officers.[71]

Senior government officials, including the Prime Minister, have publicly acknowledged Malaysia's human trafficking problem. The government has increased its investigations of trafficking cases and filed an increased number of criminal charges against traffickers, significantly expanded training of officials on the 2007 anti-trafficking law, conducted a public awareness campaign on human trafficking, opened more shelters for trafficking victims, and launched a five-year national action plan on trafficking.[72]

57 U.S. Department of State, Office to Monitor and Combat Trafficking in Person, 'Trafficking in Persons Report' (U.S. Department of State, Office to Monitor and Combat Trafficking in Person, 2010) 224.

58 The anti-smuggling provisions mimic those of anti-trafficking with the exception of victim protection provisions.

59 Section 21 of the Bill.

60 Council of Anti-Trafficking in Persons, Summary Statistics on Trafficking Cases (28 Feb 2008 – 11 July 2010). Number of victims was 471 (133 men, 338 female)

61 Amy Lim, Interview with Rafidah Yahya, SUHAKAM (9 July 2010).

62 U.S. Department of State 'Trafficking in Person Report' (2010) 224. Also validated by Amy Lim in interviews with Rafidah Yahya, SUHAKAM, 9 July 2010, and Aegile Fernandez, Tenaganita, 15 July 2010.

63 U.S. Department of State 'Trafficking in Person Report' (2010) 224.

64 UNODC 'Global Report on Trafficking in Persons' (2009) 175.

65 Ibid.

66 U.S. Department of State 'Trafficking in Person Report' (2010) 224.

67 Ibid.

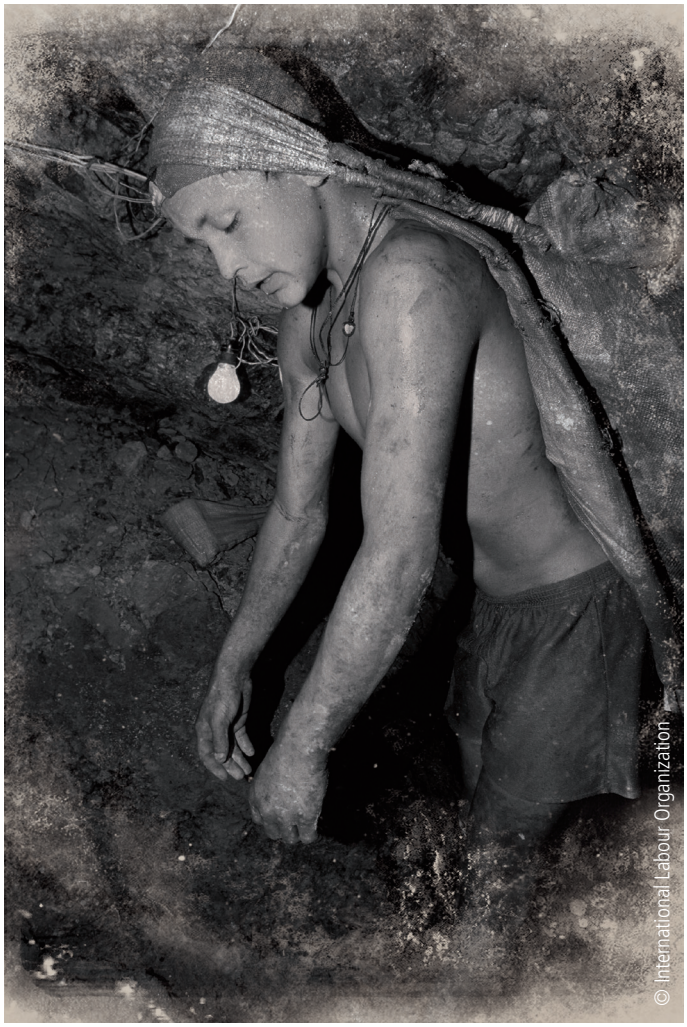
68 Tess Keam, Interview with Aegile Fernandez, Tenaganita (23 Apr 2010).

69 Amy Lim, Interview with Rafidah Yahya, SUHAKAM (9 July 2010).

70 Ibid.

71 U.S. Department of State 'Trafficking in Person Report' (2010) 224. Also validated by Amy Lim in interviews with Rafidah Yahya, SUHAKAM, 9 July 2010, and Tenagalta, 15 July 2010.

72 U.S. Department of State 'Trafficking in Person Report' (2010) (Malaysia) 224.



The National Plan of Action against Trafficking in Persons (2010-2015)[73] establishes a broad framework to seriously combat and eliminate all kinds of human trafficking activities in Malaysia, and details nine strategic goals and nine implementation plans. For the short term (one to two years), the focus will be on strengthening cooperation within government agencies and with related parties, strengthening border security, and capacity building including training of trainers, setting up adequate numbers of shelter homes, rigorous public awareness campaigns and fostering strategic alliances with foreign partners. Subsequently, the medium term (three to four years) the plan is on managing reduction of foreign workers and to further strengthen domestic legislations to support the *Anti-Trafficking in Persons Act 2007* in deterring trafficking in persons offenders.[74]

The Council for Anti-trafficking in Persons was established in 2008 by the *Anti-Trafficking in Persons Act 2007* with exclusive responsibility for formulating policies and programs to prevent and suppress trafficking in persons including programs in rendering assistance to trafficked persons; formulating protective programs for trafficked persons; and initiating education programs to increase public awareness of the causes and consequences of the act of trafficking in persons.[75] Several committees have been set by the Council. In January 2010, the Council established the Labour Trafficking Committee – a marked recognition that labour trafficking remains an issue that deserve attention.[76]

3.2.6 Nepal

3.2.6.1 Extent of the Problem

Identified primarily as a source country for trafficking poor women and children (and, to a lesser extent, men), Nepal remains one of the major external sources for women and children trafficked into India. On the other hand, there remains a significant number of child labourers trafficked or subjected to bonded labour and conditions similar to slavery in Nepal, particularly in the large Nepali carpet industry, and in numerous sex tourism locations in and around Kathmandu.[77]

According to ILO estimates, there are still some 127,000 children working in the worst forms of child labour as bonded labourers, ragpickers, porters, domestic workers, as well as in the carpet sector and in some mines.[78] Some of them are also trafficked into the sex trade, both boys and girls, or are sent as trafficked labour to India. However, the ILO has engaged in an intensive effort to combat child labour within the region, and the government has invested significantly in fighting child labour, raising the school participation rate to 90.2% by 2008.[79] The Nepali Government's plan of action aims to increase this participation rate even further, and remove all children from the worst forms of child labour by 2015.

3.2.6.2 Legal Remedies Against Trafficking and Slavery

The 2007 Interim Constitution of Nepal prohibits human trafficking, slavery, serfdom and forced labour of any kind. It also forbids the employment of minors in factories, mines or any other hazardous work.

The *Human Trafficking (Control) Act 2007 (2064)* prohibits human trafficking for both sexual exploitation and for slave and bonded labour. The Act is generally consistent with the framework established by the Palermo Protocol, despite Nepal not being a signatory.[80]

The Act also incorporates numerous changes from its previous incarnation based on making the prosecution scheme more attractive to victims, by protecting them from painful cross-examination and establishing under Statute a rescue and rehabilitation centre, with funds to compensate victims.[81]

The *Child Labour (Prohibition and Regulation) Act 2000* makes it an offence to employ a child below the age of 14 at all or to

73 Nuzhat, 'Malaysia Launches National Anti-Trafficking in Persons Action Plan', *Newsdawn* (Malaysia), 2 April 2010 < http://newsdawn.blogspot.com/2010/04/malaysia-launches-national-anti.html>.

74 Government of Malaysia, Council for Anti-Trafficking in Persons, 'National Action Plan Against Trafficking in Persons (2010 – 2015), *http://www.moha.gov.my/images/stories/mapo/NAP_%20AGAINST_TRAFFICKING_IN_PERSONS_2010_2015.pdf.*

75 *Anti-Trafficking in Persons Act*, Act 270 2007, s 6.

76 *Anti-Trafficking in Persons Act*, Act 270 2007, s 6.

77 U.S. Department of State 'Trafficking in Person Report' (2010) (Malaysia) 247.

78 International Program on Elimination of Child Labour (IPEC) Subregional information system – Nepal, *http://www.ilo.org/legacy/english/regions/asro/newdelhi/ipec/index.htm* Last update 15 June 2009, accessed 19 July 2010, 4.

79 All figures are from *Report on the Nepal Labour Force Survey*, Central Bureau of Statistics Nepal, 2008, 10, 136

80 See ss. 2-4 of the Act, which contain the substantive prohibitions on trafficking, as well as the definition of all relative terms

81 *Human Trafficking (Control) Act,* 2007, ss 12-14.

employ a child of 15 or 16 in a "risky" job. It also prohibited forced or coerced employment of children. The maximum penalty is a year in prison. However, there is little in the Act to prevent the traditional system of *Kamaiya*, effectively a form a debt-bondage that extends from parents held in debt bondage to their children as well. This presents a significant challenge, particularly in the agricultural sector, as it is harder to track and attracts less social stigma than other forms of exploitation.[82] The Government has attempted to abolish the *Kamaiya* system and free workers previously bonded under it, but the US State Department reports suspicions that many labourers who were freed in 2000 as a result of this ban were not given the land they were promised, and were quite likely to fall back into exploitative bondage.[83]

3.2.6.3 Prosecution and enforcement

The Nepali justice system faces problems associated with issues of poor governance and lack of accountability.[84]
However, most reports indicate an improving trend in combating people trafficking and slavery in Nepal. Reporting of cases more than doubled from 55 to 112, which more likely indicates a greater investigative effort rather than a spike in cases. Convictions, on the other hand, rose to a high of 60 in 2004-2005, but fell again in the 2005-2006.[85] This dip may be a representation of the political turmoil that again engulfed the country in that year, as King Gyanendra was removed and replaced with a Constituent Assembly. The UN rates the number of prosecutions as 'very high' proportionate to the populations, offering signs of encouragement.[86]

The Ministry of Women, Children and Social Welfare was established in 1995 with exclusive responsibility for addressing all forms of trafficking in women and children, the most egregious and common forms in Nepal. The Ministry has provided funding to eight NGO-run shelter homes and outlaid US$275,000 to construct 15 emergency shelters across Nepal.

The National Plan of Action against trafficking in Children and Women for Sexual and Labour Exploitation establishes a broad framework plan of action, and details 13 focus areas for policy development. This has led to the development of district specific plans of action.

A rescue and rehabilitation fund has been established in major cities, funded partly by the government, partly out of the proceeds of fines.

The National Master Plan on Child Labour was developed by the Ministry of Labour and Transport Management in 2004 in collaboration with the ILO. The goal of the Master Plan is to have all children out of the worst forms of child labour by 2015, and to reduce the overall amount of child labour. The primary means for doing so is to increase the availability of education.

82 International Labour Organisation, 'The Informal Economy and Workers in Nepal' (2004) which estimates some 17 000 children were employed under *Kamaiya* in 2004.

83 U.S. Department of State 'Trafficking in Person Report' (2009) 264.

84 International Labour Organisation, 'Decent Work Country Programme for Nepal 2008-2010', 11

85 UNODC 'Global Report on Trafficking in Persons' (2009) 9, 202.

86 Ibid. 9, 43.

However, the failure of the legal system thus far to adequately complete prosecutions destroys confidence in the justice system, and discourages victims from coming forward. There is a strong suspicion that government officials themselves are complicit in the process of trafficking, preventing the increasingly organised criminal groups behind the phenomenon from being adequately prosecuted.87 As of 2008 there had been no prosecutions of any government officials in connection with people trafficking.88 There are also an inadequate number of investigators trained in dealing with trafficking, as well as a more general problem of lack of professionalism and corruption amongst the police that hinders investigations.[89]

3.2.7 Thailand

3.2.7.1 Extent of the Problem

Thailand is a major source, destination and transit country for men, women and children subjected to human trafficking, especially forced labour and forced prostitution[90]. The majority of trafficking victims within Thailand are migrants, especially from Burma. Most people trafficked as labourers within Thailand are men, though there are also cases of women and children being trafficked for labour. People trafficked within Thailand were found in maritime fishing, seafood processing, low-end garment production and domestic work. Several cases have been reported of men, mostly Burmese, Cambodian and Thai being trafficked onto Thai fishing boats throughout the region, sometimes at sea for several years, under physical threat and without pay.[91]

Research suggests that up to 12% of migrants near Thailand's borders are likely to be victims of trafficking.[92] The degree of exploitation varies considerably, from misrepresentation and extortion to enslavement.

3.2.7.2 Legal Remedies Against Trafficking and Slavery

The *Anti-Trafficking in Persons Act 2008* included males and labour exploitation where the previous legislation did not. This new legislation considers trafficking to be a predicate crime for prosecution under the *Anti-Money Laundering Act,* allowing for additional penalties and asset confiscation.[93]

Though Thai anti-trafficking laws are largely adequate, there is an evident failure to enforce the laws and prosecute traffickers. Prosecution rates remain low and the actions of authorities such as police indicate they either fail to understand the application of anti-trafficking laws (and the associated protections to victims of trafficking) or choose to disregard them. This includes officials who have undergone anti-trafficking training.[94]

87 U.S. Department of State 'Trafficking in Person Report' (2009) 246.

88 Ibid.

89 *Regional Study for the harmonization of anti-trafficking Legal Framework in India Bangladesh and Nepal with International Standards*, Kathmandu School of Law, 2007 Kathmandu School of Law, 63.

90 U.S. Department of State 'Trafficking in Person Report' (2010).

91 U.S. Department of State 'Trafficking in Person Report' (2009) 320.

92 World Vision, 'Traffick Report: Thailand', <http://www.worldvision.com.au/Libraries/3_3_1_Human_rights_and_trafficking_PDF_reports/Trafficking_Report_Thailand.sflb.ashx>.2.

93 U.S. Department of State 'Trafficking in Person Report' (2009) 246.

94 Ibid.

The Ministry of Labour and Ministry of Social Development and Human Security (MSDHS), in coordination with the ILO, have developed the Operation Guideline on the Prevention and Suppression of Trafficking for Labour Purposes, and Assistance and Protection for Trafficked Persons.[95] The Operation Guideline sets out a comprehensive system for dealing with suspected cases of trafficking. Its focus is on the protection of victims of trafficking. It seeks to coordinate the various organisations and streamline their approach. The guidelines themselves are exemplary; however they do not seem to be regularly or uniformly put into practice.

3.2.7.3 Prosecution and enforcement

Thailand is making significant effort to enable irregular migrants to regularise their presence in Thailand through registration, though this has not met with full success.[96] Increased regularisation of illegal migrant workers could significantly reduce the vulnerability of illegal migrants to trafficking. There have been several programmes whereby permits have been made available to migrant workers to regularise their status in Thailand, however these have been rife with problems due to lack of information available publicly; unwillingness of employers to support their workers applications for permits and the relatively high cost of acquiring the permits.[97] A 2008 policy compelled migrant workers to have their citizenship verified by their national government. Laos and Cambodia set up places where their citizens were able to do this within Thailand. Burmese workers, however, were compelled to return to Burmese border areas in order to perform the verification process, putting them at risk of criminal sanction for illegally leaving Burma. Accordingly few applied. Migrants cite the high costs, longer delays in placement and poor implementation of the official channels as reasons so many continue to avoid these formal processes.[98] Some reports have indicated that the increased attempt to normalise the status of all migrant workers in Thailand has resulted in increased opportunities for police extortion.[99]

Corruption is an ongoing problem in Thailand and the area of trafficking proves no exception. 48.9% of Burmese migrant domestic workers interviewed for a Mahidol University survey reported that the Thai authorities they had encountered (usually police) demanded money from the workers and 28.6% reported receiving threats of deportation. These migrant workers were not all victims of trafficking (although most had been exploited to some degree), yet this would appear to be indicative of the general attitude of many Thai authorities to migrant workers and victims of trafficking. The interviews reported in this research indicate the officials encountered by the migrant workers (registered and non-registered, trafficked and non-trafficked) did not attempt to establish whether or not the girls and women were victims of trafficking.[100]

Migrant workers live in constant and real fear of ill-treatment, extended detention, deportation and extortion at the hands of authorities, especially police.[101] This fosters an environment in which traffickers can work with a high degree of impunity and many migrant workers are vulnerable to trafficking.

The Royal Thai Police reported investigations of 134 trafficking cases in the June 2008 – November 2009 period. The Office of the Attorney General reported initiating 17 prosecutions in 2009 and eight in early 2010. In 2009 at least eight convictions for trafficking-related offences, including five in labour-trafficking cases were recorded.[102]

In November 2009 Thailand recorded its first human trafficking convictions relating to seafood when two Thai citizens received five and eight year sentences respectively for their involvement in the forced labour of Burmese workers in a Samut Sakhon shrimp processing factory. However, prosecutions of this kind are rare. As of early 2010 there had been no arrests relating to a July 2006 case of 39 deaths from malnutrition on fishing vessels. [103]

95 Office of Welfare Promotion, Protection and Empowerment of Vulnerable Groups (OPP) Minister of Social Development and Human Security, Operational Guideline on the Prevention and Suppression of Trafficking for Labour Purposes, and Assistance and Protection for Trafficked Persons (OPP, Minister of Social Development and Human Security, 30 April 2008) <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_105028.pdf>. This was signed by the Ministry of Labour, MHDHS, Department of Employment, Department of Labour Protection and Welfare, Department of Social Development and Welfare, ILO, Office of Welfare Promotion, Protection and Empowerment of Vulnerable Groups, Sub-committee to Combat Trafficking in Women and Children.

96 Macnamara, K., *Extortion and confusion mar Thailand's migrant crackdown* (Mekong Migration Network 7 September 2010) <http://www.mekongmigration.org/?p=764>.

97 Human Rights Watch, 'From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand' (Report, Human Rights Watch, February 2010) <http://www.hrw.org/en/reports/2010/02/23/tiger-crocodile>.

98 Human Rights Watch, 'From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand' (2010).

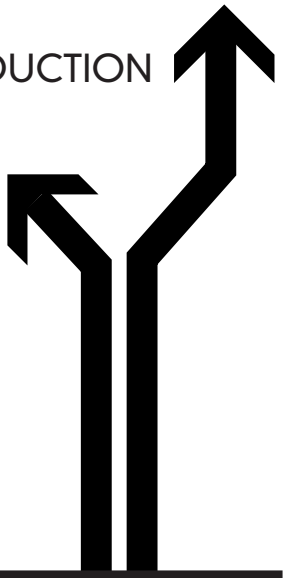
99 Macnamara, K, *Extortion and confusion mar Thailand's migrant crackdown* (Mekong Migration Network 7 September 2010)

100 Awatsaya Panam et al, *Migrant Domestic Workers: From Burma to Thailand,* Institution for Population and Social Research, Mahidol University, (2004) *http://www.ipsr.mahidol.ac.th/ipsr/Contents/Books/FullText/2004/286_MigrantDomesticWorkersFromBurmatoThailand.pdf*, 15.

101 Human Rights Watch, 'From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand' (2010).

102 U.S. Department of State 'Trafficking in Person Report' (2009) 246.

103 Ibid.



4. OBLIGATIONS ON AUSTRALIA TO ACT UNDER INTERNATIONAL LAW

The Australian Government needs to act to prevent goods tainted by trafficking and slavery from entering into Australia and to ensure that Australian companies take steps to eliminate trafficking and slavery from their own supply chains.

Chapter 4 outlines Australia's key obligations under international law in relation to combating slavery and human trafficking. These treaty obligations provide the Australian government with a clear mandate and imperative to act. This Chapter then concludes with a brief discussion on extra-territorial legislation.

4.1 Obligations under treaties relating to Slavery

The prohibition on slavery has been established as part of customary international law.[104] While legal literature establishes that slavery as an international crime is *jus cogens*, the International Court of Justice and the Economic Community of West African States Community Court of Justice[105] identifies the duty to eradicate slavery as an *erga omnes* norm.

The Australian Government accepts the international obligation to combat slavery through a number of international treaties it has ratified, including:

- 1926 *Convention to Suppress the Slave Trade and Slavery*
- *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*
- *International Covenant on Civil and Political Rights*
- *UN Convention against Transnational Organised Crime*
- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of the United Nations Convention against Transnational Organized Crime*
- *UN Convention on the Rights of the Child*
- *ILO Convention No. 29 on Forced or Compulsory Labour* (174 ratifications)
- *ILO Convention No. 105 on Abolition of forced Labour* (169 ratifications)
- *ILO Convention No. 182 on Worst Forms of Child Labour* (171 ratifications)

In addition, Australia has voted in favour of the Universal Declaration of Human Rights which was adopted by the United Nations General Assembly on 10 December 1948. Article 4 of the Declaration proclaims that '[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.'

4.2 Obligations under treaties relating to Human Trafficking

Prohibition of human trafficking has not yet reached the same status as slavery in terms of being recognised as customary international law, but it is an international crime.[106] The United Nations High Commissioner for Human Rights has taken the view that 'trafficking of persons today can be viewed as the modern equivalent of the slave trade of the nineteenth century.'[107]

Australia has accepted its obligations to combat human trafficking through ratification of a number of international human rights treaties, including:

104 Human Rights and Equal Opportunities Commission (HREOC), ' Submission in Support of Application for leave to Intervene and Submission on the Appeal' (Submission for Commonwealth Director of Public Prosecutions v Tang, HREOC, 17 April 2008) <http://www.hreoc.gov.au/legal/submissions_court/intervention/tang.html>

105 Hadijatou Mani Koraou v Republic of Niger (27 October 2008) Judgement No. ECW/CCJ/JUD/06/08 (Economic Community of West Africa States Community Court of Justice).

106 Silvia Scarpa, *'Trafficking in Human Beings: Modern Slavery'* (2008).

107 Office of the United Nations High Commissioner for Human Rights, '*Abolishing Slavery and its Contemporary Forms'* (UN Doc HR/PUB/02/4 2002).

- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of the United Nations Convention against Transnational Organized Crime* (known as the Palermo Protocol);
- The *UN Convention on the Rights of the Child* (Article 35);
- The *UN Convention on the Elimination of All Forms of Discrimination Against Women* (Article 6);
- The *Optional Protocol to the Convention on the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;* and
- *ILO Convention No. 182 on the Elimination of the Worst Forms of Child Labour.*

4.3 Obligations to Deal with Proceeds of Crime

Goods produced with the involvement of slavery or trafficked labour meet the international definition for the proceeds of crime. Australia is a State Party to the *UN Convention Against Corruption* (UNCAC) and the *UN Convention against Transnational Organised Crime* (UNTOC). Both Article 2 of UNTOC and Article 2 of UNCAC defines "Proceeds of Crime" as "any property derived from or obtained, directly or indirectly, through the commission of an offence". By this definition, goods produced through the use of slavery and trafficked labour and any revenue generated from the sale of such goods are proceeds of crime.

Article 23 of UNCAC addresses the laundering of the proceeds of crime:

1. *Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally*
   a. *(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*
   (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
   b. *Subject to the basic concepts of its legal system:*
   (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
   (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. *For purposes of implementing or applying paragraph 1 of this article:*
   a. *Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;*
   b. *Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;*
   c. *For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;*
   d. *Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;*
   e. *If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.*

Article 6 of UNTOC is very similar to Article 23 of UNCAC.

Thus, under Article 6 of UNTOC and Article 23 of UNCAC it can reasonably be argued that at a minimum it should be an offence for an Australian company to accept or sell any good where they know the good has involved slave or trafficked labour in its production.

Article 31 of UNCAC requires that States Parties take legal steps to confiscate the proceeds of crime and to identify and trace the proceeds of crime, stating:

1. *Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*
   a. *Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*
   b. *Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*
2. *Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.*
3. *Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.*
4. *If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.*
5. *If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*
6. *Income or other benefits derived from such proceeds of*

crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

7. *For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.*
8. *States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.*
9. *9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.*
10. *Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.*

Article 12 of UNTOC is very similar to Article 31 of UNCAC.

Thus Article 12 of UNTOC and Article 31 of UNCAC can be seen to justify the Australian Government requiring companies to trace of origin of goods where there is a high likelihood of slave labour or trafficked labour having been used in its production. Further Article 12(7) of UNTOC and Article 31(8) of UNCAC would justify the Australian Government requiring companies to demonstrate the goods they are importing and selling in Australia are free from slave and trafficked labour in their production, to the degree of certainly that could be reasonably expected.

Article 18 of UNTOC requires States Parties to co-operate on matters of transnational organised crimes including "Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes."

Article 27 of UNTOC and Article 48 of UNCAC requires States Parties to cooperate across borders in conducting inquiries with respect to offences covered by the Convention concerning "The movement of proceeds of crime or property derived from the commission of such offences."

Further, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* requires States Parties to take action with regards to the proceeds of crime related to the use of children in forced labour and the sexual exploitation of children. Article 7 states:

States Parties shall, subject to the provisions of national law:

a. *Take measures to provide for the seizure and confiscation, as appropriate, of:*
   (i) Goods, such as materials, assets and other instrumentalities used to commit of facilitate offences under the present protocol;
   (ii) Proceeds derived from such offences;
b. *Execute requests from another State Party for seizure or confiscation of goods or proceeds referred to in subparagraph (a);*
c. *Take measures aimed at closing, on a temporary or definitive basis, premises used to commit such offences.*

In conclusion, goods made with the involvement of slave labour or trafficked labour constitute proceeds of crime, given the acceptance of slavery and trafficking as crimes under international law. It is the view of STOP THE TRAFFIK Australia the international treaties Australia has signed up to create an obligation for Australia to take reasonable steps to prevent companies from profiting from these crimes through the sale of goods that have involved slave labour or trafficked labour in their production. Further, these treaties justify the Australian Government to require companies to take steps to ensure their products are free of slave labour and trafficked labour.

4.4 Addressing Extraterritoriality

One of the key issues in trying to reduce the amount of goods produced with slavery and human trafficking is ascertaining which government has responsibility. Why should the Australian Government take any action for crimes committed in another jurisdiction? However, effectively addressing human rights abuses involves governments working in solidarity. This principle of state cooperation is enshrined under the UN Charter, whereby member countries (including Australia) have agreed to engage in international cooperation in order to achieve the aims of the Charter, which includes the realisation of human rights under Articles 1(3) and 56.

As Cooney notes, subject to the *Australian Constitution*, federal parliament is capable of legislating extraterritorially.[108] The Australian Parliament has already accepted that corporations can be held liable for their dealings with parties involved in acts of slavery and trafficking in persons through the existing provisions of the *Criminal Code*. This includes dealings with parties operating in both Australia and overseas. A trafficking in persons offence against s 271.2 of the *Criminal Code* involves a geographical connection with Australia.

Under the Commonwealth's external affairs power, the geographical externality principle 'entitles the Commonwealth to legislate on any affairs, matters or things that are geographically external to Australia, regardless of whether such matters are otherwise the subject of a treaty or are of international concern.'[109]

One of the arguments for addressing extraterritoriality is the view that in 'the absence of effective international regulation, and the difficulties often faced by host countries in regulating the activities of transnational corporations, the home jurisdiction is arguably in the best position to control the conduct of those

108 Sean Cooney, 'A Broader Role of the Commonwealth in Eradicating Sweatshops?' (2004) 28 *Melbourne University Law Review* 290, 306 cites *Statute of Westminster* 1931 (UK), adopted in *Statute of Westminster Adoption Act 1942* (Cth) s 3.

109 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

corporations'.[110] This may even apply where the harm caused is in another jurisdiction.[111] Large corporations with overseas dealings are more likely to stem from a developed nation. Therefore, the home jurisdiction would be more able to match the power of the corporation than the host country.[112]

4.4.1 Australian Action Against Bribery of Foreign Officials

The Australian government describes itself as committed to the punishment of foreign bribery through constitutional safeguards, accountability, criminalisation of corruption and international cooperation.[113] It is just one example of Australia combating a transnational criminal activity through legislation with extraterritorial reach.

The offence of bribing a foreign public official is contained in section 70.2 of the *Criminal Code Act 1995(Cth).* Elements of the offence include providing, offering to provide or promising to provide a benefit to another person (or causing the provision or promise),[114] the benefit being not legitimately due to the other person[115] and the first-mentioned person doing so with the intention of influencing a foreign public official in order to obtain or retain business a business advantage.[116] Importantly, the offence applies to an Australian citizen, resident or body corporate incorporated by or under a law of the Commonwealth or of a State or Territory, applying regardless of the outcome or result of the bribe or the alleged necessity of the payment.[117] Aside from direct liability, companies may also be liable for the actions of their employees and agents.[118] The provisions are sufficiently broad to cover payments through intermediaries, whereby both the company and the intermediary may accrue liability for the bribe.[119] Payments to third parties and indirect benefits such as the purchase of services will also likely be caught by the provisions, demonstrating the wide range in scope that the legislation has to prevent involvement of Australian companies and individuals in corruption and bribery overseas.

From February 2010, the *Crimes Legislation Amendment (Serious and Organised Crime) (No. 2) Act 2010* which constitutes an amendment to the *Criminal Code*, has raised the penalties for corporate involvement of bribery of foreign officials. Whilst individual penalties have gone up to $1.1 million from $66,000, the corporate penalty which was previously $330,000 is now the greater of (a) $11 million, (b) three times the value of any benefit the corporation directly or indirectly obtained as a result of the conduct – including the conduct of any related corporation or (c) if the court cannot determine the value of the benefit, 10 per cent of the annual turnover of the corporation in the 12 months preceding the offence.[120] The increase in penalties is a response to criticisms of the OECD monitors charged with assessing Australia's compliance with the OECD *Convention on Combating Bribery of Foreign Public Officials.*[121] The amendments indicate the seriousness with which the Australian government is concerned with issues of bribery and corruption and the importance of deterring Australian corporations from engagement with such destructive practices overseas.

The laws prohibiting corporate involvement in the bribery of foreign officials have extraterritorial operation and are aimed at punishing specific conduct of corporations where they act socially irresponsibly overseas.

4.4.2 Examples of Extraterritorial Legislation from other Countries

There are other countries that have accepted the need for applying extraterritorial jurisdiction to corporations whose home is within their jurisdiction. Belgian and French law provide for corporate criminal responsibility and the extraterritorial jurisdiction of courts in prosecuting crimes.[122]

Under Belgian law, two complaints were lodged by private individuals against the French oil company TotalFinaElf, through the mechanism of Belgian criminal procedure called "constitution de partie civile".[123] First, in October 2001, a complaint was lodged for TotalFinaElf's alleged complicity to crimes against humanity and war crimes committed by the Congolese President Sassou Nguesso. Second, in April 2002, a complaint was lodged by Burmese citizens (some of whom had "refugee" status in Belgium after the commission of the alleged facts) against TotalFinaElf and two of its high-ranking directors, the complaint stating all three parties as guilty of complicity to crimes against humanity committed by the Burmese military during the construction of the "Yadana" pipeline project.

In August 2002, Burmese citizens brought a judicial action before French courts against two of the high-ranking directors of TotalFinaElf S.A. for acts constituting the crime of illegal confinement (where in the absence of any specific provision, the crime of illegal confinement as defined by the French Criminal Code corresponds to forced labour), for their involvement in the "Yadana" pipeline project in the context of which acts of forced labour occurred.[124]

110 Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 49.

111 *Treacy v Director of Public Prosecutions* [1971] AC 537, 561–2 (Lord Diplock).

112 Sarah Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (2000) 79.

113 Attorney General's Department, Australian Government, *Australian Approach to Fighting Corruption*, <http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~n0000Info+paper.pdf/$file/n0000Info+paper.pdf> at 10 May 2010.

114 S70.2(1)(a)

115 S70.2(1)(b)

116 S70.2(1)(c)

117 Attorney General's Department, *Fact Sheet 2: The Offence* <http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~3Fact+Sheet+2+-+as+updated+2+May+2008.pdf/$file/3Fact+Sheet+2+-+as+updated+2+May+2008.pdf> at 10 May 2010.

118 Attorney General's Department Fact sheet 2, 2.

119 Ibid.

120 *Crimes Legislation Amendment (Serious and Organised Crime) Act (No.2)* 2010 (Cth)

121 Matthew Skinner and Tim Robinson, *Focus: Deterring bribery here and abroad* (Article, Allens Arthur Robinson, 2010) <http://www.aar.com.au/pubs/ldr/foldrmar10_02.htm> at 10 May 2010.

122 Fafo, Business and International Crimes Project, http://www.fafo.no/liabilities/CCCSurveyFrance06Sep2006.pdf and http://www.fafo.no/liabilities/CCCSurveyBelgium06Sep2006.pdf.

123 Fafo, Business and International Crimes Project, http://www.fafo.no/liabilities/CCCSurveyBelgium06Sep2006.pdf.

124 Ibid.

SECTION TWO: GOVERNMENT ENGAGEMENT AND DIRECT SUPPORT FOR CORPORATIONS

5. GOVERNMENT ENGAGEMENT WITH COMPANIES

Chapter 5 briefly considers the potential for a higher level of government engagement with companies in relation to corporate social responsibility (CSR) for trafficking and slavery located in supply chains. Chapter 6 then considers direct government support through export credit agencies (ECAs).

5.1 Legislating for Increased Government Engagement

The Federal Government could consider introducing legislation that requires it to engage with companies to work with them towards the elimination of slavery and human trafficking within their supply chains. This would include assisting industries to establish mechanisms to achieve this end. This type of legislation exists in the US and is outlined below.

5.1.1 The US Trafficking Victims Protection Reauthorization Act

The *Trafficking Victims Protection Reauthorization Act (2005)* directs the U.S. Government to work with the industries involved in the production, importation and sale of products, identified by the International Labor Affairs Bureau (ILAB), to "create a standard set of practices that will reduce the likelihood that such persons [industry] will produce goods using forced or child labor"[125]. Further, it directs the U.S. Government to "consult with other departments and agencies of the US Government to reduce forced and child labor internationally and ensure that products made by forced and child labor in violation of international standards, are not imported into the US".[126]

The International Labor Affairs Bureau (ILAB) contracted with the National Research Council to conduct a workshop on developing a framework to assess practices designed to reduce forced and child labour in supply chains that produced goods imported into the United States. The workshop was not intended to produce any comprehensive or final conclusions to the Department of Labor, rather was ultimately to assist the Department by bringing together "a broad range of experts from the field of child labor, forced labor, corporate social responsibility, and best practices theory".[127]

In recognizing the need for a multi-stake holder approach to addressing the problems of forced labour and child labour in global agricultural production, section 3205 of the *Food and Energy Security Act of 2007* established the Consultative Group to Eliminate the Use of Child Labor in Imported Agriculture ('the consultative group').128 The consultative group is composed of 13 members, chaired by the U.S. Department of Agriculture (USDA) including academics, non-profit organisations and experts in the area of international child labour, as well as Department of State, private agriculture and an independent labour standards certification organisation.129 The duties of the consultative group are to develop and make recommendations to the Secretary of Agriculture regarding guidelines to reduce products being imported into the United States produced with the use of forced or child

125 *Trafficking Victims Protection Reauthorization Act of 2005*, Public L No 109 – 14, 119 Stat 3558, (2006).

126 Ibid Section 105(b)(2)(d) & (e)

127 John Sislin and Kara Murphy, *Approaches to Reducing the Use of Forced or Child Labour: Summary of a Workshop on Assessing Practice* (National Research Council, 2009) 15.

128 *Food and Energy Security Act of 2007*, 2302 USC § 3205 (2007).

129 See *Charter of the Consultative Group to Eliminate Child Labor and Forced Labor in Imported Agricultural Products*, 1043-50, Departmental Regulation of US Department of Agriculture, Foreign Agricultural Service, § 3 (25 March 2010) <http://www.ocio.usda.gov/directives/doc/DR1043-050.htm>.

labour.130 In addition, the consultative group has the task of assisting industry in ensuring that the products they buy and sell are not produced with forced or child labour.131 On 21 December 2010, the consultative group presented its recommendations to Secretary of Agriculture, Thomas Vilsack.132 The Secretary has elected to issue guidelines based on the Consultative Group's recommendations without change.133 On 12 April 2011, the US Department of Agriculture (USDA) invited public comment on the guidelines up until 29 April 2011 (oral submissions) and 11 July 2011 (written submissions).134

The following is included in the current Guidelines, as endorsed by the Secretary of Agriculture:[135]

- *Company Program Elements:* Company programs should be based upon management systems, capable of supporting and demonstrating consistent achievement of the elements outlined below ... These standards cover issues such as, impartiality and confidentiality, documentation and record control, management reviews, personnel qualification criteria, audit procedures, appeals, and complaints. ... Additionally, companies adopting the Guidelines are expected to engage with governments, international organizations, and/or local communities to promote the provision of social safety nets that prevent child and forced labor and provide services to victims and persons at risk. ...
- *Foundation Elements, Standards on Child Labor and Forced Labor:* Standards should meet or exceed ILO standards .. Where national laws on child labor are equal to or more stringent than ILO standards, company standards should meet or exceed national laws. ... Standards should be made available to the public. ...
- *Foundation Elements, Supply Chain Mapping and Risk Assessment:* Company should map its supply chain(s), beginning with the producer. ... (and) should identify areas of child/forced labor risk along chains ...
- *Communications:* Company should communicate child labor and forced labor standards, rights, expectations, monitoring and verification programs, remediation policies, and complaint process and process for redress to: i. Suppliers through training for managers, supervisors and other staff. ... ii. Workers (including unions where they exist) and producers. ... iii. Other levels of supply chain as appropriate (traders, middlemen, processors, exporters). ... iv. Civil society groups and other relevant stakeholders in the country/geographic locations of sourcing. ... The Company should (also) ensure that a safe and accessible channel is available to workers and other stakeholders to lodge complaints, including through independent monitors or verifiers.
- *Monitoring:* Company should develop monitoring tools based on its standards on child labor and forced labor ... Company may have internal staff of auditors and/or hire a credible organization to carry out monitoring activities. ... Auditors should be competent, should have knowledge of local contexts and languages, and should have the skills and knowledge appropriate for evaluating and responding to child and forced labor situations. ...
- *Continuous Improvement and Accountability, Remediation:* In consultation with relevant stakeholders, company should develop and put in place a remediation policy/plan that addresses remediation for individual victims as well as remediation of broader patterns of non-compliance caused by deficiencies in the company's and/or suppliers' systems and/or processes. ...
- *Internal Process Review:* Company should periodically check its own progress against its program goals including determining the effectiveness of its program to reduce the overall incidence of child labor or forced labor in its supply chain. ... Company should make information available to the public on its monitoring program and process to remediate/improve performance ...
- *Independent Third-Party Review:* Companies developing programs in accordance with the Guidelines should seek independent, third party review of their program implementation. Independent review assures the company's customers that the company is meeting the standards on child labor and forced labor and relevant requirements outlined within its own program. ...
- *Independent Third Party Monitoring:* ... Independent monitoring should be conducted by an entity external to the company and should demonstrate independence and impartiality as a precondition for participating in the monitoring process ...
- *Independent Third Party Verification:* Verifiers should be accredited certification bodies ... Third Party verification should be conducted at least annually ...

The guidelines represent a positive step taken jointly by the US Federal Government and industry.

130 Ibid § 4.

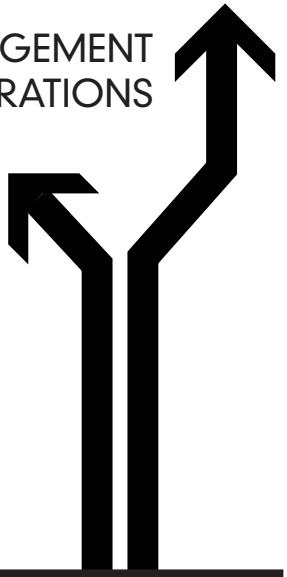
131 Ibid.

132 Foreign Agricultural Service, *Consultative Group To Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products* (12 April 2011) Federal Register: The Daily Journal of the United States Government < http://www.federalregister.gov/articles/2011/04/12/2011-8587/consultative-group-to-eliminate-the-use-of-child-labor-and-forced-labor-in-imported-agricultural>.

133 Ibid.

134 Ibid.

135 Ibid. Note: the Guidelines are available at the website listed above.



6. GOVERNMENT SUPPORT THROUGH EXPORT CREDIT AGENCIES

Chapter 6 focuses on direct government support for corporations through the government owned export credit agency (ECA) in Australia and considers the need for tougher measures in relation to ECA-backed companies found to utilise trafficked and slave labour in their supply-chains.

Export Credit Agencies (ECAs) are a common vehicle utilised by states[136] to provide export credit insurance (ECI) and/or finance for local businesses which are engaged in regions and sectors where the private markets 'lack the capacity or willingness' to provide such support.[137] ECI protects the foreign receivables of businesses operating in foreign financial markets against risks such as 'commercial and political risks that could result in non-payment of a (business's) export invoices'.[138] A range of financial instruments, such as loans, are also commonly provided to businesses through ECAs, allowing the pursuit by local business of export and investment opportunities.[139] To this end, the financial assistance provided by ECAs plays a significant role in supporting 'home country exports' and the domestic economy.[140] The significance of ECA-supported activity, however, extends well beyond home states.[141] Indeed ECA activity:

> *exceeds all multilateral development bank (MDB) and overseas development agency activity, impacts on almost every international trade decision, and directly finances one in every eight dollars of world trade, supporting US$1.5 trillion in global export business in 2008.*[142]

6.1 Industries supported by ECAs and Specific CSR risks

It is common for ECAs to support projects in 'infrastructure (road and port building), industrial facilities, extractive industries (mining, oil and gas), energy projects (power plants and dams), forestry and plantations'.[143]

There is a potential for labour rights abuses to occur in ECA supported projects. For instance, a 2003 ECA-Watch report on nine ECA-funded projects in the extractive and energy industries, raised concern regarding violations of labour rights found in core ILO conventions, in ECA-backed projects.[144] This ECA-Watch report also found that the risk of labour rights abuse was heightened where workers had been subcontracted to work on major projects; this was the case, for example, in relation to the company Aracruz

136 ECAs may be State Agencies or privatised, 'but all are mandated by the State and perform a public function'; see Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN HRC, 8th sess, Agenda Item 3, A/HRC/8/5 (7 April 2008) [39].

137 See for instance, Export Finance and Insurance Corporation, *EFIC Annual Report 2010* (2010) EFIC, 2 <http://www.efic.gov.au/about/governance/AnnualReports/Documents/EFIC-Annual-Report-2010.pdf>.

138 See for instance, Meridan Finance Group, *Export Credit Insurance* <http://www.meridianfinance.com/export_credit.html>.

139 See for instance, Export Finance and Insurance Corporation, *Overcoming Financial Barriers for Exporters* (2009) <http://www.efic.gov.au/Pages/finance.aspx>.

140 Luke Fletcher, Scott Hickie and Adele W ebb, 'Risky Business: Shining a Spotlight on Australia's Export Credit Agency' (Report, Jubilee Australia, December 2009) 9.

141 Ibid 9

142 Ibid 9.

143 Özgür Can and Sara L. Seck, 'The Legal Obligations with Respect to Human Rights and Export Credit Agencies' (Final Legal Discussion Paper, ECA-Watch, Halifax Initiative Coalition and ESCR-Net, July 2006) 2-3.

144 Gabrielle Watson (ed), 'Race to the Bottom, Take II: An Assessment of Sustainable Development Achievements of ECA-Supported Projects Two Years After OECD Common Approaches Review' (Report, ECA-Watch, September 2009) 9. Note: the violations specifically mentioned are ILO conventions on discrimination and equal pay for equal work.

Cellulose's wood pulp in Brazil, supported by Brazil and Finland's ECAs.[145] In addition, NGOs have raised concerns regarding the potential use of forced labour in the Chinese ECA-backed[146] Salween Dams Plan; this plan involves the construction of dams in Burma, which has a history of using forced labour in major construction projects.[147] Finally a report by the Halifax Initiative notes that Canada's ECA have in the past supported nuclear plant projects in Romania involving the use of forced labour.[148]

6.2 Reform of ECAs urged by the United Nations

In a 2008 report John Ruggie, the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, noted:[149]

> *On policy grounds alone, a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight - and possibly indicate where State support should not proceed or continue.*

In 2010, Ruggie further noted that:[150]

> *ECAs potentially are running two risks in relation to human rights. The first is the risk that a client's business activities or relationships contribute to human rights abuse abroad, with the moral, reputational, political and in some cases legal implications this entails for an ECA itself. The second is the financial risk to the project that may result from its adverse impact on the human rights of individuals and communities, which in turn could affect the ECA's own business.*

6.3 Australian Export Finance and Insurance Corporation (EFIC)

In Australia, the Commonwealth Government provides ECI and finance for Australian businesses through the Export Finance and Insurance Corporation (EFIC). The EFIC is a self-funded statutory corporation, and, as such, is wholly owned by the Commonwealth Government.[151]

The types of finance and insurance assistance provided by EFIC include:

Finance	Insurance
Finance, credit and working capital guarantees;	Bond insurance;
Advance payment, performance and warranty Bonds;	Documentary credit guarantees;
Direct finance.	Export payments insurance;
	Political risk insurance.

The EFIC's 2009 Annual Report stated that 'over the year, EFIC provided facilities totalling $576.5 million and supported export contracts and overseas investments of over $1.3 billion'.[152] The EFIC's profit on its commercial account totalled $33.6 million in 2009.[153] The Australian Government benefits directly from the annual profits made by the EFIC because under the *Export Finance and Insurance Corporation Act 1991* EFIC is authorised to pay dividends to the Commonwealth Government. For instance in 2008 EFIC paid 50% of the commercial account profit to the Commonwealth.[154]

6.3.1 CSR risks for EFIC

A significant number of business export activities supported by the Commonwealth appear to be in low-income and developing regions. A breakdown of exposures by region is as follows for the 2009 financial year -

Regions	Exposures
Australia / Pacific	$341m
Asia	$1.1b
Europe	$265m
North America	$75m
South America	$333m
Middle-East	$338m
Africa	$120m

EFIC does not provide information to the public about the breakdown of exposures by industry, nor does EFIC release information regarding each project it supports. However an analysis by Jubilee Australia of 'EFIC's sectoral profile shows that it has a history of supporting big extractive industry projects with large loans and insurance policies'.[155] No public information is available regarding the risk of trafficked or slave labour in such projects.

6.3.2 Current CSR Framework for EFIC

EFIC screens and classifies all export transactions, overseas projects and overseas investments for which EFIC support is sought, to identify the type and degree of environmental and social risk evaluation necessary. EFIC 'classifies each new project associated with a potential transaction as Category A (potentially significant adverse environmental and/or social impacts), Category B (Category B transaction falls in the broad spectrum between A and C) or Category C (minimal or no adverse environmental and/or social impacts) depending on the significance of its potential

145 Ibid 19 - 20.

146 Backed by China's ECA.

147 See for instance, EarthRights International, 'Energy Insecurity: How Total, Chevron, and PTTEP Contribute to Human Rights Violations, Financial Secrecy, and Nuclear Proliferation in Burma (Myanmar)' (Report, EarthRights International, July 2010) 9.

148 Halifax Initiative Coalition, 'Reckless Lending: How Canada's Export Development Corporation Puts People and the Environment at Risk' (Report, Halifax Initiative, March 2000).

149 Ibid 12.

150 Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Engaging Export Credit Agencies in Respecting Human Rights' (Speech delivered at OECD Export Credit Group's 'Common Approaches' Meeting, Paris, 23 June 2010) 4.

151 *Export Finance and Insurance Corporation Act 1991* (Cth) s 6.

152 Export, Finance and Insurance Corporation, 'EFIC Annual Report 2009: Overcoming Financial Barriers for Exporters' (Annual Report, EFIC, 2009) 4.

153 Ibid 4.

154 Ibid 64.

155 Fletcher, Hickie and W ebb, 'Risky Business' (2009) 9.

impacts'. Where a project is classified as Category A or B, EFIC will benchmark the project against (a) relevant Performance Standards of the International Finance Corporation (IFC)[156] and (b) where relevant, host country standards.

The IFC's second standard addresses 'labour and working conditions', including a prohibition on forced labour, and is based on core International Labour Organisation (ILO) obligations.[157] Paragraph 15 of IFC 'Performance Standard 2' stipulates that the client will not 'employ forced labour, which consists of any work or service not voluntarily performed that is exacted from an individual under (the) threat of force or penalty'.[158] The prohibitions contained in paragraph 15 extend responsibilities to non-employees when the non-employee is directly contracted by the client and performing work directly related to core functions essential to the client's products or services for a substantial duration. In this instance, the client must use commercially reasonable efforts to apply the requirements of IFC 'Performance Standard 2'.

In addition, when the non-employee is not directly contracted by the client but rather contracted through intermediaries and performing work directly related to core functions essential to the client's products or services for a substantial duration, the client must use commercially reasonable efforts to (i) ascertain that these contractors or intermediaries are reputable and legitimate enterprises; and (ii) require that these contractors or intermediaries apply the requirements of IFC 'Performance Standard 2'.

Finally, in relation to supply-chains, clients must consider the 'adverse impacts associated with supply chains ... where low labour cost is a factor in the competitiveness of the item supplied'. In such cases the client will inquire about, and address, forced labour in its supply chain.

EFIC has stated that it 'declines transactions if we determine that the environmental and/or social impacts do not satisfy relevant (IFC) benchmarks'.[159]

6.3.3 Improving the EFIC's CSR Framework

The EFIC Environment Policy states that the agency considers effective consultation processes and appropriate public disclosure of relevant information to be 'important mechanisms to obtain feedback on the concerns of both directly and indirectly affected stakeholders' during environmental screening decisions for Category A projects (applied to facilities over $20 million). This is implemented through a 30 day period for public comment, during which time the client's environmental assessment is published on its website. EFIC encourages, but does not require, that the assessment be carried out by independent experts not associated with the project.

However, under EFIC Environment Policy, any internal documentation developed during project assessment and approval process is treated as confidential. Also confidential is any documentation relating to monitoring and reporting on environmental and social issues during the life of the project, given that these documents contain information from clients. The binding contractual terms under which finance has been provided are considered confidential, along with any information relating to the client's compliance with measures agreed in the environmental assessment, the status of measures to mitigate environmental and social harm, and the results of monitoring programs. As a result, it is impossible for the Australian public and parliamentarians to know how EFIC makes decisions about project categorisation, how EFIC assesses the social, environmental and human rights risks associated with projects, what modifications or mitigation measures EFIC requires of post-approval monitoring activities and any sanctions that EFIC applies for non-compliance. In short, the considerable discretion that EFIC wields is not balanced with effective transparency and public scrutiny.[160]

The Commonwealth Government could require that projects that fail to meet a required standard of demonstrating that they have taken reasonable action to ensure their supply chain is free of slavery and human trafficking could be denied the services of EFIC. However, such a measure is only likely to impact on a small number of Australian companies and not necessarily those at greatest risk of having human trafficking or slavery in their supply chains.

156 Export, Finance and Insurance Corporation, Environmental Policy (June 2007) <http://www.efic.gov.au/corp-responsibility/envr-responsibility/environmentpolicy/Pages/environmentpolicy.aspx#content ; http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards>. Note: This standard will be used until the EFIC's next periodic review.

157 International Finance Corporation, *Performance Standard 2: Labour and Working Conditions* (30 April 2006) <http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards>.

158 Ibid.

159 Export Finance and Insurance Corporation, Policy on environmental and social review of transactions: Draft for Consultation (August 2010) <http://www.efic.gov.au/corp-responsibility/envr-responsibility/Documents/Policy%20on%20environmental%20and%20social%20review%20Consultation%20draft%20August%202010.pdf>.

160 Fletcher, Hickie and W ebb, 'Risky Business' (2009) 21.

SECTION THREE: CORPORATE CODES AND REPORTING

7. FAILURE OF VOLUNTARY CODES AND REPORTING

Chapter 7 considers the failure of domestic and international voluntary CSR codes and reporting as mechanisms to deal with the risk of slave or trafficked labour having been used in the production of goods in a supply chain.

Such voluntary measures appear to have not resulted in Australian companies and businesses identifying any of their products as being at risk of involving slavery or trafficking in their supply chain. In light of this failure, possible mandatory codes and reporting requirements are canvassed in Chapter 8 and 9.

7.1 Overview of Current Debate Regarding Voluntary Measures

7.1.1 Current Support for Voluntary Measures

Australian Governments have been adamant that the implementation of Corporate Social Responsibility (CSR) policies should remain a voluntary process and they have not sought to alter the framework of duties[161] nor impose any extra rigour on established reporting obligations on Australian companies.[162]

The key argument in favour of voluntary measures to deal with the use of slavery and human trafficking in supply chains is that governments should not intervene in the running of businesses, but rather create the market environment for businesses to be incentivised by stakeholders to conduct triple-bottom-line reporting.[163] Furthermore, each company should be able to decide for themselves how best to integrate their business values into their business strategy. Finally, those in favour of voluntary measures argue there are sufficient international voluntary codes present to regulate business conduct.[164]

Three key reports have been produced on CSR which support voluntary initiatives rather than mandatory requirements. The first is a 2005 Parliamentary Joint Committee on Corporations and Financial Services ('the Committee') inquiry into corporate social responsibility. The Committee released their findings in a report titled "Corporate Responsibility, Managing Risk and Creating Value".[165] In the report, the Committee concluded that reporting on social responsibility issues should be left voluntary. Making CSR reporting mandatory could cause additional costs for corporations, with some corporations quoting $50,000 just to meet the ASX Corporate Governance Council guidelines.[166] The Committee stressed that there cannot be a one-size-fits-all approach to CSR in Australia as corporations are too diversified in size, nature and structure.[167] Furthermore, mandatory CSR disclosure may lead to a 'compliance mentality', with companies simply complying with the requirements to tick the box, rather than to further their own interests and business visions.[168]

Second, the Corporations and Markets Advisory Committee ('CAMAC') inquiry into CSR, released in 2006[169], found there was no need for any additional disclosure requirements because the existing means of encouraging corporate responsibility were sufficient. The current means include the legislative and ASX regulatory requirements, 'light touches' of governmental initiatives

161 Parliament Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 4.78.

162 Ibid, 6.46.

163 Marta de la Cuesta Gonzalez and Carmen Valor Martinez, 'Fostering Corporate Social Responsibility Through Public Initiative: From the EU to the Spanish Case ' (2004) 55 *Journal of Business Ethics* 275, 277.

164 See, for example, Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report* (2006) and Parliament Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006)

165 Parliament Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006)

166 Ibid, 6.16.

167 Ibid, xiii.

168 Ibid, 6.17 - 6.19.

169 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report* (2006)

such as leadership by example and encouragement through corporate sector consultation.[170] However, notably CAMAC did contend that in specific areas of public interest, such as environmental protection, CSR should be dealt with by legislation 'tailored to the specific purpose and extending to all businesses thought to be relevant' rather than general non-financial reporting or disclosure obligations.[171]

Finally, the ASX Corporate Governance Council ('the Council') also conducted a review into what role the Council should play in promoting CSR.[172] While the Council acknowledged that it has a role to play in relation to CSR, it considers CSR as only relevant when it poses a material risk to the value of a company.[173] Therefore, it was not appropriate to adopt any reporting requirement relating to sustainability or corporate responsibility, even in the context of material non-financial risks.

7.1.2 Problems with Voluntary Initiatives

Voluntary initiatives suffer from a number of key weaknesses. The first relates to the proliferation of voluntary initiatives, codes and frameworks, which has caused inconsistencies in the way corporations report on CSR issues. As Overland points out, one of the key problems of a voluntary reporting scheme is its 'ad hoc and arbitrary character'.[174] Companies have too great a flexibility in terms of when they report, how much they report and what indicators they use to report on CSR issues. In some cases, voluntary CSR reporting has become a public relations strategy, more concerned with improving a company's image rather than facilitating any real sense of transparency. Therefore it is almost impossible for the public and community stakeholders to make an informed assessment of a company's practices from the information reported voluntarily.

Furthermore, the current voluntary initiatives are insufficient in increasing corporate transparency. The fact that Australian companies lag behind other countries in non-financial reporting was also acknowledged by the Joint Parliamentary Committee Report though it recommended no compulsory reporting measures.[175]

Finally, the existing voluntary initiatives lack monitory, accountability or enforcement mechanisms, so the companies that do participate in the schemes are not subject to any pressures for frank and full disclosure. While domestic legislative safeguards are in place to hold corporations accountable for the consequences of their actions at home, the extension of such standards to protection for human rights abuses committed by corporate groups operating offshore remains contentious.[176] In addition, a lack of extraterritorial extension of Australian standards in terms of human rights protections to developing countries (where the state may not enforce or even enact laws regarding human rights), 'leaves it open for Australian companies to breach human rights with impunity in significant parts of their operations.'[177] This is despite the findings of two relatively recent, large-scale government reports,[178] that companies need to acknowledge responsibility for the wide ranging consequences of their actions.

7.2 Current Voluntary Measures in Australia

The following provides evidence that current voluntary measures are insufficient to promote CSR, particularly in relation to reporting on supply-chains.

7.2.1 The Australian Securities Exchange ('ASX')

The ASX is Australia's principal securities exchange.[179] The ASX has extensive powers and obligations as a market regulator.[180] If a listed company is found to breach the ASX listing rules, the ASX is empowered to suspend quotation of the company's securities or to remove its listing.[181] This acts as a powerful normative control on corporate behaviour. The listing rules are not just binding contractually, they are also enforceable against listed entities and their associates under provisions of the *Corporations Act.*[182] The listing rules therefore create additional and complementary obligations to those owed by corporations under the C*orporations Act* and the common law.[183]

ASX listing rule 4.10.3 requires companies to provide a statement in their annual report disclosing the extent to which they have followed the 28 ASX Council Recommendations, framed under eight Principles of Good Governance.[184] These eight Corporate Governance Principles and Recommendations are essentially a guiding set of standards for corporate governance which were produced in response to the collapse of a number of high-profile companies occurring in Australia and overseas throughout 2001 and 2002.[185] The recommendations are generally viewed as a positive mechanism to promote improved corporate governance by encouraging socially responsible practices amongst listed companies.[186] Listing rule 4.10.3 requires disclosure about the extent to which the recommendations have been followed, thereby compelling public companies to report on their activities as they

170 Ibid 9.

171 Ibid 147.

172 'Response to Submissions on Review of Corporate Governance Principles and Recommendations' (ASX Corporate Governance Council August 2007)

173 Ibid, 7.

174 Juliette Overland, 'Corporate Social Responsibility in Context: the case for compulsory sustainability disclosure for listed public companies in Australia?' (2007) 4 *Macquarie Journal of International and Comparative Environmental Law* 1, 18.

175 Parliament Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 6.119-6.121.

176 Nolan, J., 'Corporate Responsibility in Australia: Rhetoric or Reality?' (Working Paper No 47, University of New South Wales Faculty of Law Research Series, 2007), 64.

177 Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1) *Australian Journal of Human Rights* 15.

178 Corporations and Markets Advisory Committee (CAMAC), Parliament of Australia, *The Social Responsibility of Corporations* (2006) 9.

179 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, 2009) 56.

180 Ibid, 728.

181 Ibid, 729.

182 *Corporations Act 2001* (Cth) s674, Ch 7.

183 Australian Securities Exchange, *Corporate Governance Principles and Recommendations* (Australian Securities Exchange Report, 2007) 8.

184 Survey Response, Laws of Australia (Richard Meeran), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, 2006, 2.

185 Parliament Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006), 2.64.

186 Helen Anderson, 'Corporate Social Responsibility: Some Critical Questions for Australia' (2005) 24(2) *University of Tasmania Law Review* 143, 151.

relate to key principles of CSR. However, the recommendations themselves are neither mandatory nor prescriptive. Instead, they adopt an 'if not, why not' approach whereby failure to report compliance with any recommendation compels the company to provide an explanation for their alternate action in their annual report.[187]

Two of the eight ASX Corporate Governance Principles are particularly relevant to CSR for human rights abuses; Principles 3 and 7.[188] Principle 3 promotes ethical and responsible decision making, which takes into account the reasonable expectations of stakeholders.[189] Principle 7 is about recognising and managing risk, including operational, sustainability and ethical conduct. Recommendation 7.1 is particularly relevant as it suggests that failure to consider the reasonable expectations of stakeholders can threaten a company's reputation and the success of its business operations. Effective risk management involves considering factors which bear upon the company's continued good standing with its stakeholders.[190]

These Principles mean that corporations are expected to report on company impacts on stakeholders and thus compliance with human rights standards relevant to employment conditions, or otherwise explain why such impacts have not been disclosed. Disclosure is therefore the main mechanism used by the ASX system to promote socially responsible practices by listed corporations. Reputational concerns, such as those incurred by a company acting in breach of human rights, are clearly linked to investor confidence hence both of these rules have the effect of enforcing CSR in a way that is voluntary, whilst clearly highlighting areas where companies are unwilling to disclose compliance with standards.

However, there is currently no requirement for companies to disclose human rights abuses or explicit obligations to report on the existence of slave or trafficked labour throughout company supply chains. Therefore, while the ASX mechanisms to ensure there is disclosure about CSR are in place, corporate involvement in trafficking and slavery are not adequately addressed by those measures.

7.2.2 Standards Australia: AS 8003-2003

Standards Australia describes itself as the nation's peak non-government Standards organisation.[191] Standards Australia is a private company charged by the Commonwealth Government to meet Australia's need for contemporary, internationally aligned standards. Standards Australia has produced a five-part series of standards on Corporate Governance,[192] the provisions of which substantially mirror the ASX principles, but also apply to non-listed companies.[193] Like the ASX Principles, they are voluntary standards intended as a guide for self-regulation.

Standard 8003-2003 on Corporate Social Responsibility houses an extensive set of provisions covering structure, operation and implementation of recommended CSR procedures. Section 3.9 Stakeholder Engagement and Section 3.11 Policy and Procedures on Business Ethics are particularly relevant to the issue of trafficked and slave labour. Provision 3.9 suggests that 'the entity should have adequate engagement with its stakeholders on its environmental and social impact'[194] and section 3.9 provides that 'the entity should have policy and procedures to ensure the entity behaves ethically towards all stakeholders'.[195] The implementation section of the standard incorporates the need for systemic identification and management of relevant issues as listed in section 5.2.1.[196] This section explicitly states that employment issues such as child labour, forced labour, unreasonable disciplinary practices and working hours are CSR concerns to be identified by management and/or middle management.[197] It also includes supplier issues in terms of ethical standards, fair trading terms and employment standards,[198] as well as impacts on the host community.[199] The standard also identifies the importance of discussions with stakeholders where engagement can facilitate identification of CSR issues that need to be addressed by the entity.[200] Once these issues are identified the implementation section of the standard requires practical procedures to be put in place 'to ensure that all aspects of CSR are met',[201] followed by the enactment of a detailed action plan,[202] the necessity of a feedback system for input by stakeholders,[203] and an insistence on record keeping to assist in monitoring and reporting on the entity's CSR activities.[204] The standard then provides for review[205] of the CSR program to ensure such a program remains appropriate for the entity's operations,[206] and to monitor the effectiveness of its performance.[207] The implementation section then suggests that outgoing liaison with entities interested in CSR is appropriate to maintain currency of CSR awareness,[208] and that reporting systems be established to provide for ongoing accountability.[209]

187 Australian Securities Exchange, Corporate Governance Principles and Recommendations (Australian Securities Exchange Report, 2007), 6.

188 Stakeholder interests formed their own Principle 10 under the 2003 Principles. Upon revision in 2007, Principle 10 was subsumed into Principles 3 and 7.

189 Australian Securities Exchange, *A document setting out the differences between the 2003 and 2007 editions of the Principles and Recommendations* (2007) 3.1.2. <http://www.asx.com.au/supervision/pdf/amended_principles_2003_comparison.pdf> at 10 May 2010.

190 Australian Securities Exchange, *Corporate Governance Principles and Recommendations* (Australian Securities Exchange Report, 2007), 32.

191 Standards Australia, *About Us* <http://www.standards.org.au/cat.asp?catid=21> at 10 May 2010.

192 AS 8003-2003, Australian Standards International, published 23 June 2003.

193 Charles Sampford, Melea Lewis and Virginia Berry, Submission to the Parliamentary Joint Committee on Corporations & Financial Services, *Inquiry into Corporate Responsibility & Triple-Bottom-Line reporting* 5.

194 Standards Australia, *Corporate Governance – Corporate Social Responsibility* 8003-2003, S3.9

195 Ibid (AS 8003-2003, S3.11)

196 AS 8003-2003

197 S 5.2.1(c)(i)(ii)(iii)(iv)

198 S5.2.1 (d)(i)(iii)(v)(vi)

199 S5.2.1 (g)

200 S5.2.1(i)

201 S5.2.2

202 S.5.2.3

203 S5.2.4

204 S5.2.5

205 S5.3.4

206 S5.3.4(a)

207 S5.3.4(b)

208 5.3.5

209 S5.3.6

Standards Australia however is not part of government and the standards they produce are not legal documents.[210] Although some have been placed into legislation by government and hence become mandatory, the standards are 'voluntary consensus documents' and 'their application is by choice unless their use is mandated by government or called up in a contract'.[211] Although Standards Australia asserts that compliance with their standards should give businesses a competitive edge gained from an increase in credibility,[212] the reality is that disclosure of company compliance with standards will be key to any effect the standard has on a company's reputation. Whilst the Corporate Social Responsibility Standard houses ideals for ethical business practice, it lacks any strength of enforceability. Further, STOP THE TRAFFIK Australia is unaware of any companies that use the standard to report on measures they take to ensure that slave labour and trafficked labour are not present in their supply chains.

7.2.3 Indices

Complementing the ASX and Standards Australia market-based disclosure procedures are a number of independently administered indices which rank participating corporations in accordance with their performance on a number of factors including CSR performance. These indices are used by investors to compare investment performance with reference to socially responsible business practices providing a weighted comparison of performance in light of CSR activity. Like disclosure mechanisms, the impact of ranking on these indices goes primarily to concerns about reputation and the ramifications for the company which may follow. The indices are a general indication of CSR which take into account many factors and thus are not specifically targeted at the performance of firms with regard to eliminating slavery and trafficking from their supply chains.

7.2.4 Australian Corporate Responsibility Index: St James Ethics Centre

Launched in 2003, the Australian Corporate Responsibility Index ('ACRI') is a strategic management tool designed by business, for business.[213] It is described as unique in terms of its status as the only voluntary, non-prescriptive, business-led measure and benchmark of corporate responsibility in the Australian marketplace. Its aim is to offer a benchmark for companies through a comprehensive, self-assessed mechanism that aids in corporate communication, tracking and CSR management. Covering four key areas; community, environment, marketplace and workplace, and performance in social and environmental impact areas, companies are indexed through a weighting by corporate strategy, integration, management and performance impact, as well as assurance and disclosure. The index runs on an annual cycle with results being reported in May each year.

To date around 70 companies have participated in the ACRI.[214] The index is created from responses by the company to an online survey which are then validated independently by PricewaterhouseCoopers.[215] Company scores are then weighted and participants receive detailed confidential feedback on their performance including sector comparisons where available. This mechanism allows participant companies to evaluate their own strengths and opportunities for improvement, allowing focus on where improvements can be best achieved depending on a company's impacts and business needs. The overall results are then published publically in *The Sydney Morning Herald* and *The Age*, showcased at the National Business Leaders' Forum on Sustainable Development held every year at Parliament House in Canberra. Results are also available on the index's website.

Although a useful tool for businesses, the pitfalls of such voluntary self-assessment procedures to publically review a company's responsibility credentials are many. The ACRI evaluates only a select few of the large multinationals operating in Australia and its weaknesses can be examined through the example of the Australian Wheat Board ('AWB') scandal.[216] AWB was participating in the ACRI around the same time that it was being investigated for allegedly providing $290 million in illegal payments to Saddam Hussein's regime in Iraq. This fact raises the concern that companies can use such indices to validate some of their own CSR initiatives in spite of clear action against other aspects of what might be considered socially responsible corporate behaviour.[217]

7.2.5 RepuTex

The RepuTex Social Responsibility Index ('RSRI') is another privately administered index. RSRI measures the share market performance of a portfolio of public companies listed on the ASX demonstrating a required minimum level of socially responsible performance and management of social risk.[218] RepuTex rates the largest 100 companies in Australia,[219] measuring the CSR performance and risk management of companies according to a standard scale which ranges from AAA (outstanding) to D (inadequate) based on performance across four categories; social impact, environmental impact, corporate governance and workplace practices. Only companies which achieve an A (satisfactory) grading are included in the index universe.

Whilst participation in the RepuTex Social Responsibility Index is a useful process for business to keep track of their own comparative CSR performance, like the ACRI, its practical usefulness in addressing slave labour and trafficked labour in supply chains is limited. It also has the limitations of self-reporting and the fact that it is a voluntary, private process, limited to a select group of large corporations.

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210 Standards Australia, *Standards and the Law* <http://www.standards.org.au/cat.asp?catid=147> at 10 May 2010.

211 Ibid

212 Standards Australia, *Benefits of Standards* <http://www.standards.org.au/cat.asp?catid=150> at 10 May 2010.

213 Corporate Responsibility Index, *About Us* <http://www.corporate-responsibility.com.au/content/about-us> at 10 May 2010

214 Corporate Responsibility Index, *History of the Index* <http://www.corporate-responsibility.com.au/content/history-index> at 10 May 2010

215 Corporate Responsibility Index, *How it works* <http://www.corporate-responsibility.com.au/content/how-it-works> at 10 May 2010.

216 Nolan, J., 'Corporate Responsibility in Australia: Rhetoric or Reality?' (Working Paper No 47, University of New South Wales Faculty of Law Research Series, 2007), 75-76.

217 Ibid, 75.

218 RepuTex, RepuTex Sustainability Index Series <http://www.reputex.com.au/page/view/reputex-sustainability-index-series-40/> at 10 May 2010.

219 Helen Anderson, and I. Landau, *Corporate Social Responsibility in Australia: A Review,* Working Paper No 4, Corporate Law and Accountability Research Group, Monash University (2006) 10.

7.2.6 The Australian SAM Sustainability Index

The Australian SAM Sustainability Index (AuSSI) is published by Sustainable Asset Management (SAM), an investment international group focused on sustainability investing.[220] Partnered with Dow Jones Indexes, SAM has compiled one of the world's largest sustainability databases, of which the AuSSI is the Australian branch.

AuSSI invites the largest listed companies in Australia to participate in a corporate sustainability assessment.[221] The aim is to track performance of sustainability leaders in terms of economic, environmental and social criteria out of a universe of around 200 Australian companies. The purpose of this is to allow the public to monitor the performance of companies which lead their field in terms of corporate responsibility. The index also acts as an incentive for the corporate sector to independently and pro-actively raise their sustainability performance, adding value to their own enterprise.

With its administration by SAM, the AuSSI is perhaps the most transparent and reliable of the current indexes.

7.3 Reporting and Director Duties under Corporations Law

The *Corporations Act 2001 (Cth)* contains no specific provisions which provide for CSR for trafficking and slavery in terms of explicit positive obligations. Two important aspects of CSR in Australia are however, Directors Duties and Reporting requirements. Provisions in these sections of the Act frame the ambit of CSR in Australia in terms of the limits within which CSR is both appropriate and permitted.

7.3.1 Directors Duties

The relationship of director to company is one of a fiduciary character.[222] Under both the common law and the *Corporations Act*, directors have a duty to act in the best interests of the corporation to maximise shareholder returns.[223] Section 180 states that the duty is to exercise powers and discharge duties with the degree of care and diligence that a reasonable person would exercise in the same position,[224] and this includes continued long term well being.[225] Directors duties thus reflect essential shareholder primacy theories of the corporation,[226] where such a body exists to promote commerce and risk taking which produces growth of enterprise.

Outside of this duty, there is no direct legal obligation to take interests of stakeholders other than shareholders into account when exercising powers related to the company. However, it has been established that the lack of such an obligation does not preclude directors from doing so, given that such an extreme view would unduly restrict management.[227]

Commentators have suggested that at present this interpretation of the Act is permissive of strategic CSR only.[228] *Woollworths v Kelly*[229] and s 181 of the *Corporations Act* provides that directors acting in good faith, in the best interests of the company and for a proper purpose, may choose to take into account a range of factors external to shareholders, but only if this benefits the shareholders collectively.[230] This has been characterised as the enlightened self-interest approach whereby investment in corporate responsibility and philanthropy has a recognised capacity to contribute to the long term viability of a corporation even where there is no immediate generation of profit.[231]

Under the enlightened self-interest approach, it is suggested that directors may consider and act upon the legitimate interests of stakeholders to the extent that those interests are relevant to the wellbeing of the corporation.[232] Indeed, it follows that directors should act in a socially and environmentally responsible manner because doing so is likely to lead to the long term growth of their enterprise, impacting not only reputational factors but also on the attraction and retention of staff, on investment from ethical investment funds and also in aiding the avoidance of regulation which may place costly restrictions and obligations on the running of a business. Directors' duties thus incorporate CSR on a market determination basis.

In summary, the imposition of directors' duties intends to strike a balance between supporting initiative of management and holding them accountable for their decisions and conduct. Although the provisions of the Corporations Act have been interpreted to be permissive of CSR,233 it remains that maximisation of shareholder wealth is the major consideration for directors who may take human rights concerns into account only if they are relevant to the ongoing success of the business. It is therefore open to directors to address issues of human trafficking and slavery in the supply chains of their businesses if that is going to enhance the business; however it remains that there is no direct, positive obligation to do so under the current duties.

7.3.2 Annual Reporting

Aside from small proprietary companies, all Australian corporations are obliged to lodge annual reports with the Australian

220 Sustainable Asset Management, *Group Portrait* (2010) <http://www.sam-group.com/htmle/about/portrait.cfm> at 10 May 2010.

221 The Australian SAM Sustainability Index, (2010) <http://www.aussi.net.au/> at 10 May 2010

222 Paul Redmond, *Companies and Securities Law: Commentary and Materials* (5th ed, 2009), 342.

223 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report* (2006), 12.

224 *Corporations Act 2001* (Cth), S180

225 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report (2006), 2.2.*

226 Brian R Cheffins, 'Corporations' in Cand and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 489, 489-495.

227 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report (*2006), 2.3 and *Corporations Act 2001* (Cth) s 181.

228 Belinda Simmons, 'Corporate social responsibility: have recent reforms safeguarded the future?' (2008)(1) National Environmental Law Review, 55 – 60.

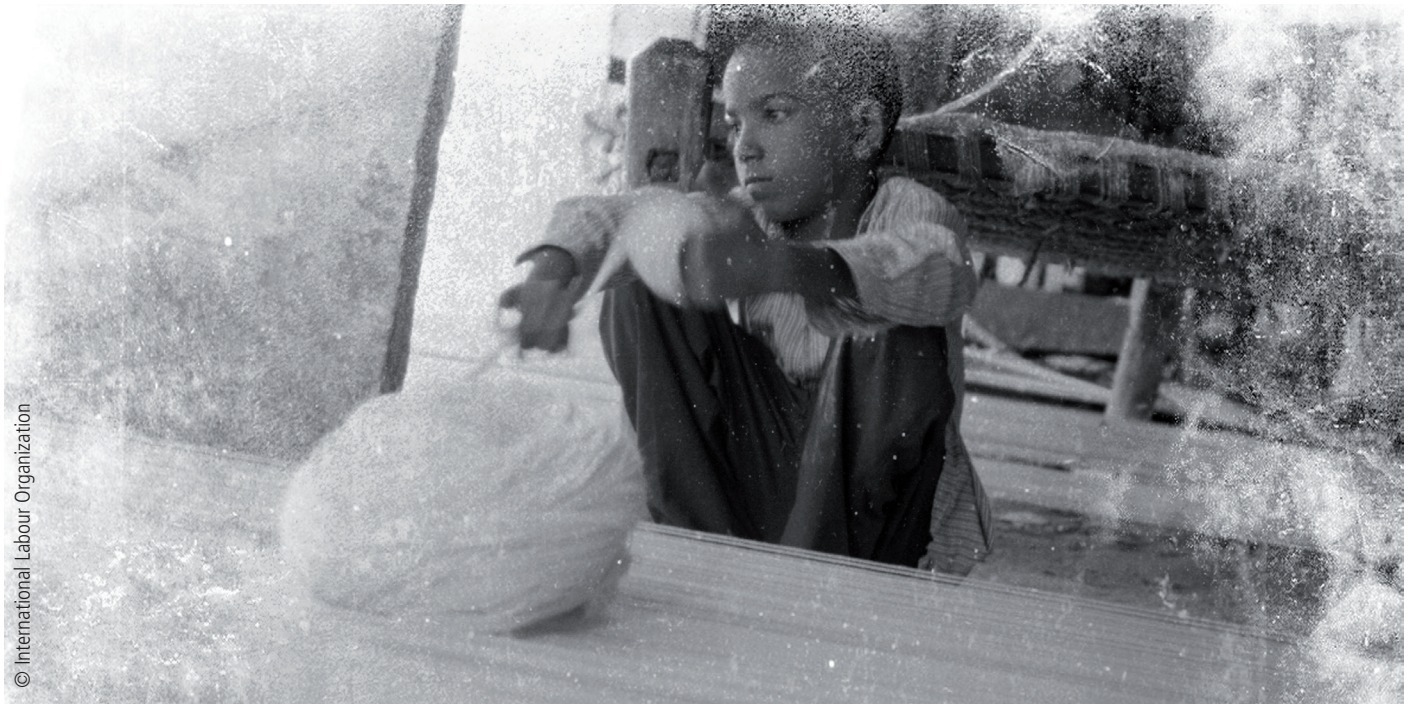
229 *Woolworths v Kelly* (1991) 4 ACSR 431

230 Belinda Simmons, 'Corporate social responsibility: have recent reforms safeguarded the future?' (2008)(1) National Environmental Law Review, 55 – 60.

231 Parliament Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006), 4.32.

232 Ibid.

233 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report* (2006) and Parliament Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006).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Securities and Investments Commission ('ASIC'),[234] these reports subsequently becoming publicly available. Within these reports there are dedicated financial reports and directors reports, both of which have relevance to CSR concerns. As with directors' duties, reports do not target CSR directly but disclosure through this mechanism does promote transparency at the risk of negative exposure of the corporation to the public, such bad press having the capacity to harm investment and other future business prospects. Disclosure has been described as 'a major theme of the modern corporate regulatory system'[235] and is the major tool used by the *Corporations Act* to encourage socially responsible behaviour of companies.

7.3.3 Financial Reporting

Section 295 of the *Corporations Act* deals with the contents of the annual financial report that corporations are obliged to lodge with ASIC.[236] Section 295 creates no obligation to make disclosure about impacts unless there are direct financial implications of an action for the company. Section 295(2) specifically requires a financial report to include statements and accompanying notes in accordance with appropriate accounting standards. Standard AASB 137 'Provisions, Contingent Liabilities and Contingent Assets'[237] demonstrates the relevance of such procedure to CSR as contingent liabilities may include penalties for clean-up costs for unlawful environmental damage.[238] This example clearly provides a platform on which expenditure may make public any underlying CSR environmental concerns by virtue of mandating disclosure of significant penalties incurred by a corporation in breach of its environmental obligations. This is a mechanism relevant to CSR generally; however it is difficult to suppose how it may be used to expose corporate involvement in such activities as trafficking and slavery. If a corporation was held criminally or civilly responsible for engagement in trafficking and slavery and was therefore forced to expend a sum worthy of disclosure in fines or damages, one might imagine that the publicity generated from such a court finding would outweigh the impact that such disclosure in a financial report may have.

7.3.4 Directors' Reporting

Since 2005, pursuant to s299A of the *Corporations Act*, publically listed Australian companies have been obliged to include any information 'that members of the community would reasonably require to make an informed assessment of…the operations of the entity…the financial position of the entity…and the entity's business strategies and its prospects for future financial years' in a directors' report. This requirement is to include an operating and financial review of the corporation's performance, plans, opportunities, corporate governance and operating risks.[239] Anderson and Gumley note the broad framing of this provision and that it clearly requires directors to consider a range of social and environmental issues which have the potential to impact on the company.[240] Although the section does not refer to specific social or environmental issues, the Explanatory Memorandum of the provision makes reference to the *G100's Guide to Review of Operations and Financial Conditions* which does specify disclosure of information relevant to social and environmental performance.[241]

234 Juliette Overland, 'Corporate Social Responsibility in Context: the case for compulsory sustainability disclosure for listed public companies in Australia?' (2007) 4 *Macquarie Journal of International and Comparative Environmental Law,* 7.

235 Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1) *Australian Journal of Human Rights* 11.

236 *Corporations Act 2001* (Cth) s 295

237 Australian Government, *Complied Accounting Standard AASB 137 Provisions, Contingent Liabilities and Contingent Assets* (2008) <http://www.aasb.com.au/admin/file/content105/c9/AASB137_07-04_COMPdec07_07-08.pdf> at 10 May 2010.

238 Juliette Overland, 'Corporate Social Responsibility in Context: the case for compulsory sustainability disclosure for listed public companies in Australia?' (2007) 4 *Macquarie Journal of International and Comparative Environmental Law,* 7.

239 Helen Anderson and Wayne Gumley, 'Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment' (2008) 29 *Adelaide Law Review* 29, 60.

240 Ibid.

241 Nolan, J., 'Corporate Responsibility in Australia: Rhetoric or Reality?' (Working Paper No 47, University of New South Wales Faculty of Law Research Series, 2007), 77.

The guide specifies disclosure should include information about human resources, and customer and supplier relationships, although Nolan cautions that despite its ambit to include human rights compliance, much depends on the breadth with which companies themselves interpret the provision in terms of quantity and quality of information reported.[242] She cites the lack of specific guidance within the s299A as leaving disclosure to be dominated by a short-term focus that prioritising immediate effects rather than long term trends creating social or environmental impact.[243]

Interestingly, s299(1)(f) of the Act compels the directors' report to give details of an entity's performance in relation to environmental regulation if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory.[244] A CSR provision not directly relevant to the protection of human rights, s299(1)(f) is an example of mandated CSR reporting. However, there is evidence that the mechanism has resulted in companies providing only brief statements in their annual reports without actually making substantive disclosure on the issue.[245] Therefore, while disclosure has increased, the actual substance of the reporting is not very useful in nature.[246]

CSR reporting is thus extremely limited under the current provisions and is virtually non-existent in terms of problems associated with trafficking and slavery. Although there are definite obligations for the reporting of environmental impacts, risks to a company related to labour trafficking or the use of slave labour are not subject to any such specific disclosure provisions. Even if the ambit of the financial and directors reports under the current regime does feasibly encompass the disclosure of such impacts, there is currently no specific statutory obligation to do so.

7.4 International Voluntary CSR Reporting Schemes

7.4.1 Global Reporting Initiative (GRI)

The Global Reporting Initiative (GRI) is an international network which has developed the *Sustainability Reporting Guidelines*.[247] The *Guidelines* provide a voluntary reporting standard which sets out the principles and indicators for companies to measure and report on sustainability issues. Under the GRI framework, companies are able to provide a description of their governance and management systems to show how they manage their sustainability and assess and report on the environmental, social and economic effects of their activities by reference to various environmental, social and economic performance indicators.

The GRI Guidelines are no more than a set of widely recognised recommendations to help corporations voluntarily disclose CSR issues in their business operations. Although independent verification of companies compliance with GRI guidelines is encouraged, the GRI guidelines do not come with any auditing, verification, certification, or consulting requirements.

7.4.2 United Nations (UN) Global Compact (2000)

UN Global Compact (2000) is an initiative under which companies can commit voluntarily to 10 principles of corporate conduct relating to many areas such as human rights, labour standards, the environment and anti-corruption. Specifically, the UN Global Compact encourages businesses to support and respect the protection of internationally proclaimed human rights (Principle 1), and to make sure that they are not complicit in human rights abuses (Principle 2). In relation to labour standards, the UN Global Compact specifies that businesses should uphold:

- the elimination of all forms of forced and compulsory labour (Principle 4)
- the effective abolition of child labour (Principle 5).[248]

Since its inception, the UN Global Compact has garnered the participation of over 3,000 companies participating in over 100 countries.[249] These companies are required to use their annual report or other public report to convey what they have, or have not, done with respect to all the principles.[250] In addition to the annual report, companies are expected to submit a 'Communications on Progress', using indicators such as the GRI, to report on how they have implemented the 10 principles in their day-to-day operations.[251] However, due to the lack of monitoring and credible reporting mechanisms, the UN Global Compact has only been able to play a promotional role in triple bottom line reporting, rather than fostering a real sense of accountability and transparency.[252]

7.4.3 OECD Guidelines for Multinational Enterprises

OECD Guidelines for Multinational Enterprises (2011) are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct. The Guidelines are the only multilaterally agreed code of responsible business conduct that governments have committed to promoting. The 2011 edition of the Guidelines were adopted by the 42 adhering governments on 25 May 2011, updating the 2000 edition of the Guidelines.[253]

The Guidelines aim to "ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign

242 Ibid., 78

243 Ibid., 78

244 *Corporations Act 2001* (Cth) S299(1)(f)

245 Juliette Overland, 'Corporate Social Responsibility in Context: the case for compulsory sustainability disclosure for listed public companies in Australia?' (2007) 4 *Macquarie Journal of International and Comparative Environmental Law,* 8, 9.

246 Ibid., 9.

247 *G3 Sustainability Reporting Guidelines* (2006) Global Reporting Initiative <http://www.globalreporting.org/ReportingFramework/G3Guidelines/> at 15 April 2010.

248 *The Ten Principles* UN Global Compact <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html> at 15 April 2010.

249 *Participants and Stakeholders* UN Global Compact <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> at 15 April 2010.

250 Marta de la Cuesta Gonzalez and Carmen Valor Martinez, 'Fostering Corporate Social Responsibility Through Public Initiative: From the EU to the Spanish Case ' (2004) 55 *Journal of Business Ethics*, 280.

251 *Communicating Progress* UN Global Compact <http://www.unglobalcompact.org/COP/index.html> at 15 April 2010.

252 Marta de la Cuesta Gonzalez and Carmen Valor Martinez, 'Fostering Corporate Social Responsibility Through Public Initiative: From the EU to the Spanish Case ' (2004) 55 *Journal of Business Ethics.*

253 OECD, *OECD Guidelines for Multinational Enterprises* (2011), OECD Publishing, http://dx.doi.org/10.1787/9789264115415-en, 3.

investment climate and to enhance the contribution to sustainable development made by multinational enterprises".[254] As such, they cover a wide range of business conduct, including employment and industrial relations, environmental protection, human rights, combating bribery, consumer interests, competition and taxation.

While corporations are encouraged to disclose codes or conduct to which the enterprise subscribes and its performance in relation to these codes[255], disclosure is not expected to place unreasonable administration or cost burdens on enterprises.[256] Further, enterprises are not expected to disclose information that may endanger their competitive position unless disclosure is necessary to fully inform the investment decision and to avoid misleading the investor.[257]

With regards to slavery and human trafficking the Guidelines call on enterprises to:[258]

- Contribute to the effective abolition of child labour, and take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency; and
- Contribute to the elimination of all forms of forced or compulsory labour and take adequate steps to ensure that forced or compulsory labour does not exist in their operations.

Enterprises are encouraged to "carry out risk-based due diligence" and to "seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship."[259] In addition they are to "encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines".[260]

One of the primary criticisms of the OECD Guidelines is its lack of enforcement or monitoring mechanisms. Observance of the Guidelines by enterprises is voluntary and not legally enforceable.[261] Nevertheless, some matters covered by the Guidelines may also be regulated by national law or international commitments. 'National Contact Points' (NCPs) have been created, more to promote the guidelines and provide a forum for mediation and conciliation between businesses and other stakeholders rather than to monitor and implement the guidelines.[262] Considerable discretion has been left to the governments to commit and live up to the OECD Guidelines.[263]

254 Ibid, 13.

255 Ibid., 28.

256 Ibid. 29.

257 Ibid. 29.

258 Ibid., 35.

259 Ibid., 20.

260 Ibid., 20.

261 Ibid., 17.

262 Marta de la Cuesta Gonzalez and Carmen Valor Martinez, 'Fostering Corporate Social Responsibility Through Public Initiative: From the EU to the Spanish Case ' (2004) 55 *Journal of Business Ethics,* 281.

263 Ibid; see also the implementation of the *OECD Guidelines* by NCPs, *Annual Meeting of the National Contact Points Report by the Chair*, OECD, 18 September 2009.

7.4.4 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* has the objective of helping companies respect human rights and avoid contributing to conflict through their mineral sourcing practices.[264] The OECD Council recommended governments actively promote the observance of the Due Diligence Guidance by companies sourcing minerals from conflicted-affected or high risk areas.[265]

Companies are encouraged to identify risks in the supply chain of the minerals in relation to human rights abuses and conflict and then to adopt or implement a risk management plan to prevent or mitigate the identified risks.[266]

The Due Diligence Guidance encourages companies sourcing from, or operating in, conflict-affected and high-risk areas, not to "tolerate nor by any means profit from, contribute to, assist with or facilitate the commission by any party of"[267] factors including:

- Any forms of forced or compulsory labour, which means work or service which is exacted from any person under the menace of penalty and for which said person has not offered himself voluntarily; and
- The worst forms of child labour as defined by the ILO Convention No 182 on the Elimination of the Worst Forms of Child Labour.

The OECD Due Diligence Guidance could provide the basis for principles that could be included in mandatory requirements on companies to address slave and trafficked labour in the supply chains of goods imported into Australia. Such mandatory requirements for when industries have failed to act sufficiently on a voluntary basis are discussed in detail in Chapters 9 and 11.

7.4.5 ILO Declarations: Multinational Enterprises and Social Policy

Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ('the Tripartite Declaration') is a set of guidelines on the responsibilities of corporations and other entities in the area of labour and employment, outlining many fundamental rights related to working conditions, wages, minimum age and the right to be free from forced labour.[268]

7.4.6 The Harkin-Engel Protocol (Cocoa Protocol)

The Protocol's full name is *Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.* It is also commonly referred to as the Cocoa Protocol.

264 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,* OECD Publishing, (2011), http://dx.doi.org/10.1787/9789264111110-en, 3.

265 Ibid., 8.

266 Ibid., 14, 16-17.

267 Ibid., 18.

268 *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,* (adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006)).

The Protocol was signed in Geneva on 19 September 2001 by chocolate and cocoa industry representatives from the US, UK and Europe and the governments of Cote d'Ivoire and Ghana. In September 2010 these parties reaffirmed their commitments by signing a Declaration of Joint Action to Support Implementation of the Harkin-Engel Protocol.

The Cocoa Protocol aims to eliminate the use of the worst forms of child labour in the growing and processing of cocoa beans and their derivative products. The Protocol was the first agreement by an entire industry to be accountable for the worst forms of child labour in its supply chain.[269]

7.4.6.1 The requirements of the Protocol

The Protocol is voluntary. It is not legally enforceable but 'a moral undertaking'.[270] Whilst the Protocol provides a six-step Key Action Plan ('Plan') with specific deadlines,[271] it fails to address the problem of poverty among the primary producers with, 'the direct correlation between low prices paid to farmers for their cocoa beans and the type and quality of labour employed'.[272] 'Farmers seek, and exploit, the cheapest forms of labour possible because of economic necessity'. 'One labour leader who was involved in the inside talks to establish the protocol says off the record that every time he would ask, "Why not just pay a better price for beans?" of the industry people in the room, "the lawyers for the chocolate companies would snap to attention and announce that it was against US law to price-fix."

7.4.6.2 The Public Certification System

The 'sixth step' under the Action Plan is the certification system - a key part of the voluntary Protocol. The certification system involves two key steps:

11. *Survey of cocoa farms*: the aim is to gather data on the worst forms of child labour and forced adult labour in West Africa.[273] This has involved a survey of cocoa farms in West Africa by manufacturers, in cooperation with West African Governments.[274]
12. *Verification of the results:* this step is critical to establishing the validity of the survey results by government and industry. This is undertaken by the International Cocoa Verification Board (ICVB).[275]

It should be noted that this certification system differs from product certification, whereby internationally recognized certifying organizations attest that particular products and their specific


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raw materials are produced according to labour practices that are confirmed by auditors. In addition, *no part* of the certification system involves the active reduction of the worst forms of child labour. This is addressed through International Cocoa Initiative (ICI) and ILO-IPEC programs.

7.4.6.3 The International Cocoa Initiative and ILO-IPEC programs

Major ICI programs have involved; sensitising cocoa growing communities to the harms of, and prohibition on, abusive labour practices;[276] a "micro-projects" fund to improve children's access to education in West Africa;[277] training public and private sectors on the worst forms of child labour;[278] and publicity of the issue through media in West Africa.[279]Similarly, the Governments of Cote d'Ivoire and Ghana and the U.S. Department of Labor are developing an ILO-IPEC project to focus on livelihoods, education services and the implementation of National Action Plans. Ghana is also developing a transparent child labour monitoring system.

'Although these are important steps forward, much more work remains in order to significantly reduce the number of children working in the worst forms of child labor in cocoa production.'[280] Thus the Harkin-Engel Protocol can not currently provide consumers with confidence that the chocolate they consume is free from slavery and human trafficking in the supply chain.[281]

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269 Carol Off, *Bitter Chocolate: Investigating the Dark Side of the World's Most Seductive Sweet* (2006) 144.

270 Ibid 144.

271 *Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour ('Protocol').*

272 Carol Off, *Bitter Chocolate: Investigating the Dark Side of the World's Most Seductive Sweet* (2006), 146.

273 See Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate and Cocoa Industry on Efforts to Address the Worst Forms of Child Labour in Cocoa Growing, 1 July 2005, available at Cocoa Verification, <http://www.cocoaverification.net/Docs/Joint_Statement_2005.pdf>.

274 See the Verification Briefing by the International Cocoa Verification Board, available at <www.cocoaverification.net/>.

275 See Cocoa Verification, <www.cocoaverification.net> .

276 See the ICI, <http://www.cocoainitiative.org/en/what-we-do/community-sensitization> .

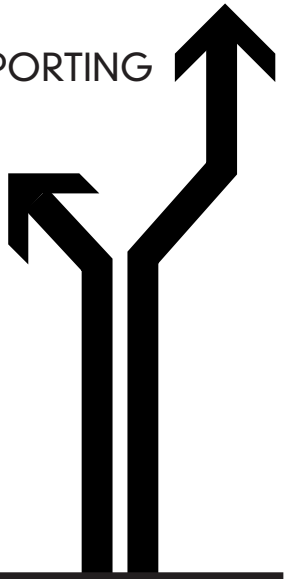
277 See the ICI, <http://www.cocoainitiative.org/en/what-we-do/micro-projects>

278 See the ICI, <http://www.cocoainitiative.org/en/what-we-do/training-activities>

279 See the ICI, <http://www.cocoainitiative.org/en/what-we-do/radio-programmes>

280 US Department of Labor's Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, 'US Department of Labor's List of Goods Produced by Child Labor or Forced Labor', 2011, 36.

281 The 2008 Report acknowledges that child labour still exists in the cocoa industry, and that this involves hazardous activities. Verification Briefing by the International



8. MANDATORY CSR REPORTING

There is a growing need for mandatory reporting by companies on their activities across jurisdictions.

One step to help combat trafficking and slavery in supply chains would be to require those industries where there is substantial risk of slavery or trafficking being in the supply chain, to mandatorily report on what steps they are taking to mitigate the risk of these human rights abuses. For mandatory reporting to have any impact on slavery and human trafficking, the system would require reporting on the whole supply chain, rather than just the corporation itself. The following sub-sections in Chapter 8 provide some examples of mandatory reporting required of corporations regarding their global social responsibility.

8.1 California Supply Chain Transparency Act (SB 657)

One model for encouraging companies to take action to ensure their supply chains are free of slavery and trafficking is requiring them to disclose what action they are taking to seek this outcome. This approach has been adopted by California. On 30 September 2010 the California *Supply Chain Transparency Act (SB657)* was signed into law. The Act requires retail sellers and manufacturers operating in California and having annual worldwide gross receipts that exceed US$100 million in annual revenue to publicly report on voluntary efforts they are taking to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. The information must be made easily accessible on the company's website. The law takes effect from 1 January 2012.

The required disclosure must include, at a minimum, to what extent the retail seller or manufacturer does each of the following:

1. Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosures shall specify if the verification was not conducted by a third party.
2. Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
3. Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
4. Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
5. Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chain of products.

The Act noted that the absence of publicly available disclosures means "consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking. Consumers are at a disadvantage in being able to force the eradication of slavery and trafficking by way of their purchasing decisions."

In Australian, such a requirement could be introduced for businesses where there is evidence of a substantial risk that slavery or human trafficking may be part of the supply chain.

8.2 Requirements to report tax and royalty payments on a country-by-country basis

Country by country reporting on taxes and royalties paid by companies is seen by many anti-corruption non-government organisations as a step to combating tax evasion and avoidance. It also makes governments accountable for the revenue streams they receive. While this example does not relate to slavery and trafficking in supply chains, it is an example of the increasing requirements on companies to have to report on matters related to corporate social responsibility.

The US Congress has passed the Dodd-Frank Act which requires

Cocoa Verification Board, available at <www.cocoaverification.net/> .

all companies registered with the US Securities and Exchange Commission to report the amounts they pay to governments for access to oil, gas and minerals on a country by country basis. The law applies to both US companies and foreign companies. The Hong Kong Stock Exchange has enacted similar country-by-country reporting. It amended its Rules Governing the Listing of Securities to include "if relevant and material to the Mineral Company's business operations, information on the following: … compliance with host country laws, regulations and permits, and payments made to host country governments in respect of tax, royalties and other significant payments on a country by country basis."

8.3 The Dodd-Frank Act and Conflict Minerals

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* requires companies that purchase specified conflict minerals emanating from the Democratic Republic of the Congo or adjoining countries, to publicly disclose measures taken to exercise due diligence on the source and supply chain of such minerals. This Act was passed by the US Congress in July 2010 and at the time of writing, regulations are still to come into effect however international pressure generated by the Act and similar UN and OECD initiatives has seen the Congolese government remove army units that were illegally occupying key mining areas.[282]

8.4 Denmark

The Danish Parliament adopted the "*Act amending the Danish Financial Statements Act (Accounting for CSR in large businesses)*" (the Amendments) in December 2008.283 The new requirements, which took effect in 2010, make CSR reporting mandatory for the country's 1,100 largest businesses, investors and state-owned companies.[284]

In the Amendments, corporate social responsibility is defined as the way that "businesses voluntarily include considerations for human rights, societal, environmental and climate conditions as well as combating corruption in their business strategies and corporate activities".[285]

The report can be part of the company's annual report, website or some other publicly accessible publication.[286] It can contain information about the business's CSR policies, implementation, results, as well as any future expectations to the work of the business.[287] If a company does not have a CSR policy, it must state this explicitly.[288]

One of the distinctive features of the Danish reporting requirements is that members of the UN Global Compact can just refer to their Communication on Progress for the UN Global Compact without a separate CSR report.[289] This potentially broadens the scope of CSR reporting, as explanatory notes to the amendments point out, while many of the principles of the UN Global Compact are covered by Danish laws, "this is not the case when Danish businesses operate abroad, where societal and environmental conditions often do not meet Danish standards".[290] This interaction between domestic Danish law and an international voluntary regime is a part of the Danish government's policy to encourage companies to join the UN Global Compact and fulfill the obligation to communicate progress.[291]

Any CSR information reported should be verified by an auditor so that it is in accordance with the financial information given in the annual report.[292]

8.5 France

France has two mechanisms which provide for CSR disclosure:
1. a *bilan social*, or social balance sheet, and
2. the *Nouvelles Régulations Économiques (NRE)*, or the New Economic Regulations.293

The French 'social balance sheet' requires companies with more than 300 employees to produce an annual report on issues including employment (workforce distribution, resignations, promotions), remuneration, health and safety, working conditions (physical conditions, working hours), training and labour relations (elections of labour delegates and workers committee members).[294] The report can be accessed internally by any worker, the worker's council, trade union delegates, shareholders and the labour inspectorate.[295] It contains only statistical information, without any comments.[296]

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282 Global Witness, www.globalwitness.org/library/dodd-frank-act-%E2%80%93-recent-developments-and-case-urgent-action, at 12 September 2011.

283 *Danish Financial Statements Act 2001* (Denmark) amended by *Act amending the Danish Financial Statements Act 2008* (Denmark). See also Danish Commerce and Companies Agency on Corporate Social Responsibility, *Statutory requirements on reporting CSR* <http://www.csrgov.dk/sw51190.asp> at 10 April 2009; Danish Commerce and Companies Agency, *Reporting on corporate social responsibility – an introduction for supervisory and executive boards* <http://www.csrgov.dk/graphics/publikationer/CSR/Reporting_CSR_L5_UK_05.pdf>.

284 *Danish Financial Statements Act 2001* (Denmark) s 99a(1).

285 *Danish Financial Statements Act 2001* (Denmark) s 99a(1).

286 *Danish Financial Statements Act 2001* (Denmark) s 149a.

287 *Danish Financial Statements Act 2001* (Denmark) s 99a(2).

288 *Danish Financial Statements Act 2001* (Denmark) s 99a(1).

289 *Danish Financial Statements Act 2001* (Denmark) s 99a(7).

290 Explanatory Notes, Act amending the Danish Financial Statements Act 2008 (Denmark) Sections 3.5.

291 Explanatory Notes, Act amending the Danish Financial Statements Act 2008 (Denmark) Sections 1 and 3.5; Danish Commerce and Companies Agency, *About the Danish law: Report on social responsibility for large businesses*, <http://www.csrgov.dk/graphics/Samfundsansvar.dk/Dokumenter/About%20the%20Danish%20law.pdf> at 10 April 2009; Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility – A Legal Analysis* (2009).

292 *Danish Financial Statements Act 2001* (Denmark) s 135(5).

293 Nouvelles Régulations Économiques, Decree Number 2002-221.

294 Decree Number 2002-221; see also, Mary Lou Egan et al, 'France's Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reporting to Promote Environmentally Sustainable Economic Development' (Paper presented at the 25th Annual Research Conference of the Association for Public Policy and Management, Washington DC, November 2003); Lucien J. Dhooge, 'Beyond Voluntarism: social disclosure and France's nouvelles régulations économiques' (2004) 21(2) *Arizona Journal of International & Comparative Law* 441; Urminsky, MD., 'Public policy, reporting and disclosure of employment and labour information by multinational enterprises (MNEs)', (2004), Working Paper No. 99, *International Labour Office – Geneva*, 3.2.1.

295 Urminsky, MD., 'Public policy, reporting and disclosure of employment and labour information by multinational enterprises (MNEs)', (2004), Working Paper No. 99, *International Labour Office – Geneva*, 3.2.1

296 Ibid.

As these *bilans sociaux* were intended only for internal circulationand are generally not available to the public, there was renewed interest in triple-bottom line reporting by the late 1990s, which provided the impetus for the introduction of the *Nouvelles Régulations Économiques* in 2002.

Article 116 of the NRE,[297] adopted on 20 February 2002, requires public companies (and subsidiaries) listed on the *premier marché* to report three stakeholder issues: human resources, labor standards, and community interests. Reporting on human resources and labor standards consists further of ten separate disclosures,[298] including the importance of subcontracting to their operations and compliance of subcontractors with fundamental conventions of the ILO.

Since the passage of the NRE in 2002, French companies are increasingly reporting on the key social and environmental indicators required by the Decree. In its first year of operation, 75% of the companies included a separate section in their annual report on the NRE 116 requirements, while a further 17% referred to separate report on the indicators.299 As one commentator suggested, the New Economic Regulations 'placed corporate social responsibility issues in general and social and environmental issues in particular squarely on the agenda of every publicly listed French corporation'.300

However, the NRE is not without limitations. Critics have pointed to its lack of sanctions for non-compliance, lack of provisions of social auditing, as well as vagueness as to whether its application extended to the foreign operations of French corporations as perceived problems with the reporting system.[301]

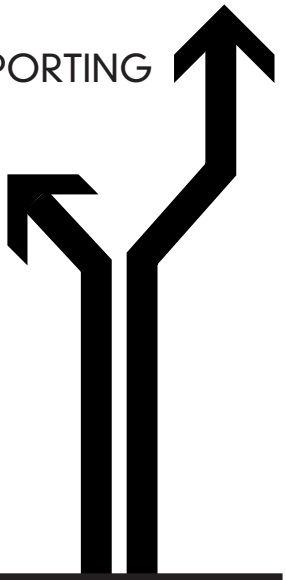
297 Decree Number 2002-221 arts. 148-2(9), 148-2.

298 Lucien J. Dhooge, 'Beyond Voluntarism: social disclosure and France's nouvelles régulations économiques' (2004) 21(2) *Arizona Journal of International & Comparative Law* 441, 449-451.

299 Mary Lou Egan et al, 'France's Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reporting to Promote Environmentally Sustainable Economic Development' (Paper presented at the 25th Annual Research Conference of the Association for Public Policy and Management, Washington DC, November 2003)

300 Lucien J. Dhooge, 'Beyond Voluntarism: social disclosure and France's nouvelles régulations économiques' (2004) 21(2) *Arizona Journal of International & Comparative Law* 441, 444.

301 Ibid 444-445.



9. MANDATORY CODES OF CONDUCT

Chapter 9 addresses mandatory codes of conduct – a more comprehensive regulatory response to slavery and trafficked labour in the supply chain of goods, as compared to reporting requirements.

A mandatory code of conduct should require industry to meet certain standards that seek to eliminate these human rights abuses. Such a code could vary from simply requiring a company to develop its own code that address principles required by the legislation, to a highly proscriptive code that outlines exactly what a company must do. This Chapter assesses mandatory codes under the *Competition and Consumer Act 2010* (Cth) (CCA) and the *Corporate Code of Conduct Bill 2000 (Cth)*.

9.1 Mandatory Codes of Conduct under the *Competition and Consumer Act*

Under the CCA mandatory industry codes can be established under Part IVB.[302] Section 51ACA of the CCA provides that an industry code is a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. There are two types of industry codes under the CCA:

a. prescribed mandatory industry codes of conduct; and
b. prescribed voluntary industry codes of conduct..

Prescribed mandatory codes of conduct are introduced by regulations pursuant to s.51AE of the CCA and are binding on all industry participants pursuant to s.51AD. The Australian Competition and Consumer Commission (ACCC) is responsible for administering and enforcing such codes. Examples of current prescribed mandatory codes of conduct include the Franchising Code of Conduct, the Oil Code, Therapeutic Goods Advertising Code 2006, Medicines Australia Code of Conduct Edition15 and the Horticulture Code.

According to the ACCC publication "Guidelines for developing effective mandatory industry codes of conduct", the Government has stated that a code of conduct will only be prescribed if:

a. the code would remedy an identified market failure or promote a social policy objective;
b. the code would be the most effective means for remedying that market failure or promoting that policy objective;
c. the benefits of the code to the community as a whole would outweigh any costs;
d. there are significant and irremediable deficiencies in any existing self-regulatory regime—for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems;
e. a systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes;
f. a range of self-regulatory options and 'light-handed' quasi regulatory options have been examined and demonstrated to be ineffective; and
g. there is a need for national application as state and territory fair trading authorities in Australia also have the options of making codes mandatory in their own jurisdiction.

Thus, a mandatory code under the CCA would be appropriate where an industry, or significant parts of the industry, have resisted 'light-handed' approaches that seek to have them address slave labour or trafficked labour in their supply chain.

9.2 Mandatory Conduct under the *Corporate Code of Conduct Bill*

In September 2000, the Australian Democrats introduced a bill into Parliament entitled the *Corporate Code of Conduct Bill 2000 (Cth)*.[303] The bill sought to 'impose and enforce internationally

302 The material presented in this section draws from advice provided by Joanne Daniels, Partner, and Nicole Smith, Articled Clerk, of Clayton Utz in February 2007.

303 The Corporate Code of Conduct Bill 2000 (Cth) was introduced in the Senate on 6 September 2000. The Bill could not be passed as the Parliamentary Joint Statutory Committee on Corporations and Securities found the Bill to be 'impracticable,

recognised human rights standards on the overseas activities of Australian corporations' and was supported by the Senate as an idea in principle.[304] Its objects were; (a) to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations of related corporations which employ more than 100 people in a foreign country; (b) to require such corporations to report on their compliance with the standards imposed by [the] act; and (c) to provide for enforcement of those standards.[305] The draft legislation intended to apply directly to foreign subsidaries related to Australian companies and covered corporations formed within the limits of the Commonwealth, holding companies, subsidiaries and subsidiaries of holding companies.[306] The bill covered environment standards,[307] health and safety standards,[308] employment standards,[309] human rights standards,[310] duties to observe tax laws,[311] duties to observe consumer health and safety standards,[312] consumer protection and trade practices standards,[313] whilst providing for extensive reporting[314] and enforcement[315] measures. The bill was therefore extremely wide in both scope and applicability.

The Parliamentary Joint Statutory Committee on Corporations and Securities in their report examining the bill[316] noted that many submissions to the inquiry 'expressed the view that enacting the ...bill was warranted by the alleged failure of some Australian companies operating overseas to adhere to standards that members of the general Australian public would find acceptable.'[317] Evidence of problems at the Baias Mare Mine in Romania and the Ok Tedi Mine in Papua New Guinea – both of which were referenced in the bill's second reading speech[318] – were relied on to showcase the need for CSR to be mandated in legislative form. Other submissions claimed such examples of corporate failure overseas as 'nothing but a "scandal of unrelated diatribes"... provid[ing] no "hard evidence" of systemic failure.'[319]

Following a series of hearings, the Committee recommended that the bill not go forward and provided a multitude of reasons.[320] Concerns included problems with the intended application of the bill; difficulties with the legality of the bill at international law given its extraterritorial scope; issues of vagary associated with the specified obligations in the bill; potential impact for Australian industry; and issues of arrogance and paternalism associated with an attempt to enforce social standards formulated in Australia on other sovereign nations.[321] Zerk suggests a further criticism of the bill in that the obligations contained in the bill would have been difficult to change to reflect the evolution of multinationals and their regulation in CSR related fields.[322] Despite its wide scope, the bill did not cover practices of foreign contractors. This is where one might expect the most serious of workers' rights abuses to be found.[323] In-depth analysis of the reasoning of the Committee and a systematic rebuttal of its findings may be found in an article by Surya Deva.[324]

Legislation to enact a Code aimed specifically at targeting elimination of trafficking and slavery in supply chains could follow the extraterritoriality model of the foreign bribery provisions which have been similarly enacted to curb morally offensive, undesirable behaviour of corporations in their activities offshore. It would also restrict a mandatory Code to only those industries where there is a reasonable risk of slavery or trafficked labour being in the supply chain of the goods being produced. Further, the scope of the Code would be narrowly targeted at slavery and human trafficking which are accepted violations of international law.

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unworkable, unnecessary and unwarranted'. See the report of the Parliamentary Committee available at http://www.aph.gov.au/senate/committee/corporations_ctte/corp_code/report/report.pdf. Commonwealth of Australia (Parliamentary Joint Statutory Committee on Corporations and Securities), 'Report on the Corporate Code of Conduct Bill', June 2001.

304 Surya Deva, 'Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations' (2004) 8(1) *Newcastle Law Review* 87.

305 *Corporate Code of Conduct Bill* (2000) s 3.

306 Ibid, s 4

307 Ibid, s 7

308 Ibid, s 8

309 Ibid, s 9

310 Ibid, s 10

311 Ibid, s 11

312 Ibid, s 12

313 Ibid, s 13

314 Ibid, Part 3

315 Ibid, Part 4

316 Parliament Joint Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Code of Conduct Bill* (2001).

317 Ibid., 3.1

318 Second Reading Speech, Senator V. Bourne, 6 September 2000, Senate Hansard, 17, 457.

319 Parliament Joint Committee on Corporations and Securities, Parliament of Australia, Report on the Corporate Code of Conduct Bill (2001), 3.3.

320 Jennifer A. Zerk, *Multinationals and Corporate Responsibility: Limitations and Opportunities in International Law* (2006) 166.

321 Ibid., 166.

322 Ibid., 166

323 Ibid., 166

324 Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?' (2004) 5 *Melbourne Journal of International Law* 37, 57-63.

SECTION FOUR: PRODUCT TARGETED MEASURES

10. PRODUCT LABELLING

Chapter 10 canvasses possible labelling schemes for products sold in Australia.

The Belgian Social Label is discussed as one example of the pitfalls of a Government-approved voluntary labelling scheme. This chapter then establishes two key reasons why a *mandatory* labelling scheme would be justified, namely; to address products at risk of involving trafficking and slavery in their supply chain and to respond to ethical consumerism. The Commonwealth Government could require products at risk of slavery or trafficked labour in their supply chains to have to carry labels. Such labelling could either be:

- Labelling that indicates that a product meets a specified level of certification to ensure that it is free of slavery and trafficked labour in its supply chain, which by implication indicates that products of the same type (for example chocolate) that do not bear the label have a much greater risk of such abuses having occurred in their production; or
- The product bears a label warning consumers that slavery or trafficked labour may have been involved in the production of the product in question. A company can avoid having to include such a label on its packaging if it can demonstrate that it has taken certain steps to ensure that slavery and trafficked labour are not involved in the production of its product.

However, mandatory labelling measures may be considered to be "technical regulations" and would thus need to comply with elements of the WTO Agreement on Technical Barriers to Trade, such as being no more trade restrictive than necessary to fulfil a legitimate objective.

10.1 Belgian *Social Label*

The purpose of the Belgian Social Label is to promote socially responsible production and respect for international labour standards in producing countries.[325] In order to be awarded the label, companies must demonstrate compliance with core ILO standards, including the prohibition of forced labour, the right to freedom of association, the right to organize and bargain collectively, prohibition of discrimination in employment and wages and the prohibition of child labour. In comparison to other voluntary labels, the Belgian Social Label conducts an assessment of the whole production chain of a company's product, rather than confining the assessment to production within the company.

Companies lodge an application which is then forwarded to the Ministry of Economic Affairs. The application is examined on the basis of the description of the product and production line. An independent audit is conducted in the form of interviews with workers and management and at each stage in the production line, under conditions which guarantee independence and freedom of speech. The report is then examined by an independent scrutiny committee. This committee meets under the auspices of the Central Economic Council, the main advisory body bringing together the social partners and other stakeholders chosen according to the subject under discussion.

The social label scrutiny committee comprises representatives from business and trade unions, as well as representatives from consumer organisations belonging to the Consumer Council and from NGOs belonging to the Federal Council on Sustainable Development. Various ministerial departments are also represented: the ministries of economic affairs, employment and labour, the social economy and development cooperation. The last of these is involved because the legislation earmarks funding to assist the social partners in developing countries

325 Sophie Spillemaeckers and Griet Vanhoutte, 'A Product Sustainability Assessment' in Jan Jonker and Cornelis de Witte (eds), *Management Models for Corporate Social Responsibility* (2006) 257; Sophie Spillemaeckers, 'The Belgian social label: a new and challenging concept of chain management' (2006) *Forum Ethibel: Advancing Socially Responsible Investing*; Sophie Spillemaeckers, 'The Belgian social label: A governmental application of Social LCA' (2007); Céline Louche, Luc Van Liedekerke, Patricia Everaert, Dirk LeRoy, Ans Rossy and Marie d'Huart, 'Chapter 6: Belgium' in Samuel O Idowu and Walter Leal Filho (eds), *Global Practices of Corporate Social Responsibility* (2009) 125; and Bruno Melckmans, 'Strengths and weaknesses of Belgium's social label' in ILO, *Corporate Social Responsibility: Myth or Reality?* (2003).

to comply with the demands of the label. If the committee's opinion is favourable, the Ministry of Economic Affairs awards the label for a three-year period, subject to interim inspections which are less rigorous than the initial inspection. In practical terms, the only cost to be borne by the company is that of the audit, the intensity and costliness of which will depend on the complexity of the product line.

Interim inspections are conducted over the three years that the Belgian Social Label is awarded. These inspections are less rigorous than the initial inspection. Any breach of the label's reference criteria after it has been awarded may – following an investigation into the accuracy of the information concerning this breach – lead to the label being withdrawn. The withdrawal is then made public, a measure intended to persuade company managers to be particularly vigilant once the label has been granted.

Companies may have a variety of reasons for applying for the label. Top of the list is marketing, in cases where companies deliberately market themselves in terms of sustainable development and, in particular, the social aspects of sustainable development.

Only six products have been awarded the label since the legislation entered into force in 2002.[326]

326 POD Maatschappelijke Integratie, *Liste des produits ayant obtenu le label social Belge* (2005) <http://www.social-label.be/social-label/FR/liste_produits/produits.htm>.

10.2 Compulsory *labelling system*

10.2.1 Positive and negative labelling options

Voluntary labelling schemes have their place, but at the moment represent a minority of companies involved in the production of goods where slavery or trafficked labour may be involved. Cadbury, Nestlé and Mars all have a small fraction of their current chocolate production using cocoa which is certified as free of slave labour or trafficked labour through Fairtrade, UTZ Certified and Rainforest Alliance certified cocoa. This has allowed these companies to label the products using the certified cocoa with the label of the independent certification scheme. However, this is a long way from having all chocolate manufacturers voluntarily adopting certified labelling schemes ensuring all the cocoa they are using is free of slavery and trafficked labour. The use of voluntary labelling for cocoa products is well in advance of many other products where slavery or trafficking is in the supply chain. For example, no voluntary label exists to certified seafood caught on fishing boats is free of slavery and human trafficking, despite both being present to a significant degree in this industry. The Belgian Social Label's lack of popularity also reflects the minimal incentives for companies to participate in voluntary labelling schemes. Compulsory labelling schemes enforced by government would be one way to try and push an industry to do more to eliminate slavery and human trafficking from its supply chain.

There are two key reasons why such a compulsory labelling system should exist for products involving slave labour. First, voluntary schemes are ineffective. Second, it is likely that a significant number of Australian consumers would like to know if slavery is involved in the supply chains of the products they buy without having to do detailed research of their own.

10.2.2 First step – Addressing high-risk products

The Australian Government could invest in a compulsory labelling and certification system for 'high risk' products. 'High risk' products could be defined as those where there is a reasonable basis to believe that slavery or human trafficking has been involved in the supply chain of the product. The United States Department of Labor currently identifies such 'high risk' products, pursuant to Executive Order (EO) 13126 on the 'Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor'.

Products meeting certification requirements would receive a corresponding label, such as, '*this product has adopted a certification system to reduce the risk of slavery in its' production*'. Whereas non-certified could receive negative labelling, after a reasonable time period in which the industry has been given a chance to address slavery and human trafficking in its supply chain, such as '*Warning: This product may have involved slavery in its production*'. The certification system could allow companies to draw on existing, credible, supply-chain certification systems as providing 'proof' that the product supply-chain is slave free. The United Kingdom's 'Procurement Policy for Legal and Sustainable Timber' provides an example of where companies have been allowed to use existing voluntary certification schemes, in order to demonstrate a 'clean' supply chain.[327]

10.2.3 Responding to Ethical Consumerism

'Ethical consumerism' in Australia is a growing trend.[328] This has been recognised both by Australian businesses and government representatives.[329] Indeed one recent study estimated that up to 41% of the adult population are interested in adopting 'ethical consumer' shopping habits.[330]

There is some anecdotal evidence to suggest that consumers are progressively more concerned with labour conditions in product supply chains. First, consumers are increasingly buying Fairtrade and UTZ Certified products – certification systems which are promoted to consumers as providing stable and secure incomes and better working conditions.[331] Retail sales of Fairtrade Certified products in Australia and New Zealand increased by 58% between 2008 and 2009 to over AU$50 million'.[332] In addition, tens of thousands of Australian consumers have shown support for NGO campaigns regarding slavery and human trafficking in the production of goods, such as those conducted by STOP THE TRAFFIK Australia and Don't Trade Lives on slavery and human trafficking in cocoa production in West Africa.[333]

10.2.4 Existing Compulsory Labelling: Genetically Modified Food (GM)

In Australia, compulsory labelling systems enforced by the Government have two key aims: first, the benefit of consumer safety and, secondly, to promote competition and fair trade in the marketplace. In general, Australian compulsory labelling systems do not seek to address environmental or social justice concerns.

There is, however, an exception. The labelling of GM food, which is administered by Food Standards Australia and New Zealand, allows consumers to make choices beyond health concerns. Under Standard 1.5.2, which came into effect in December 2001, food produced using gene technology must be labelled. The Standard is 'intended to provide information to consumers to facilitate choice, assisting consumers to purchase or avoid GM foods depending on their own views and beliefs'.[334] There are also further labelling obligations 'where the GM food raises significant ethical, cultural and religious concerns with respect to genetic modification'.[335]

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327 See CPET, *UK Government Timber Procurement Policy* (January 2010) <http://www.cpet.org.uk/documents.

328 See for instance Mobium Group, 'Living Lifestyles of Health and Sustainability Research Project' (2007).

329 See 'The Hub of Responsible Business Practice', an initiative of the St. James Ethics Centre and funded by the Australian Government, available at < http://thehub.ethics.org.au/>. See however The Sydney Morning Herald, *Industry yet to chase 'ethical consumer'*, 6 September 2007, accessed at <http://www.smh.com.au/news/business/industry-yet-to-chase-ethical-consumer/2007/09/05/1188783320949.html>. See also World News, *Hon Kate Ellis MP Talks Ethical Consumerism*, available at < http://wn.com/Hon_Kate_Ellis_MP_talks_Ethical_Consumerism>.

330 Mobium Group, 'Living Lifestyles of Health and Sustainability Research Project' (2007).

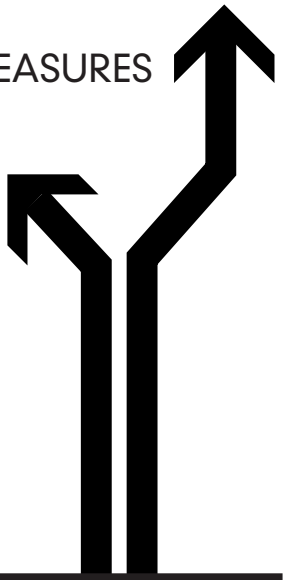
331 See FTANZ, < http://www.fta.org.au/about-fairtrade/label>

332 See FTANZ, < http://www.fta.org.au/about-fairtrade/facts-figures>

333 For instance over 17 months, more than 25,000 Australians supported World Vision's Don't Trade Lives actions targeting the chocolate industry. World Vision, *Big lessons from "Big Chocolate"*, <http://www.worldvision.com.au/Libraries/AnnualProgramReview09_CaseStudies/Big_Lessons_from_Big_Chocolate.sflb.ashx>.

334 Food Standards Australia and New Zealand, *Part 3. Labelling of GM Foods* (16 April 2010), <http://www.foodstandards.gov.au/consumerinformation/gmfoods/frequentlyaskedquestionsongeneticallymodifiedfoods/part3labellingofgmfo4659.cfm>.

335 Ibid.



11. PRODUCT BANS AND MANDATORY CERTIFICATION

11.1 Mandatory Certification

The strongest regulatory response that can be made with regards to a product in which slavery or trafficked labour may have been involved in its production would be to legislate a certification process or require a certification process that meets certain characteristics in order for the good to be permitted to be sold in Australia. For example, legislation might require that certain goods are subject to an independent audited certification process with regular unannounced inspections of the places of production to ensure that slavery and human trafficking are not used in the production of the good. Such mandatory certification schemes have been required by Australia for specific goods, such as diamonds and timber coming from conflict zones in Africa. The Gillard Government has promised a legislated certification requirement for timber and wood products to ensure they are not illegally sourced. There are numerous examples of legislated certification required on products for human rights and environmental in other countries around the world. Chapter 11 gives examples of mandatory certification schemes related to issues of social justice, human rights, environmental or corruption concerns.

11.2 The *Lacey Act*

The US *Lacey Act* provides an example of a compulsory certification law.[336] The *Lacey Act* requires import declarations with each shipment of certain plant-based products into the US to deal with illegal sourcing of those products. The *Lacey Act* covers plants taken in violation of foreign as well as domestic law. The *Lacey Act* applies regardless whether the underlying foreign law violation is criminal or civil in nature. The underlying foreign law must be one aimed at protecting plants and their products.

In a *Lacey Act* plant prosecution, the government must prove the following elements:

1. The plant was taken, possessed, transported or sold in violation of a US federal, state or foreign law or regulation;
2. The defendant knowingly imported, exported, transported, received, acquired, or purchased the illegal plant or attempted to do so; and
3. The defendant knew of or, with due care, should have known of the violation.

A conviction under the *Lacey Act* does not require the government to prove that the defendant knew the specific law or regulation that was violated. Rather, the government need only prove that the defendant knew of the plant's unlawfulness.

A person found guilty of a *Lacey Act* felony faces up to five years in prison, significant fines and forfeiture. A failure to exercise due care can expose an organisation or an individual to civil penalties of up to US$10,000 per violation of the Act.

The *Lacey Act* provides that plant products that contain illegally taken plant material are subject to forfeiture even if the owner had no reason to know that the products are illegal. Although the illegal plant content may be hard to prove, if the government manages to do so, each person or entity along the supply chain may be required to forfeit their goods, regardless whether the person or entity exercised due care or knew of the illegality.

11.3 The Kimberley Process for Conflict Diamonds

Australia is part of the Kimberley Process banning the importation of conflict diamonds. The Kimberley Process is a joint initiative between 75 countries, industry and civil society which aims to address – and ultimately eliminate - the trade in conflict diamonds.[337] The Kimberley Process Certification Scheme (KPCS) was introduced in early 2003, and received UN support through General Assembly and Security Council Resolutions 55/56 of December 2000 and 1459 (2003) respectively.[338] Participants sought and gained exemptions from WTO rules for measures applied under the KPCS.[339]

336 Marcus A. Asner and Grace Pickering, 'The Lacey Act and the World of Illegal Plant Products', (2010) 21 (6) *Environmental Law in New York* 101.

337 Kimberley Process, *Background* < http://www.kimberleyprocess.com/background/index_en.html>.

338 Department of Foreign Affairs and Trade, *Australian Diamonds and the Kimberley Process* <http://www.dfat.gov.au/publications/stats-pubs/downloads/diamond.pdf> 12.

339 Ibid.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Under Section I of the KPCS, 'Conflict Diamonds' are defined as: [340]

> *rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future.*[341]

Therefore the KPCS only applies to the trade in *rough* diamonds (as opposed to regulating other stages of the supply chain) and only applies to 'conflict diamonds' identified in United Nations Security Council or General Assembly Resolutions. 'Conflict diamonds' identified through the KPCS process have fuelled conflicts in Liberia, Sierra Leone, Angola, the Democratic Republic of Congo and Côte d'Ivoire.[342]

The main requirements for participants specified under the KPCS document are as follows:

> *Requirements for Export (Section II: The Kimberly Process Certificate)*
> *Each Participant should ensure that:*
> - *a Kimberley Process Certificate accompanies each shipment of rough diamonds;*
> - *Processes for issuing Certificates meet the minimum standards specified in Section IV;*
> - *Certificates meet the minimum requirements specified in Annex I, including the provision of information on the importer/exporter and the inclusion of a guarantee that the 'rough diamonds have been handled in accordance with the provisions of the KPCS;*[343] *and*
> - *It must notify all other participants of the features of its Certificate, for purposes of validation.*
>
> *Requirements for Import (Section III: the International Trade in Rough Diamonds)*
> *Each participant should ensure that:*
> - *with regard to shipments of rough diamonds exported to a participant, require that each such shipment is accompanied by a duly validated Certificate;*
> - *with regard to shipments of rough diamonds imported from a participant:*
>   - *require a duly validated Certificate;*
>   - *ensure that confirmation of receipt is sent expeditiously to the relevant Exporting Authority.*
>   - *require that the original of the Certificate be readily accessible for a period of no less than three years;*
> - *ensure that no shipment of rough diamonds is imported from or exported to a non-participant.*[344]

340 Kimberley Process Certification Scheme (KPCS) Document, available at Kimberley Process, *Core Documents* < http://www.kimberleyprocess.com/documents/basic_core_documents_en.html>.

341 Ibid Section I, Definitions.

342 Global Witness, *Conflict Diamonds* <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds>.

343 Note: As long as minimum requirements are met, Participants may at their discretion establish additional characteristics for their own Certificates, for example their form, additional data or security elements. The full list of minimum requirements are outlined in the KPCS Document under Annex I.

344 Note: the Participant must also recognise that Participants through whose territory shipments transit are not required to meet the requirement of paragraphs (a) and

Requirements for Internal Controls (Section IV: Internal Controls)
Each participant should:

- *establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory;*
- *designate an Importing and an Exporting Authority(ies);*
- *ensure that rough diamonds are imported and exported in tamper resistant containers;*
- *as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions; and*
- *collect and maintain relevant official production, import and export data, and collate and exchange such data.*

This collaborative effort is overseen by a rotating chair and secretariat, drawn from countries participating in the Kimberly Process.[345] A number of working groups have also been established to support the work of the chair and secretariat.[346] This includes the Working Group on Monitoring (WGM), which deals with the implementation of obligations by participating countries.[347] Participants are expected to submit an Annual Report to this working group. In addition, plenary sessions are also held once a year to provide an opportunity for participant discussions and decisions regarding the KPCS.[348]

11.3.1 Australia's Implementation of Obligations

As outlined above, the Kimberley Process required that Australia implement legislation regarding the import and export of rough diamonds.

The Department of Foreign Affairs and Trade has overall responsibility for the implementation of the KPCS.[349] Per Australia's obligations under the KPCS (Internal Controls), the Department of Resources, Energy and Tourism (DRET) has been designated as the export authority, while the Australian Customs and Border Protection Service has been designated as the import authority.[350]

Regulation 4MA, made under the *Customs (Prohibited Imports) Regulations 1956 (Cth)*, regulates the importation of rough diamonds into Australia. Similarly to the regulation of exports from Australia, Regulation 4MA prohibits the importation of rough diamonds unless the importing country is a participant of the Kimberly Process, the country of origin of the rough diamonds has issued a Kimberley Process Certificate for the rough diamonds and the rough diamonds are imported in a tamper resistant container. The importer must also retain the original certificate for five years and present this certificate to the DRET upon request.

11.3.2 Evaluating the Success of the Kimberly Process

The Kimberley Process has played a key role in the reduction of conflict diamonds.[351] Diamond experts estimate that conflict diamonds now represent a fraction of one percent of the international trade in diamonds, compared to estimates of up to 15% in the 1990s. In addition, the Kimberley Process is also credited as having played a role in stabilising fragile countries and as having supported their development. The Kimberly Process has had this impact because it has made life harder for the criminals involved in the conflict diamond trade and it has brought large volumes of certified diamonds from fragile countries onto the legal market. This has increased the revenues of a number of governments of impoverished African countries, and helped them to address their countries' development challenges. For example, approximately $125 million worth of diamonds were legally exported from Sierra Leone in 2006, compared to almost none at the end of the 1990s.[352]

Nevertheless, according to Global Witness and Partnership Canada Africa, a number of key problems remain with the Kimberly Process. The first relates to the definition of 'conflict diamonds'. The KPCS definition is narrow, and applies only to cases where *rough* diamonds are used by *rebel* groups. Other 'systematic and gross human rights violations' associated with the diamond trade are not addressed, including abuses occurring during the polishing stage of the supply chain and human rights abuses committed by participant countries themselves.[353] For instance, in 2009 the Zimbabwean government unleashed state-sponsored violence against unarmed diamond diggers.[354] At the same time, Zimbabwe continued to export diamonds under the KPCS that benefited 'political and military gangsters'.[355] The narrow definition of 'conflict diamonds' has meant that some participant countries have argued that diamonds benefiting the Zimbabwean government are outside the technical definition of 'conflict diamonds' (as the violence was not committed by a rebel group) and therefore Zimbabwe should not be suspended from the KPCS.[356]

Second, action is only taken by participants where there is an absolute consensus. This means that it is extremely difficult to take action against a participant country that is not abiding by the rules of the Kimberley Process.[357] Third, there is no permanent secretariat, no funding and no central repository of knowledge or

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(b) above, and of Section II (a) provided that the designated authorities of the Participant through whose territory a shipment passes, ensure that the shipment leaves its territory in an identical state as it entered its territory (i.e. unopened and not tampered with). See KPCS Document, Section III.

345 Kimberley Process, *Structure* <http://www.kimberleyprocess.com/structure/index_en.html>.

346 Ibid.

347 Ibid.

348 Ibid.

349 Department of Foreign Affairs and Trade, *Australian Diamonds and the Kimberley Process* <http://www.dfat.gov.au/publications/stats-pubs/downloads/diamond.pdf> 13.

350 Ibid 13

351 Kimberley Process, *Background* < http://www.kimberleyprocess.com/background/index_en.html>.

352 Ibid.

353 Global Witness, Conflict Diamonds <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds>.

354 Ibid.

355 Partnership Canada Africa, *Zimbabwe, Diamonds and the Wrong Side of History*, March 2009 <http://www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-Eng.pdf>.

356 Global Witness, Conflict Diamonds <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds>; Global Witness and Partnership Canada Africa, *Paddles for Kimberley: An Agenda for Reform*, June 2010 <http://www.pacweb.org/Documents/diamonds_KP/Paddles_for_Kimberley-June_2010.pdf>.

357 Ibid.

ongoing institutional capacity to support the Kimberley Process. This has led to a lack of continuity between chairmanships – the Kimberley Process chair rotates amongst the member countries on an annual basis – insufficient monitoring and a slow response to crisis situations. The future of the Kimberley Process has also been challenged by Zimbabwe committing to sell its diamonds regardless of sanctions.[358] Despite these and other drawbacks,[359] the Kimberley Process remains the largest 'checks and balances' import/export scheme by government, industry and civil society that addresses humanitarian concerns.

11.4 Compliance with the CITES

Australia is a States Party to the *Convention on International Trade in Endangered Species* (CITES). Australia has obligations to assist in ensuring that the Convention is not breached by the importation of products protected by the Convention.

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) contains provisions for imports involving protected timber species. The Act sets out procedures for the domestic operation of the CITES system, including the requirements for imports of CITES specimens (sections 303CD–303CK, 303FA–303FI).

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) contains specific offences relating to importation of protected species; under section 303CD it is an offence to import any of the species listed in the CITES appendixes into Australia unless a permit has been issued for the importation (sections 303CD(2), 303CG, 303CB, 303GC), or the import is otherwise authorised (section 303CD(3)–(6)). The offence carries a penalty of 10 years imprisonment, 1,000 penalty units or both (section 303CD). An additional offence for importation of certain 'regulated live specimen' (which also includes plants, section 303EA) is set out in section 303EK of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). This offence applies to protected species that are listed in other statutory instruments and are not already covered in the CITES appendixes (section 303EB(5)).

The Act contains general offences in sections 18A and 19A criminalising conduct that 'results or will result in' (section 18A(1)) or 'is likely to have' (section 18A(2)) 'a significant impact on (i) a listed threatened species, or (ii) a listed threatened ecological community'. A further offence for actions causing (and likely to cause) 'significant impact on the world heritage value of a declared World Heritage property' can be found in section 15A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The Act contains no specific offences for forging import permits or for obtaining these permits by way of fraud or bribery. In these instances, liability for the general offences of forging Commonwealth documents and bribing Commonwealth officers under the *Criminal Code* (Cth) may arise.[360]

11.5 Liberian Conflict Timber

It is not without precedent that the Australian Government has banned the importation of a product on human rights grounds, in addition to conflict diamonds. Liberian conflict timber provides another such example. In December 2000 the UN Security Council commissioned and received a report recommending that a temporary embargo be placed on Liberian timber exports until the Liberian government could demonstrate that it was not involved in the trafficking of arms to, or diamonds from, Sierra Leone[361]. The UN Security Council subsequently placed an embargo on Liberian timber in May 2001. In May 2003, the UN Security Council renewed the sanctions[362] against Liberia and extended the measures to also include a ban on timber exports[363]. The increased measures were prompted because the Government had not shown that the revenue from the Liberian timber industry 'is used for legitimate social, humanitarian and development purposes'[364]. Accordingly, Australia abided by the Security Council's decision and the *Customs Act 1901* was amended to include the prohibition on the importation of round logs and timber products from Liberia[365].

In 2006, the Security Council, in accordance with UN Security Council resolution 1689 (2006), reviewed the sanctions placed on Liberian timber and subsequently decided not to renew the bans.[366] This was due to the Liberian government adhering to stipulations in Resolution 1689 which called for 'a transparent, accountable and Government-controlled forestry sector'[367.] As such, Australia followed suit and the amendments to the *Customs Act* were repealed.[368]

358 Ben Doherty, 'Mugabe vows to defy rules on "blood diamonds"', *The Age* (Melbourne), 20 June 2011, 9.

359 See Global Witness and Partnership Canada Africa, *Paddles for Kimberley: An Agenda for Reform*, June 2010 <http://www.pacweb.org/Documents/diamonds_KP/Paddles_for_Kimberley-June_2010.pdf>.

360 Andreas Schloenhardt, *The illegal trade in timber and timber products in the Asia–Pacific region*, Australian Institute of Criminology, 119-123.

361 aragraph 49 of the Report of the Panel of Experts appointed Pursuant to UN Security Council Resolution 1306 (2000) The principals in Liberia's timber industry are involved in a variety of illicit activities, and large amounts of the proceeds are used to pay for extra-budgetary activities, including the acquisition of weapons. Consideration should be given to placing a temporary embargo on Liberian timber exports, until Liberia demonstrates convincingly that it is no longer involved in the trafficking of arms to, or diamonds from, Sierra Leone.

362 United Nations Security Council Resolution 1521 (2003)

363 'Extending sanctions against Liberia, Security council adds ban on timber exports', UN News www.un.org/apps/news/story/asp?NewsID=6976&Cr=liberia&Cr1=# (accessed 26/3/2010)

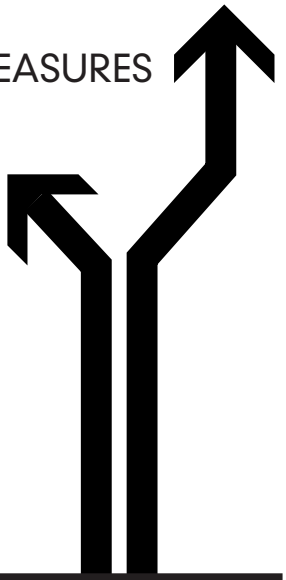
364 Ibid.

365 Customs Act Regulation 4Q of the Principal Regulations.

366 Security Council, SC/8856, 20 October 2006.

367 Ibid.

368 Amendments to the Customs (Prohibited Imports) regulations 1956 – Heavy metal levels, Marked Fuel, Liberian sanctions.



12. COMMONWEATH PROCUREMENT

Chapter 12 addresses a very direct way the Australian Government can withdraw its support from companies that fail to demonstrate adequate action to address the possibility of slavery or human trafficking in their supply chain is through excluding such companies from government procurement.

Although the Australian Government currently has ethical standards in place for procurement, no specific standard is in place which addresses trafficked or slave labour in the production of goods. This Chapter then gives examples of other countries initiatives in relation to CSR and procurement, namely the United States, United Kingdom and Belgium.

12.1 Government Policy and Regulation

The procurement process[369] for Federal Government agencies and officials is undertaken within a framework of Commonwealth legislation, regulations and relevant government policy. This covers the wide variety of goods and services purchased by Government departments and agencies from the private sector, '(f)rom advertising and cleaning services to engineering and office equipment, and from training and project management to research and recruitment'.[370]

The principle Act governing procurement at the Commonwealth level is the *Financial Management and Accountability Act 1997* (FMA Act). S 44(1) of the FMA Act requires Chief Executives of Federal agencies to promote 'efficient, effective and ethical use' of Commonwealth resources 'that is not inconsistent with the policies of the Commonwealth' and for which the Chief Executive is responsible. S 44(2) states that in doing so Chief Executives must 'comply with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law'. In turn, '(t)his obligation is reinforced by the requirement' in Regulation 9 of the *Financial Management and Accountability Regulations 1997* 'that Chief Executives and other approvers of public expenditure must be satisfied that the proposed expenditure is in accordance with the policies of the Government'.[371]

There are two key documents which elaborate on the requirements under s 44 of the FMA; the 'Commonwealth Procurement Guidelines' (CPG) and the 'Financial Management Guidance on Complying with Policies of the Commonwealth in Procurement' (FMG).

12.1.1 Commonwealth Procurement Guidelines (CPG)

Under Regulation 7(1) of the *Financial Management and Accountability Regulations 1997* the Minister for Finance and Deregulation has issued the CPG. Regulation 7(2) of the *Financial Management and Accountability Regulations 1997* states that '(a)n official performing duties in relation to procurement must act in accordance with the (CPG)'. There are more than 120 Government departments that are subject to the CPGs.[372]

The CPGs are said to 'establish the core procurement policy

369 The term 'procurement' encompasses the whole process of acquiring property or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.

370 Australian Government Department of Finance and Deregulation, *Selling to the Australian Government: A Guide for Business* (February 2009) < http://www.finance.gov.au/publications/selling-to-the-australian-government/index.html> vii.

371 Australian Government Department of Finance and Deregulation, *Commonwealth Procurement Guidelines* (1 December 2008) < http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html> 7.

372 Australian Government Department of Finance and Deregulation, *Selling to the Australian Government: A Guide for Business* (February 2009) < http://www.finance.gov.au/publications/selling-to-the-australian-government/index.html>, 2.

framework and articulate the Government's expectations for all departments and agencies subject to the (FMA) … when performing duties in relation to procurement'.[373] Division 1, Section 6 of the CPG further elaborates on the requirement contained in Section 44 of the FMA that the agencies promote the 'efficient, effective and ethical use of resources' with regards to procurement.[374]

Para 6.20 states that:

> *Agencies should include contract provisions requiring contractors to comply with materially relevant laws and should, as far as practicable, require suppliers to apply such a requirement to sub-contractors. Contractors must also be able to make available details of all sub-contractors engaged in respect of the procurement contract.*

In addition, para 6.22 states that:

> *Agencies must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.*

12.1.2 Guidance on Complying with Policies of the Commonwealth in Procurement

In addition to compliance with the CPG, the *Financial Management Guidance on Complying with Policies of the Commonwealth in Procurement* (FMG) publication is designed to 'assist agencies subject to the FMA Act to comply with policies of the Commonwealth in procurement', as required by s 44 of the FMA Act and Regulation 9 of the *Financial Management and Accountability Regulations 1997*.[375] The FMG states that this:

> *guidance focuses on policies of the Commonwealth as they relate to procurement. It includes a core list of policies that interact with procurement which does not preclude officials applying other policies of the Commonwealth that are to be complied within a specific procurement process.* [376]

The Interacting Policy Table 'provides a core list of policies of the Commonwealth that interact with procurement through FMA Regulation'. These cover policy areas such as employment and workplace relations, environment, international obligations (specifically Trade Sanctions) and social inclusion. In addition, links to model tender clauses and statutory declarations are included in the table for certain core policy areas. For instance, the Government has provided a model clause and statutory declaration in support of Fair Work Principles.[377] The statutory declaration requires the tenderer to declare their compliance with such principles; for instance, 'where the tenderer is a Clothing and Footwear Manufacturer with a commercial presence in Australia, it is accredited with the *Homeworkers' Code of Practice*, or is seeking such accreditation'.[378] No policy (or model term/ statutory declaration) on slave labour or trafficked labour in supply chains is currently covered by the FMG.

12.2 Strengthening ethical standards for procurement

Arguably government agencies currently have the capacity to refuse to contract with a supplier where there is evidence that trafficked or slave labour exist in their supply chain, or where the supplier is unable to confirm by statutory declaration that they have taken positive steps to ensure their supply chain is free of such violations of international law. This is because s 44 of the FMA requires agencies to promote the ethical use of Commonwealth resources, combined, in particular, with para 6.22 of the CPG which requires that 'agencies *must* not seek to benefit from supplier practices that may be dishonest, unethical or unsafe'. Finally, the FMG states that the listed policies do not preclude government agencies applying other Government policies.

Nevertheless, in a recent report on Human Rights and the UK private sector, the UK Joint Committee on Human Rights concluded that 'assertions that public authorities can take steps in their procurement processes to incorporate human rights standards are unlikely to lead to real change' and that '(g)uidance from central Government will be required to encourage a more proactive approach'.[379] The argument that Government must provide guidance and leadership can also be made in Australia; indeed the Federal Government itself appears to view central direction as important given it currently provides detailed guidance to agencies through the CPG and FMG on implementation of ethical requirements and government policy.

Governments have 'immense power as a purchaser and should take responsibility for (labour) rights impacts in (their) supply chain'.[380] STOP THE TRAFFIK believes the Federal Government should provide guidance and leadership in implementing policies designed to ensure that public resources do not support companies that have trafficked or slave labour in their supply chains. The requirement should be for companies to demonstrate that they have taken reasonable steps to ensure their products are free of slavery and trafficked labour, rather than requiring a government agency to have to gather evidence that the company has such human rights violations in its supply chain. The latter case is likely to be highly ineffective, as most government agencies will only have the resources to detect the most obvious cases of trafficking and slavery in the supply chains of their suppliers.

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373 Australian Government Department of Finance and Deregulation, *Commonwealth Procurement Guidelines* (1 December 2008) < http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html>, 2.

374 It should be noted that those obligations 'which must be complied with, in all circumstances, are denoted by the use of the term *must* in these CPGs'. Whereas, '(t)he use of the term *should* denotes matters of sound practice'; see Australian Government Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, 2. Note also that the Department of Finance and Deregulation has issued a guidance document on 'Ethics' to assist agencies to implement the Government's procurement policy.

375 Australian Government Department of Finance and Deregulation, *Guidance on Complying with Policies of the Commonwealth in Procurement* (July 2010) <http://www.finance.gov.au/publications/fmg-series/10-complying-with-legislation.html>.

376 Ibid.

377 Australian Government Department of Finance and Deregulation, *Model Clauses for Tender Documentation (July 2010)* <http://www.finance.gov.au/publications/fmg-series/tender_clauses.html#ewr>.

378 Ibid.

379 Joint Committee on Human Rights, United Kingdom House of Lords and House of Commons, *Any of our business? Human rights and the UK private sector* (2009) 69.

380 Ibid., 68.

12.3 Examples of other Countries Initiatives

12.3.1 United States Executive Order 13126

Executive Order (EO) 13126 on the 'Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor' applies to purchases made by the US Federal Government, and is designed to ensure that 'executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by forced or indentured child labor'.[381]

Pursuant to Section 2 of the EO, the US Department of Labor (in consultation and cooperation with the Department of the Treasury and the Department of State) publishes in 'the Federal Register a list of products ('EO List'), identified by their country of origin, that those Departments have a reasonable basis to believe might have been mined, produced, or manufactured by forced or indentured child labor'.[382]

In addition, Section 3 of the EO empowers the Federal Acquisition Regulatory Council (FARC) to issue rules relating to contractor certifications. Under these certifications, a contractor must certify that a product furnished under the procurement contract is free of forced/indentured labour where that product is included in the EO List. Section 3 also empowers the FARC to issue rules regarding investigations - where a product is suspected to be made from forced/indentured labour - and contractual remedies.

The Department of Labor published an initial determination of the EO List on 18 January 2001. Since then, the list has been updated on a periodic basis, depending on the nature and extent of information received, pursuant to the Department of Labor's (DOL) procedural guidelines.[383] The process for updating the EO List is as follows:[384]

- *Gathering information:* the DOL relies 'on a wide variety of materials originating from its own research, other U.S. Government agencies, foreign governments, international organizations, civil society organizations, academic institutions, trade unions, the media, and others. DOS[the Department of State] and U.S. embassies and consulates gathered data from key contacts, conducting site visits, and reviewing local media sources. Comprehensive desk reviews (are) carried out to gather all publicly available information on labor conditions in the production of thousands of products. Additional information (are) sought from the public through Federal Register notices and a public hearing'.
- *Assessment of information:* in evaluating information for inclusion of a product on the EO List, DOL, in consultation with DHS and DOS, considered and weighed several factors including:
  - The nature of the information describing the use of forced or indentured child labor;
  - The source of the information;
  - The date of the information;
  - The extent of corroboration of the information by appropriate sources;
  - Whether the information involved more than an isolated incident; and
  - Whether recent and credible efforts are being made to address forced or indentured child labor in a particular country and industry.
- *Initial and Final Determination:* When the DOL wishes to update the EO List, it publishes an Initial Determination which 'sets forth an updated list of products, by country of origin, which the (DOL) preliminarily believes might have been mined, produced, or manufactured by forced or indentured child labor'.385 The DOL then 'invites public comment on its initial determination as to products that appear on the updated list set forth in this notice' and 'consider(s) all public comments prior to publishing a final determination updating the list of products, made in consultation and cooperation with the Department of State, and the Department of Homeland Security'.

The DOL released a final determination in the *Federal Register* on 20 July 2010, updating the EO List.[386] The final determination contains a list of 21 countries and 29 products. See Appendix 3 for the current EO List of products.

12.3.1.1 Contractual certification under FARC rules

On 18 January 2001, the US Federal Acquisition Regulatory Council (FARC) published rules regarding the 'application of labor laws to government acquisitions' *FARC rules on government acquisition*, including, under part 22.1503, the 'procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor'.[387] The following rules were promulgated in relation to contractor certification under part 22.1503:

a. When issuing a solicitation for supplies expected to exceed the micropurchase threshold, the contracting officer must check the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor (the List) (www.dol.gov/dol/ilab) (see 22.1505(a)). Appearance of a product on the List is not a bar to purchase of any such product mined, produced, or manufactured in the identified country, but rather is an alert that there is a reasonable basis to believe that such product may have been mined, produced, or manufactured by forced or indentured child labor.

b. …

381 *Executive Order 13126 of June 12, 1999*, § 1. In particular, the laws listed in Section 1 are the *Tariff Act of 1930*, 19 USC § 1307, the *Fair Labor Standards Act*, 29 USC § 201 *et seq*, and the *Walsh-Healey Public Contracts Act*, 41 USC § 35 *et seq*.

382 *Executive Order 13126 of June 12, 1999*, § 2.

383 United States Department of Labor, Office of the Secretary, Bureau of International Labor Affairs, *Procedural Guidelines for the Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Under 48 CFR Subpart 22.15 and E.O. 13126 of 18 January 2001*, p 5351 (2001).

384 United States Department of Labor, Bureau of International Labor Affairs, *Frequently Asked Questions* < http://www.dol.gov/ILAB/faqs.htm#eo>.

385 Department of Labor, Office of the Secretary of Labor, *Notice of Initial Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor Pursuant to Executive Order 13126 of 11 September 2009*, p 46794 (2009).

386 Department of Labor, Office of the Secretary of Labor, *Notice of Final Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Pursuant to Executive Order 13126 of 20 July 2010*, p 42164 (2010).

387 *Application of Labor Laws to Government Acquisitions* 48 CFR § 22 (2001).


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c. Except as provided in paragraph (b) of this section,[388] before the contracting officer may make an award for an end product (regardless of country of origin) of a type identified by country of origin on the List the offeror must certify that—
   (1) It will not supply any end product on the List that was mined, produced, or manufactured in a country identified on the List for that product, as specified in the solicitation by the contracting officer in the Certification Regarding Knowledge of Child Labor for Listed End Products; or
   (2) (i) It has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any end product to be furnished under the contract that is on the List and was mined, produced, or manufactured in a country identified on the List for that product; and
   (ii) On the basis of those efforts, the offeror is unaware of any such use of child labor.

d. Absent any actual knowledge that the certification is false, the contracting officer must rely on the offerors' certifications in making award decisions.

See Appendix 2 for the provisions required to be inserted into contracts where a product supplied by the contractor is included in the Federal Register List of Products.

In addition to rules regarding contractor certification, part 22.1503(e) provides the following rules on investigations to be carried out by an agency's Inspector General:

> *(e) Whenever a contracting officer has reason to believe that forced or indentured child labor was used to mine, produce, or manufacture an end product furnished pursuant to a contract awarded subject to the certification required in paragraph (c) of this section, the contracting officer must refer the matter for investigation by the agency's Inspector General, the Attorney General, or the Secretary of the Treasury, whichever is determined appropriate in accordance with agency procedures, except to the extent that the end product is from the country listed in paragraph (b) of this section, under a contract exceeding the applicable threshold.*

The FARC rules on government acquisition also address Government agency's recourse to remedies against contractors. Part 22.1504(a) allows for Government agency's to impose remedies for the following violations:

1. The contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor.

388 Part 22.1503 (b) of the *Application of Labor Laws to Government Acquisitions* 48 CFR § 22 (2001) states:
(b) The requirements of this subpart that result from the appearance of any end product on the List do not apply to a solicitation or contract if the identified country of origin on the List is—
(1) Canada, and the anticipated value of the acquisition is $25,000 or more (see 25.405);
(2) Israel, and the anticipated value of the acquisition is $50,000 or more (see 25.406);
(3) Mexico, and the anticipated value of the acquisition is $54,372 or more (see 25.405); or
(4) Aruba, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, or the United Kingdom and the anticipated value of the acquisition is $177,000 or more (see 25.403(b)).

2. The contractor has failed to cooperate as required in accordance with the clause at 52.222–19, Child Labor Cooperation with Authorities and Remedies, with an investigation of the use of forced or indentured child labor by an Inspector General, the Attorney General, or the Secretary of the Treasury.
3. The contractor uses forced or indentured child labor in its mining, production, or manufacturing processes.
4. The contractor has furnished an end product or component mined, produced, or manufactured, wholly or in part, by forced or indentured child labor.

In response to the violations outlined above, part 22.1504(b) stipulates that:

1. The contracting officer may terminate the contract.
2. The suspending official may suspend the contractor in accordance with the procedures in subpart 9.4.
3. The debarring official may debar the contractor for a period not to exceed 3 years in accordance with the procedures in subpart 9.4.

It should be noted that part 22.1503(f) states that 'proper certification will not prevent the head of an agency from imposing remedies in accordance with part 22.1504(a)(4) if it is later discovered that the contractor has furnished an end product or component that has in fact been mined, produced, or manufactured, wholly or in part, using forced or indentured child labor.' In addition remedies in part 22.1504(b)(2) and (b)(3) are deemed inappropriate unless the contractor knew of the violation.

12.3.2 United Kingdom procurement policy on legal and sustainable timber

The UK was the first country to introduce a procurement policy for timber in order to curb the importation of illegal and unsustainable timber into the UK. [389] Since April 2009 'only timber and wood-derived products originating either from independently verifiable Legal and Sustainable sources or from a licensed Forest Law Enforcement, Governance and Trade (FLEGT) partner'[390] may be used 'on the Government estate including temporary site works and material supplied by contractors'.[391] In addition, since January 2010 the following 'social criteria' have been including in the definition of 'sustainable' timber:[392]

- Identification, documentation and respect of legal, customary and traditional tenure and use rights related to the forest;
- Mechanisms for resolving grievances and disputes including those relating to tenure and use rights, to forest management practices and to work conditions; and
- Safeguarding the basic labour rights and health and safety of forest workers.

This policy applies to 'all central government departments, executive agencies and non-departmental public bodies (NDPBs) in England'. [393]

The 'Executive Summary of UK Government Timber Procurement Advice' provides government agencies with model contractual terms to include in timber procurement contracts.[394] The contractual terms include:

- The requirement for contractors to ensure that any timber or wood-derived products supplied to the Government are from either Legal and Sustainable or FLEGT-licensed or equivalent sources; and
- The reservation of the right for a Contracting Authority to require independent verification of the evidence provided by applicants. Such independent verification must be provided and paid for by the contractor and must result in a report that (a) verifies the forest source of the timber or wood and (b) assesses whether the source meets the criteria for Legal and Sustainable sources or compliance with FLEGT-licensed requirements.

Bidders are required to indicate their acceptance of the contract conditions as a requirement of submitting a compliant bid. This can be achieved by bidders signing a statement to this effect as part of their 'Invitation to Tender' (ITT) response. If bidders do not agree to abide by the contract conditions, their bid can be marked as non-compliant.[395] See Appendix 4 for the complete list of contractual stipulations to be included in timber procurement contracts.

The Government routinely requires evidence of compliance with the timber procurement policy 'where timber is from a high-risk source, that is, where the record of forest governance is poor and forest management not always responsible'. 396 In order to demonstrate that timber is from a legal and sustainable source it is necessary to prove: [397]

389 Chatham House Report Card, located at Illegal-Logging.info, *Illegal Logging and Related Trade: Indicators of the Global Response - Country Report Cards* (15 July 2010) < http://www.illegal-logging.info/approach.php?a_id=186>.

390 A FLEGT is a timber-producing country that has signed up to a bilateral Voluntary Partnership Agreement with the European Union concerning the EU's Forest Law Enforcement, Governance and Trade scheme and whose timber and wood-derived products have been licensed for export by that country's government.

391 Central Point of Expertise on Timber (CPET), *Executive Summary of UK Government Timber Procurement Advice Note April 2010* (April 2010) <http://www.cpet.org.uk/files/TPAN%20April%2010.pdf>. The CPET is funded by the UK Department for Environment, Food and Rural Affairs to provide free advice and guidance to all public sector buyers and their suppliers to aid compliance with the policy. One other alternative that should be noted is for a company to supply recycled timber. Also it should be noted that 'there may occasionally be situations where a particular type of product or timber species is needed (e.g. for use in marine defences or refurbishment of an historic building) and no Legal and Sustainable or FLEGT-licensed or equivalent source is available. In this case, Contracting Authorities must: (a) ensure that they have in place a documented justification setting out why no alternative product or timber species can be used; (b) require from potential contractors evidence that the source of the timber was legally managed; and (c) give preference to timber from sources that are demonstrably in an active programme to improve and certify forest management. Further information is set out in CPET, *UK Government Timber Procurement Policy: Framework for Evaluating Category B Evidence* (July 2010) <http://www.cpet.org.uk/documents>.

392 CPET, *UK Government Timber Procurement Policy* (January 2010) < http://www.cpet.org.uk/documents >.

393 CPET, *Executive Summary of UK Government Timber Procurement Advice Note April 2010* (April 2010) <http://www.cpet.org.uk/files/TPAN%20April%2010.pdf>.

394 Ibid.

395 Ibid.

396 Ibid.

397 Ibid.

- *The source of the timber (chain of custody):* In general, timber and wood-derived products go through a number of stages between the forest and the final product. Since the policy applies to legality and sustainability in the forest, it is necessary to know the area of the forest the timber originated from.
- *That the forest source was legally and sustainably managed:* Once the source of the timber is known, then it is necessary to show that the forest was managed legally and sustainably.

Two types of evidence may be submitted in order to demonstrate compliance: [398]

- *Category A evidence* is independent certification under a scheme recognised by the UK government as meeting the government's procurement criteria. The UK Government makes a list of assessed certification schemes that currently meet the government's requirements available online.[399] Certification schemes include both forest management certification and chain custody certification.
- *Category B evidence* is documentary evidence (other than Category A evidence) that provides assurance that the source is legal and sustainable. Category B evidence can be combined with Category A evidence (for example a certified forest of origin combined with non-certified evidence of chain of custody).

If the proof supplied to the Government is 'found to be inadequate' then independent verification is required (see the contractual term on independent verification listed above). [400]

In a recent study by Chatham House the UK policy has been credited as having a 'major impact on the response of the private sector and the level of illegal wood consumption'. [401] Similar policies exist in Denmark and the Netherlands.[402]

12.3.3 Belgium Government's Guide for Sustainable Procurement

The Belgium Federal Government promotes sustainable procurement through its *Guide for Sustainable Procurement* (The Guide).[403] The Guide provides a catalogue of companies whose products meet stipulated environmental and/or social standards. In order to be listed in the Guide, companies must request certification for their products and are in turn awarded labels in accordance with the standards which they meet.[404] For instance, one dimension of the social standards used to assess companies is consideration of eight core ILO norms, including the abolition of forced labour.[405] Those companies which are certified as having slave-free supply chains are listed in the guide with a corresponding label on labour standards.[406]

398 Ibid.

399 See CPET, *Evidence of Compliance for Category A Evidence* (December 2008) <http://www.cpet.org.uk/evidence-of-compliance/category-a-evidence/approved-schemes>.

400 CPET, *Executive Summary of UK Government Timber Procurement Advice Note April 2010* (April 2010) <http://www.cpet.org.uk/files/TPAN%20April%2010.pdf>, 41.

401 Chatham House Report Card, located at Illegal-Logging.info, *Illegal Logging and Related Trade: Indicators of the Global Response - Country Report Cards* (15 July 2010) < http://www.illegal-logging.info/approach.php?a_id=186>..

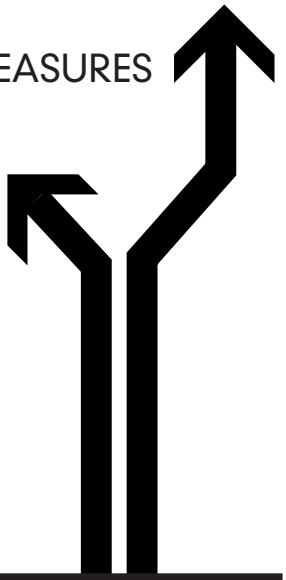
402 The European Coalition for Corporate Justice, 'Sustainable Procurement in the European Union: Proposals and Recommendations to the European Commission and the European Parliament' (February 2007) < http://www.fairtrade.se/obj/docpart/1/161f4787feb102363046457e4b2ae2c6.pdf>.

403 Federal Public Planning Service Sustainable Development (Belgium), *Sustainable Public Procurement* (March 2008) <http://www.guidedesachatsdurables.be/en>.

404 Ibid.

405 Ibid.

406 Government agencies are not limited to the list of suppliers in the Guide. However, Government agencies are encouraged to consider the environmental and social aspects of a candidate contractor's products at certain stages of the procurement assessment. For instance, the Government agency may have regard to compliance with ILO Conventions in assessing the implementation of the procurement contract.



13. OVERCOMING WTO RESTRICTIONS

One of the arguments against restricting the importation or sale of goods produced using slavery and human trafficking, is the fear of breaching World Trade Organisation (WTO) requirements.

Chapter 13 makes the case that Article XX paragraph (a), (b) and/or (e) of the General Agreement on Tariffs and Trade (GATT) constitutes an exception to WTO rule. Decisions by the World Trade Organisation (WTO) panel and WTO Appellate Body (WTOAB) indicate that Article XX is a sufficiently broad exception to allow legislation to be adopted that restricts the importation of goods on the grounds of slavery and human trafficking. This applies even in circumstances that involve the labour practices outside a state's jurisdiction, provided the restrictions are applied in a non-discriminatory manner. Finally this Chapter highlights where the WTO has deemed legislation to be in contravention of the GATT and the indicators developed by the WTOAB, in order to determine if the legislation is discriminatory.

13.1 Article XX of GATT

WTO jurisprudence indicates that measures such as an import ban or a certification scheme generally triggers a violation of Article 1, 11 and or 13 of the GATT.[407]

Article XX provides for exceptions whereby the state is permitted to deviate from the articles above when pursuing legitimate social or political objectives.[408] Article XX is a defence that may be invoked by a responding party in the event a WTO adjudicative body has found the party to be in breach of its WTO obligations.

The test for applying the exceptions clause is derived from the *US - Standards for Reformulated and Conventional Gasoline (Gasoline)* case and was reaffirmed in the *Shrimp - Turtle* case.[409] Using this test, the measure's design and objective must first fall properly under one of the enumerated paragraphs in article XX. Secondly, if a measure is found to be within the scope of one of the exceptions, then the measure must not be discriminatory between members as enshrined in the article XX chapeau.[410] In this determination the Panel or Appellate body will balance 'the right of a member to invoke an exception under Article XX with the duty of the same member to respect the treaty rights of other members.'[411]

Restrictions on trade that are on the grounds of slavery and human trafficking could in theory fall under paragraphs (a), (b) or (e) of article XX.[412] The latter paragraph has been described as applicable to the products of prison labour rather than the conditions in which the products were made.[413] It is argued by some scholars however that governments may rely on paragraph (e) to ban the

407 Matthew T Mitro, 'Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions' (2001) 51 *American University Law Review* 1223, 1235.

408 Ibid.

409 United States – Import prohibition of certain shrimp and shrimp products, Report of the Appellate Body (WT/DS58/AB/R), 12 October 1998. This concerned an action brought by India, Malaysia, Pakistan and Thailand in response to a ban imposed by the US on the importation of certain shrimp and shrimp products. The US argued that the ban aimed to protect sea turtles and was therefore legitimate under article XX (g) of the GATT. The WTOAB ultimately struck down the ban since they held that while the 'measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of article XX of the GATT 1994', the measure was applied by the United States in a discriminatory manner which is 'contrary to the requirements of the chapeau of Article X' (para 186).

410 Ibid. paragraph 186.

411 Ibid. paragraph 156.

412 Paragraph (a) allows for restrictions necessary to protect public morals, paragraph (b) provides for restrictions necessary to protect human, animal or plant life or health, while paragraph (e) provides for restrictions relating to the products of prison labour.

413 Matthew T Mitro, 'Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions' (2001) 51 *American University Law Review* 1223, 1231.

trade of products of slave labour, child labour or forced labour.[414] Paragraph (a) on the other hand allows for restrictions to protect public morals. In 2005 the UN High Commissioner noted that member states' obligations towards their own population could fall within public morals or public order.[415] A defence of public morals was raised in a dispute between the US and Antigua but was unsuccessful.[416] To date no member has successfully been able to rely on paragraph (a) or (e) in article XX to ban products in the interest of human rights.

The focus of this section will be on paragraph (b) as it is among the most considered exceptions in WTO jurisprudence. article XX (b) is also a notable exception for restrictions on the grounds of slavery and trafficking.

13.2 WTO rulings on Article XX (b)

13.2.1 The Scope of Article XX (b): Application of the necessity test

Importantly, there is a significant disparity in the approach adopted by the panel and/or the WTOAB in *Tuna - Dolphin*[417] and in subsequent disputes. For example, the panel in *Tuna -Dolphin* — operating under a Vienna Convention contextual analysis — held that measures involving unilateral action or means of reaching beyond a state's territory were unnecessary and beyond the scope of article XX (b).[418] The panel reasoned that unilateral measures unfairly coerce other members to adopt similar policies which would ultimately result in the collapse of the multilateral trading system.[419] However, the necessity of a unilateral objective under article XX (b) was reconsidered in the *Asbestos* case.[420] Here the WTOAB found the objective of banning asbestos was 'important in the highest degree' and stated that such objectives to protect human life were 'easily justifiable'.[421] Further, the WTOAB in *Asbestos* showed openness towards unilateral sanctions under article XX (b) even though the measure here was non-coercive.[422]

Subsequent practice has indicated that the WTOAB or panel will allow for unilateral sanctions under a balancing approach where they determine whether the import ban is justified as necessary. For instance, the panel in the *Retreaded tyres* dispute between Brazil and the European Communities described this determination as balancing the contribution of the restriction 'to its stated objective against its trade restrictiveness, taking into account the importance of underlying interests or values.'[423] Some scholars go as far as asserting that the decision in the *Shrimp - Turtle* case indicates a unilateral import ban aimed at coercing nations to enforce their own laws pertaining to human rights abuses such as child labour may be justifiable. However to date no WTO dispute has explicitly approved of coercive embargoes.[424]

13.2.2 Application of restrictions in a non-discriminatory manner

Although the *Shrimp - Turtle* mainly concerned the application of paragraph (g) rather than (b), the case is useful to indicate where the WTOAB will find a state's restriction to apply in a discriminatory manner. For example the WTOAB has found that applications of restrictions that lack:

- a degree of flexibility in standard setting,
- cooperation and negotiation between the parties involved, and
- a level of procedural protection given to applicants indicate restrictions that are applied in a discriminatory manner.[425]

In the *Shrimp - Turtle* case, the WTOAB found that the United States (US) discriminated unjustifiably through exercising insufficient flexibility in its requirements of applicant states.[426] The initial 1996 guidelines and US State Department administrators required applicants to adopt turtle safe fishing methods in order to receive an import license. It was found that while Section 609 appeared non discriminatory, the guidelines failed to consider — or make provisions to consider — the varying conditions in other countries. Thus this discrimination rendered the standards for certification insufficiently flexible.[427]

Following this however, the US revised these certification guidelines in order to allow nations to demonstrate a regulatory program 'comparable in effectiveness.'[428] The WTOAB contrasted this standard to the US' initial approach which conditioned markets to adopt policies much like their own. Rather than providing import licenses subject to the adoption of 'essentially the same' policies as the US, the revised guidelines allowed for applicants to implement different — but equally effective — measures which would accommodate their specific conditions. It was held that this 'comparably effective' test did not discriminate unjustifiably.[429]

In the *Shrimp - Turtle* case it was demonstrated a lack of negotiation and cooperation can often signify unjustifiable discrimination. As sea turtles frequently migrate, an effective policy regarding their protection would need to be implemented in a number of adjoining regions. To help facilitate this, the *Inter-American Convention* encouraged parties to negotiate with one

414 Ibid 1223-1273.

415 Office of United Nations High Commissioner for Human Rights publication 'Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights' accessible at http://www.ohchr.org/Documents/Publications/WTOen.pdf

416 United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services. (WT/DS285) Report of the Appellate Body, 2003.

417 Restrictions on Imports of Tuna (DS21/R), Report of the Panel, Sept. 3, 1991.

418 Matthew T Mitro, 'Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions' (2001) 51 *American University Law Review* 1223, 1249.

419 Ibid., 1223, 1257.

420 EC – Measures affecting asbestos and asbestos-containing products, Report of the Appellate Body (WT/DS135/AB/R), 12 March 2001.

421 Matthew T Mitro, 'Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions' (2001) 51 *American University Law Review* 1223, 1250.

422 Ibid., 1260.

423 Appellate Body Report, Brazil – Retreated Tyres, WT/DS332 paragraph 210. A similar conclusion was reached by the Appellate Body in the European Communities – Measures Affecting Asbestos and Products Containing Asbestos, WT/DS134/R/AB paragraph 168.

424 Matthew T Mitro, 'Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions' (2001) 51 *American University Law Review* 1223, 1258.

425 Ibid., 1223, 1262.

426 Ibid ,1263.

427 Ibid.

428 Ibid.

429 Ibid.

another regarding compatible protocols they may wish to adopt.[430] The US proposed such a protocol apply to the Asian regions subject to the approval of several Asian nations (which included the complainants). The complainants rejected the offer to create multilateral negations for a policy of this kind, but nonetheless the requirement for turtle-safe fishing was established as a multilateral environmental standard. It was claimed however, that the US did not seek an agreement with the members and provided the complainants with much less time to phase in the necessary technology. The WTOAB found that a member should be 'judged on its active participation and its final support to the negotiations' and established that the US had not engaged in serious attempts to reach a solution at the international level before resorting to the enactment of domestic legislation.[431]

In the case of slavery and trafficking, Australia has taken a number of measures including developing human trafficking initiatives in the Asian region, as well as ratifying a number of treaties combating slavery and trafficking.[432] In order to secure compliance with article XX a government must attempt to find a solution at international law before the enactment of a restrictive measure in domestic legislation.[433] While the importance of the objective to reduce slavery would weigh in favour of the measures meeting the necessity test, this would be balanced against the possibility of other less trade restrictive measures which would achieve the same outcome.

Lastly, the WTOAB has indicated that legislation which fails to afford a level of procedural protection to applicants may be regarded as a restriction applying in a discriminatory manner.[434] In *Shrimp-Turtle* the US provided no review or access to a forum where the application for state certification was considered. Further, it was found that an applicant was not entitled to an explanation or an opportunity to appeal the decision regarding certification.[435] Here the WTOAB found that — because of a lack of transparency and due process — the application of the legislation resulted in arbitrary discrimination. Following the Panel's ruling the US agreed to provide notice of the steps needed for certification and the opportunity to submit additional information if desired. Ultimately the WTOAB held that such measures satisfy the requirement of due process.[436]

It needs to be noted that the Appellate Body is yet to rule on whether there is an implied jurisdiction limitation to article XX.

Since *Gasoline*, principles of public international law have played an increasing role in the context of GATT disputes. It has become evident that the 'GATT could not be interpreted in clinical isolation from public international law'.437 Aaronson proposes that the exceptions enshrined in article XX may be the best foundation for a more effective approach to protecting human rights at home or responding to abuses abroad in the context of the WTO.[438] The indicia outlined in S*hrimp - Turtle* serve as useful signposts to guide future legislation that will restrict the importation of goods on the grounds of slavery and human trafficking. Cases such as *Shrimp - Turtle* and *Asbestos* demonstrate that the WTO tends to adopt a more generous approach in the application of article XX than observed in *Dolphin - Tuna*. Ultimately legislation that provides a degree of flexibility in standard setting, cooperation and negotiation between the parties involved and a level of procedural protection given to applicants will satisfy the two limbed test of article XX and will be upheld by the WTO.

430 Ibid 1266.

431 Ibid.

432 'People Trafficking: Australia's response,' Research Note by the Department of Parliamentary Services, Parliament of Australia.

433 Matthew T Mitro, 'Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions' (2001) 51 *American University Law Review* 1223, 1266.

434 Ibid., 1268-1269.

435 Ibid.

436 Ibid.

437 *Gasoline case* Section IIIB.

438 Susan Aaronson, 'Seeping in slowly: How Human Rights Concerns Are Penetrating the WTO' (2007) 6 (2) *World Trade Review* 413, 430.

SECTION FIVE: CIVIL AND CRIMINAL LITIGATION

14. CORPORATE LIABILITY

Australian companies often conduct overseas business through the use of a subsidiary or sub-contractor.

The use of diffuse corporate structures can 'distance and separate the parent, headquarters, company, from the local operating subsidiaries [and sub-contractors], thereby protecting the [corporation] from legal liability'.[439] This includes protecting the parent from liability where the subsidiary and/or sub-contractor has utilised slave or trafficked labour in the production of goods. Often the use of slave or trafficked labour by a sub-contractor will occur without the company having direct knowledge these abuses are taking place. However, there may be indirect signs that such abuses are taking place, such as where a supplier can offer a product at a significantly lower price than similar suppliers. Chapter 14 addresses the circumstances in which a corporation may be held responsible for the acts of a subsidiary or sub-contractor under Australian law. Chapters 15, 16 and 17 address the application of criminal and civil (torts and labour) law to corporations.

14.1 Parent liability for Subsidiaries

In Australia, the 'separate entity doctrine' continues to operate at common law,[440] meaning that ordinarily one company may 'be the controller of another company without the two being identified as one legal unit'.[441] In relation to corporate groups, one of the legal consequences of this doctrine is that a company may 'reduce its exposure to a particular risk by having a subsidiary conduct the risk-producing activity'.[442] In addition, this doctrine means that courts cannot ordinarily treat a subsidiary as an agent for the parent even where it is a 'wholly-owned subsidiary company controlled by a parent company'.[443]This position was outlined by the English Court of Appeal in *Adams v Cape Industries Plc*:[444]

> *Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.*

The 'separate entity doctrine' is said to be justified in relation to commercial dealings on the basis that voluntary creditors who enter into contracts with one company in a corporate group ought to be aware that any claim extends only so far as the legal entity with which they contract, as opposed to other members of the corporate group.[445] Nevertheless, in exceptional circumstances a parent company could be exposed to direct liability for the acts of a subsidiary. For instance, a court will hold the principal company liable for the acts of the subsidiary where a company structure is used to perpetrate fraud or where the company structure is used with the sole or dominant purpose of enabling another person to avoid an existing legal obligation.[446] Another pertinent circumstance where the court may hold the parent company to account is where tort claimant is unable to recover from a wholly-owned subsidiary.[447] Under such circumstances, a departure from the 'separate entity doctrine' is said to be warranted on the basis that '(u)nlike contract creditors, the involuntary tort creditor, injured by corporate negligence, has a need for compensation but no ability to self-protect *ex ante* against the risk of non-

439 Meeran, Richard, 'Liability of multinational corporations: a critical stage in the UK' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (2000) 251, 252.

440 Ford's Principles of Corporations Law (online), *A Company as a Corporate Entity: Incorporation and its Consequences* (2008) 4.240 <www.lexisnexis.com.au>. Note: this was originally affirmed by the House of Lords in *Salomon v Salomon & Co* [1897] AC 22.

441 Ford's Principles of Corporations Law, *A Company as a Corporate Entity*, 4.270.

442 Ibid 4.3.10.

443 Ibid 4.250. See also *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567. Note, one exception is where the parent fails to give the subsidiary the resources required for it to perform its function.

444 [1991] 1 All ER 929 at 1019

445 See for instance, Ford's Principles of Corporations Law, *A Company as a Corporate Entity,* 4.310.

446 Ibid 4.250.

447 (1989) 7 ACLC 841 (New South Wales Court of Appeal).

payment' by the subsidiary.[448] Unfortunately, however, the ability of a tort claimant to successfully sue the parent company is not assured. No overriding principle is evident from existing case law which would provide a guide to the circumstances under which the parent may be held responsible for the subsidiary in tort claims.[449]

Finally, it has been suggested that under international law, provided the parent company has sufficient control, knowledge and involvement in its subsidiary's business, it may owe a duty of care under tort law to those affected by the subsidiary's operations.[450] Unfortunately, however, such a duty can be circumvented by the use of diffuse corporate structures.[451] Moreover, this international approach has no application under Australian law unless adopted by Australian courts in the development of common law principles of liability, or incorporated through legislation. The Australian case of *Dagi v BHP and Ok Tedi Mining Ltd (No 2)* [452] provides an example of the way in which the common law could be developed to make parent companies responsible for the acts of subsidiaries.

14.2 Liability for Sub-Contractors

There have been a number of high-profile cases where sub-contractors have been exposed for the use of slave labour in the production of goods.[453] Sub-contractors are often engaged by corporations to supply materials and/or finished goods. The sub-contractor may be an individual or business entity. This part considers whether a corporation could be found responsible for the conduct of individuals or business entities engaged as sub-contractors.

14.2.1 Vicarious liability of a Corporation as an Employer

In relation to the conduct of individual persons, in Australia an employer can be held liable for the tortious acts of an employee, but in principal is not liable for the tortious acts of an independent contractor.[454] Difficulties can arise in classifying personnel as an 'employee' or 'independent contractor' because of the blurred contours of each category. Nevertheless, pursuant to the High Court's majority judgment in *Hollis v Vabu*,[455] it would be very difficult to establish that an overseas supplier/exporter was an employee of a corporation, and thus render the corporation liable for the tortious conduct of the individual in question. This is because, in order for there to be an employment relationship, the Court must first find that a contract of employment exists between the worker and purported employer.[456] Given the usual lack of contact between corporations and overseas workers, it would be difficult to establish an express or implied agreement existed between them. Even if a contract existed between the company and the worker, the worker would still need to establish that this agreement constituted an *employment contract*, rather than a *contract for services* as an independent contractor. Per *Hollis v Vabu*, the Court will examine the 'totality of the relationship' between the parties, including consideration of factors or indicia which point towards or away from an employment relationship, in deciding the nature of the contract. Unless the relationship met some or all of the following indicia, it is unlikely that the individual would be classified as an employee;

- The corporation has the authority to control the worker;
- The corporation has the authority to suspend and dismiss the worker;
- The worker is presented as part of 'employer's' business;
- The worker is paid by the corporation according to time worked (wages); and/or
- The corporation provides for paid holidays and sick leave and deducts income tax.

Thus, a corporation is rarely vicariously liable for the acts of the sub-contractor aside from those rare situations where legislation imposes liability on a corporation for the acts of both an *employee and sub-contractor*.[457]

14.2.2 Liability through an Agent of the Corporation

A sub-contractor (individual or business) *may*, under certain circumstances, be viewed as an agent of the corporation. The term 'agent' traditionally connotes:

> *an authority or capacity in one person (the 'agent') to create legal relations between a person occupying the position of principal and third parties However, it is not essential for an agent to have the capacity to actually create legal relations on behalf of the principal; an agent may be appointed to represent the principal in a less extensive manner, depending on the terms of the agent's authority, including merely to make representations on behalf of the principal. In each case, though, the critical element of the common law concept of agency is the representative capacity in which the agent acts vis-à-vis the principal.*

Agency is constituted by the substance of the relationship between the purported principal and agent, as opposed to the terminology used by the parties. It would no doubt be difficult to establish that sub-contractor located in a developing country has been

448 Helen Anderson, 'Piercing the Veil on Corporate Groups in Australia: The Case for Reform' (2009) 33 *Melbourne University Law Review* 333.

449 See *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 (NSWCA, Hope and Meagher JJA, Rogers AJA).

450 This is important when it is the parent company that holds the group's assets: see Richard Meeran, 'Liability of multinational corporations: a critical stage in the UK' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (2000) 251, 261.

451 Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' (2004) 28 *Melbourne University Law Review* 290.

452 This case is cited in Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11 (1) *Australian Journal of Human Rights* 1.

453 See for instance, The Guardian, *Indian Slave Children Found Making Low Cost Clothes Destined for the Gap*, 28 October 2007 <http://www.guardian.co.uk/world/2007/oct/28/ethicalbusiness.retail>.

454 Luntz, Harold et al, *Torts: Cases and Commentary* (2009) 807.

455 *Hollis v Vabu* Pty Ltd (2001) 207 CLR 21: Vabu Pty Ltd conducted a business of delivering parcels and documents. A bicycle courier hired by Vabu had by accident struck Mr Hollis and caused him injury. The case was about determining whether the bicycle courier was to be characterised as an employee of Vabu. If so, Vabu could be held vicariously liable for the conduct of the bicycle courier. The High Court held the bicycle courier to be an employee of Vabu. In its reasoning, the High Court carried out a detailed analysis of the nature of the particular relationship shared between Vabu and the bicycle courier.

456 Andrew Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 2nd ed, 2009) 47-51.

457 An example is provided by Ford's Principles of Corporations Law (online), *Corporate Liability: A Company's Liability for Civil and Criminal Wrongs* (2010) 16.130, <www.lexisnexis.com.au>.

given representative capacity on behalf of the parent corporation. Contractual terms and a lack of direct dealings between these parties would be likely to mitigate against such a result. If, however, a sub-contractor is found to be an agent, there may be consequences for the corporation under civil and criminal law depending on the nature of the wrong and the applicable law.

Under tort law, a 'principal is liable for the torts of his or her agent when they are committed whilst the agent is acting within the scope of the agent's authority'.[458] This includes situations where the principal expressly authorised the commission of a tort or subsequently ratified the agents' acts.[459] It would be unlikely, however, that a corporation would authorise the sub-contractor to utilise trafficked or slave labour. A majority of the High Court have not accepted the view of a wider principle of vicarious liability attaching to a principal for the tortious acts of an agent.[460] If it were accepted, this would mean that the principal is liable for the tort of the agent without proof of fault. The strong dissenting judgments of McHugh J in *Hollis v Vabu* and Kirby J in *Sweeney v Boylan Nominees Pty Ltd*[461] in support of a wider principle do however evidence significant development in the law in this regard. In *Hollis v Vabu,* McHugh J reiterated the view that he had held in *Scott v Davis*, that 'a principal is also liable for the wrongful acts of an agent where the agent is performing a task which the principal has agreed to perform or a duty which the principal is obliged to perform and the principal has delegated that task or duty to the agent, provided that the agent is not an independent contractor'.[462] This 'representative agency' view was taken up by Kirby J in *Sweeney v Boylan Nominees.*

Finally, in certain cases a company may be held to be the principle offender under criminal law where their own agent has 'acted in breach of a law imposing a criminal penalty'.[463] Or, the corporation may be held to be vicariously liable under criminal law for the acts of the agent. Much depends on the particular criminal law applied. For instance, under *Criminal Code Act 1995* the physical element of an offence by a corporation may be committed by an agent, as will be discussed further below in relation to the crimes of people trafficking and slavery.

14.3 Extending Liability for Corporations

14.3.1 Civil Law

The use of the tort of negligence has raised the possibility of a parent company being held responsible for the actions of subsidiaries.[464] The leading example in Australia is the case of *Dagi v BHP and Ok Tedi Mining Ltd (No 2),*[465] where a negligence claim was brought to the Victorian Supreme Court on behalf of 35,000 villagers in Papua New Guinea in the Victorian Supreme Court. against Australian mining giant BHP, claiming they had suffered damage caused by the Ok Tedi copper mine. In *Dagi*, tort law was used to overcome a number of obstacles that arise in the operation of corporate groups overseas whereby the parent company's sufficient control, knowledge and involvement in operations may extend a duty of care to stakeholders who are negatively affected by the subsidiary's operations.[466] Although the precedential value of *Dagi* is limited as a result of it having settled before trial, it nevertheless provides an illustration of the potential of tort law to hold corporations accountable for the commission of extraterritorial torts.

In addition, there have been a number of cases in the UK which demonstrate the possibility of oversees workers suing a parent company in a foreign jurisdiction, despite the 'separate entity doctrine'. In the UK cases of *Ngcobo v Thor Chemicals*[467] and *Lubbe v Cape PLC*[468], tort claims were brought by South African workers exposed to dangers by subsidiaries of UK-based parent companies. In *Thor Chemicals*, the South African plaintiffs (20 in total) were employees of 'Thor', a subsidiary of 'TLC' UK, who suffered mercury poisoning at a plant located in South Africa.[469] A criminal prosecution was launched in South Africa, but the subsidiary was fined a mere equivalent of a £3,000.[470] Compensation claims against the parent company were then launched in the English High Court, with the plaintiffs alleging that the principle company was liable because of its negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process. The claim was settled out of court for £1.3 million. While in Lubbe v Cape PLC,[471] 3,000 South African plaintiffs sued Cape PLC, the parent company of several subsidiaries that operated asbestos factories in South Africa. The claim was made against Cape PLC, not as an employer or occupier of the factory, but as a 'parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group'.[472] While this case eventually settled,[473] the House of Lords gave thought in an interlocutory judgment as to how responsibility of a parent company for the observance of health

458 *Smith v Keal* (1882) 9 QBD 340.

459 Ibid.

460 Luntz, *Torts: Cases and Commentary* 842.

461 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161. In this case the plaintiff went into a suburban service station to buy milk, and a heavy refrigerator door fell on her and injured her. The refrigerator had just been repaired by Boylan Nominees Pty Ltd. They had asked a Mr Comninos to do the job for them, sending him with a document on their letterhead that described him as 'our mechanic'. But Mr Comninos was not an employee of Boylan. The trial judge found that Boylan was nevertheless vicariously liable for Mr Comninos' negligence. This decision was overturned by the NSW Court of Appeal, and the plaintiff appealed to the High Court. The High Court affirmed the Court of Appeal's decision.

462 *Scott v Davis* (2000) 204 CLR 333, 346.

463 Ford's Corporations Law, *Corporate Liability*, 16.170.

464 Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' (2004) 28 *Melbourne University Law Review* 290; Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1) *Australian Journal of Human Rights* 10.

465 Ibid.

466 Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1) *Australian Journal of Human Rights 10.*

467 *Ngcobo v Thor Chemicals Holdings Ltd* (1995) TLR (10 November) (Unreported).

468 Lubbe v Cape PLC (2000) [2000] 4 All ER 268 (HL). Available online at <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm>

469 Richard Meeran, *Corporations, Human Rights and Transnational* Litigation (29 January 2003) Castan Centre for Human Rights <http://www.law.monash.edu.au/castancentre/events/2003/meeranpaper.html>.

470 Ibid.

471 [2000] 4 All ER 268 (HL).

472 [2000] 4 All ER 268 (HL).

473 Castan Centre for Human Rights, *Transnational Human Rights Litigation against Companies* (2009) <http://www.law.monash.edu.au/castancentre/projects/mchr/trans-hr-litigation.html>.

and safety standards by subsidiaries could be established:

> *Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence ...*[474]

14.3.2 Criminal Law

As discussed above, corporations are able to avoid criminal liability through the use of diffuse corporate structures. Nevertheless, it is possible to enhance the role of criminal law to encourage greater corporate responsibility in relation to the use of slave and trafficked labour in the production of some goods imported into Australia. This could be achieved by enhancing the offence of aiding and abetting the crimes of slavery or trafficking in persons in 'the procurement and use of products or resources (including labour) in the knowledge that the supply of these resources involves the commission of crimes;' the supplier being the principal perpetrator of the crime and the individual associated with the corporation being the aider or abettor to the crime.

The International Law Commission's (ILC) second version of the draft Code of Crimes against the Peace and Security of Mankind provides that the legal test applicable to the attaching of accomplice liability for the aiding or abetting of a crime is if the accomplice 'knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission'.[475]

In international criminal law, if the elements of the principle of superior responsibility are met, the corporation superior of an individual associated with a corporation who is held responsible for involvement in a crime under international law, can also be held criminally responsible. While the principle of superior responsibility has traditionally applied to military personnel, it is also applicable to civilians. 'The principle that military and civilian superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law.'[476]

The principle of superior responsibility does not only encompass crimes physically and personally committed by subordinates but also encompasses other modes of individual criminal responsibility including aiding and abetting. This principle has been enunciated by the ILC and applied by the Nuremberg and Tokyo Tribunals, the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers of Cambodia. The essential elements of superior responsibility are:[477]

a. superior-subordinate relationship between the superior (the accused) and the perpetrator of the crime;
b. the accused knew or had reason to know that the crime was about to be, was being, or had been, committed; and
c. the accused failed to take the necessary and reasonable measures to prevent the crime, or to stop the crime or punish the perpetrator thereof.

A superior-subordinate relationship involves the effective exercise of power or control. The critical element of the superior's effective control over the persons committing the offence must be established and this is defined as the material ability to prevent or punish the commission of the offence.

In terms of the intellectual element, it must be established that the superior had either actual or constructive knowledge. Constructive knowledge refers to the fact that the superior had in his or her possession information that would at least put the superior on notice of the risk of offences being committed.

Australian corporations can be implicated by acts or related activities of slavery and trafficking in persons taking place overseas via supply chain relationships. 'If company officials procure and use resources for their business activities, such as labour or goods, in the knowledge that this will involve the commission of crimes, then they may be considered to be aiding and abetting their commission.'[478]

Accomplice liability does not attach to an individual associated with a corporation who oversees the corporation's procurement of goods from a supplier who has committed crimes of slavery or trafficking in persons, simply because of the corporation's use of such goods. Whether the corporation is a major customer of the supplier (ie that the corporations' buying practice substantially affected the commission of the crimes by encouraging their commission) and whether the individual had knowledge of the criminal activity are pertinent considerations. It would not, however, be necessary to connect the corporation's orders from the supplier directly with an instance of slavery or trafficking in persons in terms of cause and effect. It is sufficient to show the corporation's actions encouraged the supplier to continue using slave or trafficked labour.

The argument that a crime would have occurred anyway is not available as a defence against allegations of aiding and abetting and superior responsibility under international law. 'It is sufficient if the assistance of the business or business official changed in a substantial way how the crimes were committed, such as the way they were carried out or the timing.'[479]

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474 [2000] 4 All ER 268 (HL).

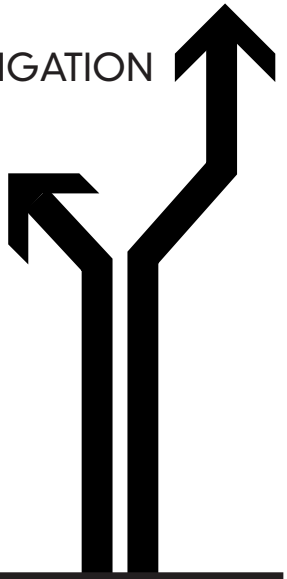
475 International Law Commission, *Yearbook of the International Law Commission: Report of the Commission to the General Assembly on the Work of its Forty-eighth Session*, UN Doc A/CN.4/SER.A/1996/Add.l (1996) 18.

476 International Commission of Jurists, *Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (2008)<http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22851>.

477 Ibid.

478 Ibid.

479 Ibid.



15. CRIMINAL LIABILITY

Chapter 15 analyses the potential for a corporation to be held liable for the use of trafficked or slave labour under Commonwealth criminal law.

This includes addressing the inadequacy of existing anti-slavery provisions, particularly due to a lack of prosecutions. The lack of prosecutions, in turn, may be explained by evidentiary challenges in establishing liability.

15.1 Inadequacy of existing Anti-Slavery Provisions in Australian Law

The *Criminal Code Act 1995 (Cth)* has provisions criminalising acts and related activities of slavery and trafficking in persons. It provides for the attributing of criminal responsibility to bodies corporate, applying to bodies corporate in the same way as it applies to individuals.[480]

Slavery in Australia has been a criminal offence since 1824 due to the application of the Slave Trade Act 1824. In 1999, slavery offences were inserted into the Commonwealth *Criminal Code Act 1995* (Division 270). The *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* added Division 270 to the Criminal Code which set out offences of deceptive recruitment into sexual services (s270.7), causing another person to enter into or remain in sexual servitude (s270.6) and slavery (s270.3).

Under the provisions in the Criminal Code, the physical element of an offence 'must also be attributed to [a] body corporate' if the offence is 'committed by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority'.[481]

In relation to a physical element of an offence, if intention, knowledge or recklessness is a fault element, 'that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.'[482]

Division 12.3(2) provides that, *'[t]he means by which such an authorisation or permission may be established include:'*

a. *proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or*
b. *proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or*
c. *proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non compliance with the relevant provision; or*
d. *proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.*

The *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* inserted new offences into the Criminal Code that criminalise trafficking in persons activity, fulfilling Australia's legislative obligations under the Palermo Protocol. The Act added a new Division 271 dealing with Trafficking and Debt Bondage to the Criminal Code, and amended the existing sexual servitude offences to include deception as to the fact that the engagement for sexual services would involve exploitation, debt bondage or the confiscation of the person's travel or identity documents.

The Criminal Code also contains the offences of people smuggling (s73.1) and aggravated people smuggling (s73.2). The latter offence encompasses causing the victim of people smuggling to enter into slavery or sexual servitude. These offences

480 Div 12.1

481 Div 12.2

482 Div 12.3(1)

were inserted into the Criminal Code by the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002.*

On the face of it, these provisions within the Criminal Code would appear to address the use of slavery and trafficked labour in the production of goods imported into Australia. Provided

- an overseas supplier's/exporter's relationship with the corporation establishes a sufficient connection between the parties such that the former could be characterised as either an 'employee, agent or officer of the body corporate', and;
- that the acts of the former are of sufficient connection to the latter's business such that the former could be characterised as having acted 'within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority';
- the corporation could be held liable for the acts of the overseas supplier/exporter.

Intention, knowledge or recklessness pertaining to the commission of an offence, is attributable to a corporation even if authorising or permitting of the commission of the offence is tacit or implied. This authorising or permitting can come in the aggregate and expansive form of what the Criminal Code identifies as 'corporate culture' and broadly defines as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.' Furthermore, it is not just about the corporate culture having positively authorised or permitted the commission of the offence ('a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non compliance with the relevant provision'), but also having done so negatively in how 'the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.'

For the purposes of the offences of slavery and trafficking in persons, the fault elements concerned are those of intention, knowledge and recklessness. Sections 5.2, 5.3 and 5.4 of the Criminal Code set out the definitions for intention, knowledge and recklessness respectively:

5.2 Intention

1. *A person has intention with respect to conduct if he or she means to engage in that conduct.*
2. *A person has intention with respect to a circumstance if he or she believes that it exists or will exist.*
3. *A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.*

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

1. *A person is reckless with respect to a circumstance if:*
   (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
   (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
2. *A person is reckless with respect to a result if:*
   (a) he or she is aware of a substantial risk that the result will occur; and
   (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

3. *The question whether taking a risk is unjustifiable is one of fact.*
4. *If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.*

15.1.1 Jurisprudence on Offences under the Criminal Code (Cth)

In practice the existing body of jurisprudence pertaining to the offences of slavery and trafficking in persons under the Criminal Code is limited, where the offence involves an Australia company operating overseas. At present, no Australian corporation has been convicted under Division 270 or Division 271 offences. There is also no jurisprudence regarding the conviction of an individual under the Division 270 or Division 271 offences for an individual's involvement in acts or activities having taken place overseas. The following are some seminal cases pertaining to Divisions 270 and 271 of the Criminal Code:

(a) McIvor and Tanuchit[483]

This case resulted in the first convictions for slavery in New South Wales under the Criminal Code.

(b) Sieders and Yotchomchin[484]

On 21 July 2006, Somsri Yotchomchin and Johan Sieders were each found guilty of one count of conducting a business, namely a brothel, which involved the sexual servitude of other persons contrary to section 270.6(2) of the Criminal Code. These were the first convictions in Australia for sexual servitude offences.

(c) R v Dobie [2008][485]

Keith William Dobie is a Gold Coast man who became the first person to be convicted for trafficking charges under the Criminal Code.

(d) Rasalingham[486]

The first person to be charged with trafficking offences under Division 271 of the Criminal Code was Mr Yogalingham Rasalingam, a restaurant owner in the Blue Mountains near Sydney. This case represents the first labour exploitation matter prosecuted in Australia under Division 271.

(e) R v Wei Tang [2008]

This case is significant as it provides the first consideration by the High Court of the application of the general principles of criminal responsibility under Chapter 2 of the Criminal Code to the slavery offences under section 270.3(1).

The High Court of Australia's judgment in *R v Wei Tang* provides support for the proposition that a trafficking in persons offence can be pursued under the offence of slavery. In this case, the defendant was charged with five counts of intentionally possessing a slave and five counts of intentionally exercising over a slave a power attaching to the right of ownership, namely the power to use, contrary to paragraph 270.3(1)(a) of the *Criminal Code*. The charges were in relation to five Thai women who had worked at a brothel owned by the defendant. The defendant recruited the women in Thailand and as a part of the agreement to come to Australia to work in the sex industry, the women each incurred a debt of between $35,000 and $45,000 which they would pay off by servicing clients of the brothel. The women were required to work at the brothel six days a week, and had restrictions placed on their freedom of movement whilst they were repaying their debts.

483 The defendant couple owned and managed a brothel. The defendants recruited the five victims in Thailand to work in Australia. Four of the victims knew that they would be providing sexual services. On arrival, the defendants enforced an artificial 'debt contract' to repay an amount between $35 000 and $45 000 by servicing clients at the brothel. The victims were forced to work seven days a week, on average for 16 hours a day. The defendants forced the victims to work during their menstruation and during severe illnesses and infections. The victims were paid cash on only one day of the week and the amount earned on the remainder of the week went to clearing their 'debt'. During the victims' period of slavery the defendants forced the victims to work and sleep in locked premises and were forbidden to leave the brothel without being in the company of the defendants or a trusted associate. The victims' passports were confiscated on their arrival and were restricted access to telephones.

484 Four women were recruited in Thailand to come to Australia and work in the sex industry. For the recruiter obtaining a tourist visa on the women's behalf for travel to Australia, a debt was imposed that was to be paid off upon the women's arrival to Australia. Each of the women provided sexual services at brothels owned by the defendants. The women did not receive any payment for their services, and were told that their earnings would go directly towards paying off their individual 'debt' of about $45,000. The Crown case was that the conditions in which the women were kept in Australia amounted to 'servitude' under section 270.6(2) of the Criminal Code.

485 Dobie owed debts to loan sharks. He recruited two women from Thailand to come to Australia to work for him as prostitutes. The women were promised easy money and good working conditions, with the defendant paying for their air fares and visas. He involved his friends in assisting the entry of the women by providing false information to DIAC and the Australian Embassy in Thailand in support of the visa applications. He accommodated the women, sent a small amount of money to their families in Thailand, and gave them $20 per day for food and toiletries. They were not free to choose when to work and who to service, and were intimidated and pressured to work as much as they could. One complainant was made to have group sex when she did not want to.

486 The defendant owned and operated four Indian restaurants in the Blue Mountains. The victim was introduced to the defendant in India and it was alleged that during this meeting the defendant offered the victim employment in his restaurants in Australia. The employment arrangement involved the victim working 365 days a year, without payment for the first year, but during this time the defendant would provide money to the victim's family each time he returned to India. On arrival in Australia, the defendant took possession of the victim's passport, ticket and other documents. The victim was required to work long hours at the restaurants owned by the defendant and was not allowed any days off. He did not receive any payment for his work and there was no evidence to suggest any payments were made to his family in India.

This understanding, favoured by the majority of the High Court, requires intention only in relation to the *exercise of any the powers attaching to ownership.* The fault element relates to the physical elements of the offence. Therefore, that the slavery offence is a viable alternative in pursuing human traffickers, as there is no requirement to prove consideration on the part of traffickers of having dealt with a complainant as a slave.

15.1.2 Challenges regarding Criminal Prosecution

The *Code* currently does not provide for the monitoring of corporate groups and supply chains to ensure that Australian corporations are not benefiting from slavery and human trafficking. The implementation of measures that hold corporations accountable for slavery and human trafficking occurring in their supply chains, whatever the structure between themselves and the entity or persons directly involved in committing the offence, would be one way of overcoming the problems inherent in the *Criminal Code*. However, even if corporate liability was extended in such a way, any attempt to mount a prosecution against an Australian business for the involvement of slave or trafficked labour in its supply chain would still involve substantial evidentiary challenges. These include:

- Analysis of complex multilayered structuring and intricate chains of command;
- Interviewing witness and obtaining other evidence (e.g. documentation) located in another country;
- Locating witnesses in another country;
- Physical protection for witnesses;[487]
- Executing searches and tracing financial assets in another country;
- Serving documents on witnesses and suspects;
- Long delays in responses to request caused by logistical or resource problems in the jurisdiction where the offence occurred;
- Refusals of requests for officials from requesting/investigating States to carry out investigations on another State's territory even with the supervision of the local authorities;
- Different definitions of crimes between the jurisdiction where the offence occurred and Australia; and
- Language problems in dealing with such requests.

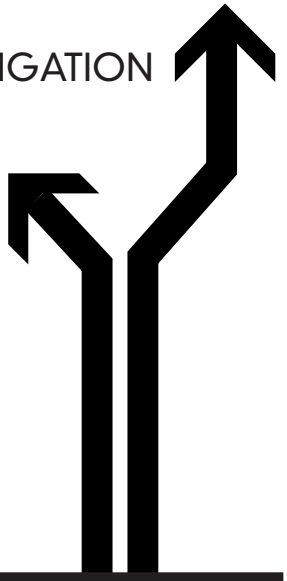
Further, federal prosecutors may remain reluctant to launch investigations involving extraterritorial crimes out of respect for the doctrine of international comity,[488] which refers to 'mutual respect for the sovereignty of other States and refraining from unjustified interference in the internal affairs of those States'.[489] For instance, in the context of child sex tourism, it has been suggested that respect for state sovereignty may explain the low number of actual prosecutions in comparison to the estimated number of child sex tourists.[490] These difficulties mean that the likelihood of a successful criminal prosecution are, and are likely to remain, low in Australia.

487 'Physical protection for witnesses also has a transnational dimension. Where victims/witnesses are returned or return to their countries of origin, testimonies become difficult or impossible to obtain. This because of problems ensuring that the procedural requirements of the prosecuting country are met and also because the witness/victim cannot be protected from intimidation and threats': Offce of the Special Representative and Co-ordinator for Combating Tracking in Human Beings, *A Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region* (2007) Organization for Security and Co-operation in Europe <http://www.osce.org/publications/cthb/2008/01/23622_811_en.pdf>.
Co-ordinator for Combating Trafficking in Human Beings, *A Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region* (2007) Organization for Security and Co-operation in Europe <http://www.osce.org/publications/cthb/2008/01/23622_811_en.pdf>

488 Jonathan Clough, 'Not-so-innocents Abroad: Corporate Criminal Liability for Human Rights Abuses' (2005) 11(1) *Australian Journal of Human Rights* 1.

489 Council of Europe: European Committee on Crime Problems, 'Extraterritorial Criminal Jurisdiction', *Criminal Law Forum 3* (2005) 441.

490 Naomi L Svensson, 'Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws', *Loyola of Los Angeles International and Comparative Law Review* 28(64) (2006), 641



16. LABOUR LAW

This chapter addresses current and possible protection for workers in developing countries who are *not* direct employees of Australian companies but are rather located in product supply chains of such companies.

At present, no Australian legislation or common law principle of labour law protects such workers. Part 16.2 addresses one possible way to provide workers with greater protection - to allow the victims of slavery and trafficked labour to seek compensation for their loss based on the model of outworker legislation in Victoria and NSW.

16.1 Current Protection for Overseas Workers under Labour Law

In general, foreign workers who 'experience the worst working conditions' are those whose relationship with Australian businesses are 'mediated through supply-chains'.[491] In Australia legislation exists that provides a level of protection for outsourced labour, such as independent contractors[492] and outworkers, however, this protective legislation does not extend to workers in foreign jurisdictions. And, as Chapter 3 established, such workers are sometimes not adequately protected against trafficking and slavery under host state law.

16.2 Increasing Supply Chain Accountability for Outsourced Labour

A possible mechanism to encourage companies to take all reasonable measures to ensure that slavery and trafficked labour are not present in their supply chains is to allow the victims of slavery and trafficked labour to seek compensation for their loss based on the model of outworker legislation in Victoria and NSW. This is similar to the path of civil action outlined above and suffers many of the same problems, in that the victim of slavery or trafficking will often lack the resources to seek any action in relation to the final retailer of the product they were forced to produce.

Under the NSW Ethical Clothing Trades Extended Responsibility Scheme retailers need to establish if their contractors are engaging outworkers to make the clothes and if so, ensure the supplier is registered under the Award to give work out to outworkers. They need to keep information received from the supplier about the manufacture of clothing products for six years. Retailers also are required to report suspected instances of outworkers being engaged under less favourable terms than the relevant award.[493] They can avoid these obligations if they comply with the Voluntary Retailers Ethical Clothing Code of Practice. Under the Voluntary Code the retailers provides a list of their suppliers to the Textile, Clothing and Footwear Union of Australia (TCFUA). The TCFUA is then able to follow up with the suppliers about their Award compliance. Currently failure to comply with these obligations can result in a fine of up to $11,000.

All clothing outworkers in NSW can legally pursue an employer for any unpaid remuneration.[494] Unpaid remuneration claims apply to all employers up and down the clothing chain, except those that are only involved in the retail sale of clothing. The clothing outworker lodges a claim for unpaid remuneration against the person they believe to be their employer. This person is known as the apparent employer. An outworker makes a claim by serving a written notice on the apparent employer. All claims must be made within six months of the work's completion.

491 Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foriegn Sweatshops?' (2004) 28 *Melbourne University Law Review* 290.

492 *Independent Contractors Act 2006* (Cth).

493 See NSW Government, *Industrial Relations: Information for the Clothing Industry* <http://www.industrialrelations.nsw.gov.au/Employers/Employer_responsibilities/Information_for_the_Clothing_Industry.html >.

494 Office of Industrial Relations, NSW Department of Commerce; Australian Business Limited; and TCFUA, *Guide to Employment in the NSW Clothing Industry* (2003) 29-30. <http://www.industrialrelations.nsw.gov.au/pdfs/clothing_final.pdf>.

If an employer is named as the apparent employer they are liable for the total amount of the unpaid remuneration owed to the outworker concerned, unless they can locate the actual employer. The apparent employer can be the principal manufacturer or fashion house which ultimately receives the finished product, if they have contracted work to another person who then gives that work to an outworkers and does not pay that outworker.

The apparent employer is able to refer the claim to the person whom they believe to be the actual employer within 14 days of receiving the outworkers claim.

To refer a claim an employer is required to:
- advise the outworker concerned in writing of the name and address of the actual employer whom they believe is liable; and
- serve a copy of the claim on the person(s) they believe to be the actual employer.

Only when the actual employer has accepted the claims liability will the apparent employer no longer be liable. To accept liability the actual employer must, within 14 days of the apparent employer serving them notice, pay for the whole or part of the unpaid claim. The apparent employer remains liable for the remaining amount which has not been paid by the actual employer.

If the actual employer accepts liability, they must serve a written notice on the apparent employer.

An apparent employer who pays all or part of the amount of the outworker's claim may deduct that amount from any money the apparent employer owes the actual employer.

When the actual employer does not accept liability, recovery action can be taken against the apparent employer under Part 2 of Chapter 7 of the *Industrial Relations Act 1996*. In such proceedings the apparent employer will be liable unless they are able to prove that:
- the work was not done, or
- the amount claimed for the work is not correct.

Employers can avoid claims for unpaid remuneration by ensuring that each supply contract for the manufacture of clothing includes a clear undertaking to pay all workers, including outworkers, their proper legal entitlements.

It is an offence to:
- intimidate, intentionally hinder, prevent or discourage a person from making an unpaid remuneration claim;
- for an apparent employer or actual employer to make a statement in a notice that he or she knows is false or misleading; and
- for an apparent employer to serve notice on an actual employer when the person serving the notice does not know or have reasonable grounds to believe the person is the actual employer.

Similar provisions are contained within the Victorian *Outworkers (Improved Protection) Act 2003*, Division 2 (see Appendix 1).

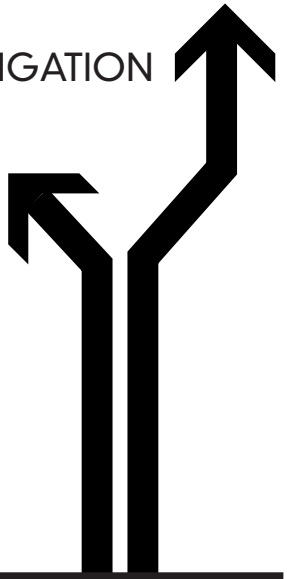
A similar provision could be established for certain industries where there is a high risk of slavery or human trafficking being involved in their supply chain. A company could be held to be liable to pay unpaid wages to victims of slavery and trafficking overseas where the victim in question is able to reasonably establish the company has benefited from their abuse and the company has not taken reasonable steps to try to ensure that slavery and human trafficking are not in its supply chain.

Examples could be:
- A trafficked labourer on a cocoa plantation in West Africa who has been held in a situation of slave labour is, with the assistance of a non-government organisation, is able to establish that a chocolate manufacturer was the ultimate recipient of the cocoa beans they produced. The Australian legislation would allow them to file a claim for unpaid wages at the local rate in the country in which the plantation is located. The company must pay the wages unless it can show it has taken reasonable steps to map its supply chain and require those further down the supply chain to comply with local laws banning slavery and trafficking.
- Trafficked clothing workers in India are sewing for a label which is exported to a clothing retailer in Australia. The workers can claim their unpaid wages at the local Indian rate from the Australian retailer unless the retailer can demonstrate they have taken reasonable steps to map their supply chain and sought meaningful assurances from their suppliers that no trafficked or slave labour was being used in the production of the clothing.

The advantage of this type of legislation is that it would not require the victim to have to prove the company knew of their being subjected to trafficking or slavery, merely the company would be held liable for the unpaid wages if it has been reckless in its sourcing of goods in industries with a high risk of slavery or trafficking.

However, such a mechanism is not without substantial difficulties. For example, it is very unlikely that many victims of trafficking and slavery that have been abused in the manufacture of goods imported into Australia are likely to be able to serve claims on companies operating in Australia. Then there is the need to assign a body that will assess if a company has taken reasonable steps to ensure that slavery and human trafficking were not in its supply chain.

For these reasons this option might be seen as appropriate initially as applying to industries where it is reasonable to assume the Australian company should have knowledge of its supply chain and where it is easier for the victim of slavery or trafficking to be clear about the final company that has benefited from their abuse. The clothing industry is a good example of this and would allow the lessons of the NSW and Victorian outworkers legislation to be extended, in an appropriate form, to clothing production overseas.



17. TORTS LAW

Chapter 17 addresses the potential for foreign workers to sue an Australian company under the tort of negligence.

Part 17.1 discusses the difficulties involved in establishing that a company owed a duty of care to workers located in their supply chain, including establishing a breach and causation. In addition, jurisdictional problems relating to extraterritorial torts claims are discussed. Finally, Part 17.2 briefly assesses the benefits of adopting similar legislation to that of the United State's *Alien Torts Act*.

17.1 Current Liability for Negligent Acts

'Tort law potentially allows CSR standards to be enforced privately by affected individuals'.[495] Negligence has been the main arm of tort law which has extended to protect individuals from inappropriate corporate action by Australian companies offshore.[496] In Australia, in an action for negligence the plaintiff must prove that:[497]

- the defendant owed him or her a duty to take reasonable care;
- the defendant breached that duty by failing to take reasonable care;
- the defendant's breach of duty caused the injury or damage suffered by the plaintiff; and
- the injury or damage suffered was not too remote a consequence of the breach of duty.

The general test for determining whether a duty of care exists is whether the 'defendant ought reasonably to foresee that his or her conduct may be likely to cause loss or damage to the plaintiff or a class of persons to which the plaintiff belongs'.[498] One non-determinative factor considered by the court is whether a 'relationship of sufficient proximity between the plaintiff and defendant may give rise to a duty of care in the particular circumstances of the case'.[499] This is likely to be problematic where the Australian company has no direct connection or knowledge of the class of persons (supply chain workers) to which the plaintiff belonged.

In an appropriate case, the plaintiff could argue that the Australian company owed a duty of care to ensure that their overseas subsidiaries did not utilise trafficked or slave labour, particularly where 'the parent corporation exercises considerable control over the operations of those subsidiaries'.[500] As Zark points out, case law from common law jurisdictions does not 'positively rule out the possibility of parent company liability for the health, safety and (other) failings of foreign subsidiaries in appropriate cases'.[501] Indeed, in *Lubbe v Cape PLC*, the House of Lords indicated (but did not decide) likely considerations in assessing the alleged negligence of parent companies in relation to the activities of their subsidiaries:

> *Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence ...*[502]

495 Jennifer A Zark, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2006) 200.

496 Richard Meeran, 'Liability of multinational corporations: a critical stage in the UK' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (2000) 251.

497 Halsbury's Laws of Australia (online), *Negligence* (2006), [300-1] <www.lexisnexis.com.au>.

498 Ibid [300-5].

499 Ibid. See for instance, *Jaensch v Coffey* (1984) 155 CLR 549 at 584-5, per Deane J.

500 Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foriegn Sweatshops?' (2004) 28 *Melbourne University Law Review* 290.

501 Jennifer A Zark, *Multinationals and Corporate Social Responsibility,* 201.

502 [2000] 4 All ER 268 (HL).

Nevertheless there is a dearth of case law on this point, given the 'financial, technical, logistical and emotional' difficulties in mounting such a claim; procedural obstacles such as *forum non conveniens* (see below) and due to the 'tendency of claims to settle once a critical stage in the litigation is reached'.[503] And, as Cooney also points out, 'in relation to the substantive question of liability, in those cases involving diffuse corporate structures and complex supply chains, there are likely to be major obstacles to establishing a duty of care, especially where the Australian firm exercises little influence over the entities employing the relevant workers'.[504]

17.1.1 Jurisdictional Issues

Australia has no universal jurisdiction tort legislation. In general, a court can exercise jurisdiction over an extraterritorial tort action if a nexus exists between the wrongdoing committed and the jurisdiction. Among others, a nexus exists in civil cases by virtue of domicile, presence in a jurisdiction, the registration of a place of business in the jurisdiction, accession to the jurisdiction, the place of commission of the wrongdoing, or circumstances wherein a party is a 'necessary and proper party' to litigation involving the wrongdoing over which the court already has jurisdiction. It has been noted that the Australian approach to exercising jurisdiction over extraterritorial matters is relatively lenient,[505] especially following the High Court's decision in *Regie Nationale des Usiness Renault SA v Zhang* removing the need for plaintiffs to comply with the 'double actionability rule'.[506]

In addition, however, the legal issue of *forum non conveniens* arises in the bringing of an extraterritorial tort claim. *Forum non conveniens* describes the 'discretionary power of a court to decline jurisdiction and to grant a stay of proceedings brought before it on the basis that the court is an inappropriate forum for those proceedings.'[507] The content of the doctrine has been held to mean that a stay may be granted only when a court is a 'clearly inappropriate forum' to hear the case.[508] An action brought by a foreign worker in an Australian court may result in the Australian court having to apply foreign law,[509] which together with the physical location of witnesses, documentary evidence and the plaintiff in the foreign jurisdiction; may amount to *forum non conveniens*.[510] Even with extraterritorial reach conferred by universal jurisdiction, the doctrine still poses a challenge to the bringing of extraterritorial tort claims.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However, with regard to *forum non conveniens* considerations, several factors work in favour of overseas plaintiffs looking to bring extraterritorial tort claims in Australian courts:

- Many corporations operate in countries where domestic legal systems are weak and largely unregulated.
- Because of a fear of discouraging investment or because of corruption, many governments in developing countries may be unwilling to impose requirements on foreign companies which have invested in their country. Many developing countries see foreign direct investment as a critical ingredient of economic development.
- Many host states lack adequate resources (eg investigative or enforcement bodies) to monitor and regulate corporate activities; and many do not have adequate legal machinery equipped to scrutinise and respond to human rights violations perpetrated by corporations.

503 Ibid. See for instance *Dagi v BHP and Ok Tedi Mining Ltd (No 2); Ngcobo v Thor Chemicals Holdings Ltd* (1995) TLR (10 November) (Unreported).

504 Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foriegn Sweatshops?' (2004) 28 *Melbourne University Law Review* 290.

505 Barnali Choudhury, 'Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses' *Northwestern Journal of International law & Business* 26(43) (2005), 53; Sarah Joseph, *Corporations and Transnational Rights Litigation* (2004) 123.

506 *Regie Nationale des Usiness Renault SA v Zhang,* (2002) 210 CLR 491.

507 Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' (2004) 28 *Melbourne University Law Review* 290.

508 *Voth v Manildra* (1990) 171 CLR 538, 557.

509 Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' (2004) 28 *Melbourne University Law Review* 290.

510 *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20.

In the Australian case of *Voth v Manildra Flour Mills Pty Ltd*,[511] the High Court of Australia adopted the 'clearly inappropriate forum' test as the test for *forum non conveniens* in Australia.[512] In Australia is Dagi, where Broken Hill Proprietary Pty Ltd was unsuccessful in establishing that the Victorian Supreme Court was a 'clearly inappropriate forum'. It was held in favour of the plaintiffs that the claim could be successfully lodged in the Victorian Supreme Court, instead of the host country of Papua New Guinea which had been the preference of the defendants. To avoid the jurisdiction of Australian courts, 'Australian companies must demonstrate that the use of the local jurisdiction is so unreasonable as to amount to harassment by the foreign plaintiff'.[513]

17.2 The Potential for Increased Liability under Torts Law

17.2.1 Alien Torts Act

In the US, the *Alien Tort Claims Act* (ATC) has facilitated litigation in that it has overcome some of the jurisdictional problems that arise when corporations commit breaches outside their state of incorporation. The ATC covers private individuals who commit torts in the course of violating international law.[514] The ATC provides that 'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[515] The ATC has been recognised in the US as becoming an increasingly fertile ground for taking legal action in scrutinising corporations' actions overseas.[516]

Extraterritorial tort legislation like that of the *Alien Tort Claims Act* is however not without its limitations. Due to the potentially broad reach of the legislation's applicability, it is not unforeseeable that there will be judicial delimitation and thus gradual constriction and erosion of this broad reach. In the US, shortly after the Ninth Circuit's decision in *Doe I v Unocal Corporation*,[517] the Supreme Court held in the case of *Sosa v Alvarez-Machain*[518] that the Alien Tort Statute only conferred jurisdiction over certain kinds of customary international norms.

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511 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538: Manildra sued Voth, an accountant practising in Missouri (USA), in New South Wales for damages for professional negligence in failing to advise on their liability to account to the Inland Revenue Service (USA) for withholding tax. Penalties and interest became payable by Manildra, with some of the damage occurring in New South Wales. Voth sought to stay the proceedings on the ground that the New South Wales court lacked jurisdiction. This plea was rejected at first instance and by the Court of Appeal, but allowed by the High Court.

512 It has been noted that this test is from the plaintiff's point of view a more generous approach than the 'more appropriate forum' test adopted in the UK.

513 Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2000),1080.

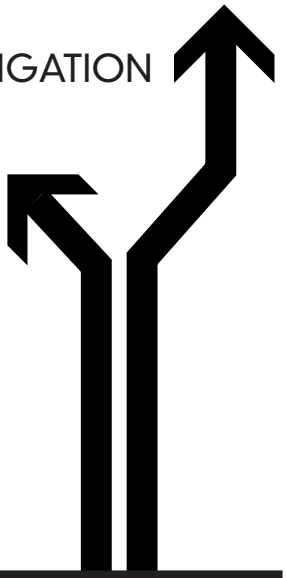
514 Ralph G Steinhardt R G, 'The internationalization of domestic law' in Ralph G Steinhardt and A D'Amato (eds) *The Alien Tort Claims Act: An Analytical Anthology* (Transnational Publishers, 1999), 11.

515 *Alien Tort Claims Act, 28 USC* § 1350 (1789).

516 See Weil, Gotshal & Manges LLP, *Weil Briefing: Mass Torts/Appellate* (2009) <http://www.weil.com/files/upload/Briefing_Mass_Torts_Feb_09.pdf>.

517 *Doe I v Unocal Corporation*, 395 US 978 (2003).

518 *Sosa v Alvarez-Machain*, 542 US 692 (2004).



18. COMMON DIFFICULTIES FOR ENFORCING CIVIL LIABILITIES

Chapter 18 addresses common problems for enforcing civil liabilities under labour and torts law, namely the costs involved in running a case; the risk of an adverse costs order and the possibility that the case will be settled out of court, which limits the development of pertinent case law.

18.1 Costs

Often the large discrepancy between the resources available to plaintiffs and those available to corporations places the former at a significant disadvantage. Almost all potential plaintiffs that have been victims of slavery and trafficking will not have the resources available to commence legal proceedings. Practical barriers for victims of rights abuses can be largely characterised as problems of resources. Costs including lawyers' fees, transporting witnesses to Australia, interpreters and document translation; mean that sustaining a common law action against an Australian corporation is out of the reach of the average victim of trafficking or slavery.[519] This would mean that either legal aid would need to be provided to such plaintiffs or non-government organisations would need to provide assistance to the plaintiff to pursue such cases.

Cooney suggests therefore that the only situation in which Australian common law will be of practical use to victims of rights abuses perpetrated by corporations, is when such a suit is launched as a class action. However, even in this situation, strenuous defence by the accused firm will provide formidable opposition to any plaintiff's case.[520]

Support by sponsorship by NGOs and trade unions is an option, however in practice such organisations are unable to launch such an action directly as they have not themselves suffered loss,[521] with the sponsorship of a test case facing considerable logistical difficulties including the identification of a plaintiff.[522] In addition, NGOs or unions willing to support an action would potentially risk an award of costs against them. This is because, in Australia, the ability to avoid the risk of costs being awarded against an unsuccessful plaintiff is limited. In the case of *Ruddock v Vadarlis*,[523] it was held by the majority that '[i]n cases where public interest factors are invoked, the court is not excused from the obligation to exercise its discretion in relation to costs by reference to all the circumstances of the case.' In that case, several factors regarding the case were considered by the majority to support a decision of there being no order as to costs. Some relevant factors include, whether:

- proceedings raise novel and important questions of law
- there was divided judicial opinion on the relevant issues that illustrate their difficulty
- there was financial gain to parties bringing claims
- legal representation for parties bringing claims was provided free of charge
- a case involved matters of high public importance.

The limited public interest qualification to the award of costs[524] acts strongly against NGOs or unions being willing to take up cases on behalf of victims of slavery and trafficking in cases against corporations, even where such a civil remedy may exist.

The Australian Government is unlikely to remove the threat of a

519 Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foriegn Sweatshops?' (2004) 28 *Melbourne University Law Review* 290.

520 Ibid.

521 Ibid.

522 Ibid.

523 Ibid.

524 *Ruddock v Vardarlis (No 2)* (2001) 115 FCR 229, 236.

victim of slavery or trafficking having costs awarded against them on the basis that this may encourage the bringing of a significant number of cases that have limited merit. On the other hand, given the extreme nature of slavery and trafficking and the other difficulties in being able to mount such as case, the risk of a large number of cases being generated would appear extremely low. This is borne out by the very limited number of such cases brought under the US *Alien Tort Act*, which probably has the lowest barriers to bringing such a case anywhere in the world.

18.2 Other deterrents to Civil Actions

There is the possibility of a civil action being settled out-of-court. Where civil actions are settled out-of-court, their potential for contribution to the growth of the body of case law on civil wrongs relating to acts or related activities of slavery and trafficking in persons, is checked. The cases of *Doe I v Unocal Corporation, Abdullahi v. Pfizer, Inc.*,[525] *Wiwa v Royal Dutch Petroleum, Wiwa v SPDC, and Wiwa v Anderson*,[526] are examples of more recent and significant civil actions in the US brought under the *Alien Tort Claims Act* that have been settled out-of-court.

525 *Abdullahi v. Pfizer, Inc.,* Nos 05-4863-cv (L), 05-6768-cv (CON) WL 214649 (2009).

526 Center for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al* <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>.

CONCLUSION

Goods are being imported into Australia where slavery and trafficking have been involved in their production. While laws in the countries where these goods are produced usually adequately criminalise these abuses, adequate law enforcement is often lacking. While Australian law recognises that slavery and human trafficking are serious offences wherever they occur, it currently has failed to offer any practical incentive for companies selling imported goods in Australia to ensure that slavery and human trafficking are not in their supply chain. In effect, ignoring these abuses to potentially provide cheaper goods to Australian consumers is left as a commercial decision between the importer, the retailer and the consumer. Voluntary action has been taken in the case of the chocolate industry due to substantial global pressure brought by concerned consumers, but even here voluntarily certification of cocoa as free of slavery and trafficked labour still only applies to a tiny fraction of cocoa imported into Australia and other Western countries.

Australia is lagging behind a number of other OECD countries, most notably the US, in taking actions to encourage companies to ensure their supply chains are free of slavery and human trafficking.

There is a need to act in consumer countries if the scourge of slavery and human trafficking is to be eliminated. It is not good enough to chastise developing countries for failing to eliminate these abuses, while at the same time allowing companies and consumers in Australia to benefit from the slavery and human trafficking through the lower production costs that are likely to result. Simply put, goods produced with slavery or human trafficking meet the international definition of 'proceeds or crime' under the UN *Convention against Transnational Organised Crime* and the UN *Convention Against Corruption* which Australia has voluntarily adopted.

In summary the options available to the Australian Government to take action to deal with slavery and human trafficking involved in the production of goods imported into Australia include:

- Conducting research and publicly reporting on goods where there is a reasonable risk that slavery or human trafficking may have been involved in the production of the goods;
- Establish a consultative committee of academics, non-government organisations and relevant industry bodies to advise government on actions needed to combat slavery and human trafficking involved in the production of goods imported into Australia;
- Introducing legislation that requires Government to engage with industries to create a standard set of practices that reduce the likelihood that slavery or human trafficking is involved in the production of imported goods, for goods where there is a reasonable risk of these abuses being present;
- Companies that fail to meet the required standard of demonstrating that they have taken reasonable action to ensure their supply chain is free of slavery and human trafficking should be denied the services of the Export Finance and Insurance Corporation (EFIC);
- Require companies where there is substantial risk of slavery or trafficking being in the supply chain, to mandatorily report on what steps they are taking to mitigate the risk of these human rights abuses;
- For industries that fail to take adequate action to address serious risks of slavery and human trafficking, the Government should introduce mandatory codes of conduct that will require action to reduce these abuses;
- Labelling of products, either to indicate that a product meets a certain standard in ensuring that its supply chain is free of slavery and human trafficking, or warning labels for products where there is a significant risk that slavery or human trafficking was involved in the supply chain;
- Legislate mandatory certification schemes for products where there is a high risk of slavery or human trafficking being present in their supply chains and where the industry has failed to take adequate and reasonable action to significantly address the abuses; and
- Amend the Financial Management and Accountability Act 1997 and the 'Commonwealth Procurement Guidelines' to require suppliers to provide guarantees that their supply chains are free of slavery and human trafficking.

BIBLIOGRAPHY

Articles/Books/Reports

Aaronson, S.A., and Zimmerman, J.M., *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking*, Cambridge University Press, (2008).

Aaronson, S.A., 'Seeping in slowly: How Human Rights Concerns Are Penetrating the WTO', *World Trade Review* 6(2) (2007), 413 - 449.

Anderson, H. and Landau, I., *Corporate Social Responsibility in Australia: A Review,* Working Paper No 4, Corporate Law and Accountability Research Group, Monash University (2006) 10.

Anderson, H., 'Corporate Social Responsibility: Some Critical Questions for Australia', *University of Tasmania Law Review* 24(2) (2007), 143-172.

Anderson, H., 'Piercing the Veil on Corporate Groups in Australia: The Case for Reform', *Melbourne University Law Review* 33 (2009), 333-367.

Anderson, H., and Gumley, W., 'Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment', *Adelaide Law Review* 29(1) (2008), 29-77.

Appellate Body Report, Brazil – Retreated Tyres, WT/DS332 paragraph 210.

Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline), WT/DS2/9, adopted on 20 May 1996, Section III.B.

Asner, M.A., and Pickering, G., The Lacey Act and the World of Illegal Plant Products', *Environmental Law in New York* 21(6) (2010), 101 -105.

ASX Corporate Governance Council, Corporate Governance Principles and Recommendations with 2010 Amendments (2nd Edition).

ASX Corporate Governance Council, 'Response to Submissions on Review of Corporate Governance Principles and Recommendations ' (August 2007).

Australian Department of Foreign Affairs and Trade, *Composition of Trade to Australia 2009-2010* (2010).

Australian Government, Export Finance & Insurance Corporation, Annual Report 2009, (2009).

Australian Securities Exchange, Corporate Governance Principles and Recommendations (Australian Securities Exchange Report, 2007).

Awatsaya Panam et al, *Migrant Domestic Workers: From Burma to Thailand*, Institution for Population and Social Research, Mahidol University, (2004) <http://www.ipsr.mahidol.ac.th/ipsr/Contents/Books/FullText/2004/286_MigrantDomesticWorkersFromBurmatoThailand.pdf>.

Bangladesh Thematic Group on Trafficking, Revisiting The Human Trafficking Paradigm: The Bangladesh Experience (Part I: Trafficking of Adults) (2004).

Bezencon, V., and Blili, S., 'Fair Trade Managerial Practices: Strategy, Organisation and Engagement', *Journal of Business Ethics* (2009), 90-95.

Bimal, K.P., and Hasnath, S.A., 'Trafficking in Bangladeshi Women and Girls', *Geographical Review* 19(2) (200 0), 268-276.

Boyefio, Gilbert, 'Ghana's Human Trafficking Act needs fine tuning', *The Statesman,* Accra, Ghana, 30 January 2007, <http://www.thestatesmanonline.com/pages/news_detail.php?section=1&newsid=2289>.

Can, O., and Seck, S., 'The Legal Obligations with Respect to Human Rights and Export Credit Agencies' (Final Legal Discussion Paper, ECA-Watch, Halifax Initiative Coalition and ESCR-Net, July 2006)

Center for Constitutional Rights, Wiwa et al v. Royal Dutch Petroleum et al <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>,

Central Bureau of Statistics Nepal, 'Report on the Nepal Labour Force Survey' 2008.

Cheffins, B. R., 'Corporations' in Cand and Tushnet (eds), The Oxford Handbook of Legal Studies (2003) 489.

Choudhury, B., 'Beyond the Alien Tort Claims Act: alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses', *Northwestern Journal of International law & Business* 26(1) (2005), 43-75.

Clough, J., 'Not-so-innocents Abroad: Corporate Criminal Liability for Human Rights Abuses', *Australian Journal of Human Rights* 11(1) (2005), 1-32.

Cooney, S., 'A Broader Role of the Commonwealth in Eradicating Sweatshops?', *Melbourne University Law Review* 28 (2004), 290-342.

Corporations and Markets Advisory Committee, Parliament of Australia, 'The Social Responsibility of Corporations', (2006).

Council of Europe: European Committee on Crime Problems, 'Extraterritorial Criminal Jurisdiction', *Criminal Law Forum* 3 (1992), 441.

Danish Immigration Service, Protection of Victims of Trafficking in Ghana (Report 2/2008).

De la Cuesta Gonzalez, M., and Valor Martinez, C., 'Fostering Corporate Social Responsibility Through Public Initiative: From the EU to the Spanish Case ', *Journal of Business Ethics* (2004), 275-293.

De Pelsmacker, P., Janssens, W., Sterckx, E., and Mielants, C., 'Consumer preferences for the marketing of ethically labelled coffee', *International Marketing Review* 22 (2005), 512-530.

Defourny, J., and Nyssens, M., 'Social Enterprise in Europe: Recent Trends and Developments', *Social Enterprises Journal* 4 (2008), 202-228.

Department of Parliamentary Services, Parliament of Australia, 'People Trafficking: Australia's response,' Research Note, (2005) <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn20.pdf>.

Deva, S., 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?', *Melbourne Journal of International Law* 5 (2004), 37.

Deva, S., 'Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations', *Newcastle Law Review* 8(1) (2004), 87-116.

Dhooge, L., 'Beyond Voluntarism: social disclosure and France's nouvelles régulations économiques', (2004) 21 (2) *Arizona Journal of International & Comparative Law* 441-491.

Doherty, B., 'Mugabe vows to defy rules on "blood diamonds" ", *The Age* (Melbourne), 20 June 2011, 9.

EarthRights International, 'Energy Insecurity: How Total, Chevron, and PTTEP Contribute to Human Rights Violations, Financial Secrecy, and Nuclear Proliferation in Burma (Myanmar)' (Report, EarthRights International, July 2010).

Egan et al, 'France's Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reporting to Promote Environmentally Sustainable Economic Development' (Paper presented at the 25th Annual Research Conference of the Association for Public Policy and Management, Washington DC, November 2003).

European Coalition for Corporate Justice, Sustainable Procurement in the European Union: Proposals and Recommendations to the European Commission and the European Parliament' (February 2007) <http://www.fairtrade.se/obj/docpart/1/161f4787feb10236 3046457e4b2ae2c6.pdf>.

Export Finance and Insurance Corporation, *EFIC Annual Report 2010* (2010) EFIC, 2 <http://www.efic.gov.au/about/governance/AnnualReports/Documents/EFIC-Annual-Report-2010.pdf>.

Fitzgerald, S., 'Corporate Accountability for Human Rights Violations in Australian Domestic Law', *Australian Journal of Human Rights* 11(1) (2005), 33.

Fletcher, L., Hickie, S., and Webb, Adele., Risky Business - Shining a Spotlight on Australia's Export Credit Agency, (Jubilee Australia, 2009).

Ford's Principles of Corporations Law (online), *A Company as a Corporate Entity: Incorporation and its Consequences* (2008) 4.240 <www.lexisnexis.com.au>

Ford's Principles of Corporations Law (online), *Corporate Liability: A Company's Liability for Civil and Criminal Wrongs* (2010) 16.130 www.lexisnexis.com.au

GATT Panel Report, United States – Restrictions on Imports of Tuna, DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155.

Government of Ghana, Ministry of Manpower, Youth and Employment, National Programme for the Elimination of the Worst Forms of Child Labor in Cocoa (2006).

Government of Malaysia, Council for Anti-Trafficking in Persons, 'National Action Plan Against Trafficking in Persons 2010 – 2015, <http://www.moha.gov.my/images/stories/mapo/NAP_%20AGAINST_TRAFFICKING_IN_PERSONS_2010_2015.pdf>.

Halifax Initiative, Reckless Lending – How Canada's export development Corporation Puts people and the environment at risk, (Vol. 1, 2000).

Human Rights and Equal Opportunity Commission, 'Submissions in Support of Application for Leave to Intervene and Submission on the Appeal' Australian Human Rights Commission (2008) <http://www.hreoc.gov.au/legal/submissions_court/intervention/tang.html>.

Human Rights Watch, Help Wanted: Abuses against Female Migrant Workers in Indonesia and Malaysia, 15 (9(B)) (2004).

Human Rights Watch, 'From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand' (February 2010) <http://www.hrw.org/en/reports/2010/02/23/tiger-crocodile>.

Human Trafficking Working Group (University of Queensland TC Beirne School of Law), Case Report: R v Wei Tang (2009) <http://www.law.uq.edu.au/documents/humantraffic/case-reports/wei_tang.pdf>.

International Commission of Jurists, Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes [2] (2008), <http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22851>.

International Labour Organisation, 'Decent Work Country Programme for Nepal 2008-2010'.

International Labour Organisation, 'The Informal Economy and Workers in Nepal' (2004).

International Labor Rights Forum, *Pick All the Cotton: Update on Uzbekistan's Use of Forced Child Labor in 2009 Harvest* (2009).

International Program on Elimination of Child Labour (IPEC) Subregional information system – Nepal, (2009) <http://www.ilo.org/legacy/english/regions/asro/newdelhi/ipec/index.htm>.

International Law Commission, Yearbook of the International Law Commission: Report of the Commission to the General Assembly on the Work of its Forty-eighth Session, UN Doc A/CN.4/SER.A/1996/Add.l (1996).

International Trade Union Confederation, *Internationally Recognised Core Labour Standards in India* (2011).

Joint Committee on Human Rights, United Kingdom House of Lords and House of Commons, 'Any of our business? Human rights and the UK private sector', The Stationery Office (2009).

Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate and Cocoa Industry on Efforts to Address the Worst Forms of Child Labour in Cocoa Growing, 1 July 2005, available at Cocoa Verification, <http://www.cocoaverification.net/Docs/Joint_Statement_2005.pdf>.

Joseph, S., 'An Overview of the Human Rights Accountability of Multinational Enterprises' in Menno T Kamminga and Saman Zia-Zarifi (eds), Liability of Multinational Corporations Under International Law (2000), 75-93.

Joseph, S., Corporations and Transnational Rights Litigation' (Hart Publishing, 2004).

Joshi , S., Zutshi, B., and Vajpeyi, A., 'Review of Child Labour, Education and Poverty Agenda India Country Report 2006', *Global March Against Child Labour*.

Karbowski, J., 'Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility', *Virginia Journal of International Law* 49 (2009), 729-787.

Kathmandu School of Law, *Regional Study for the harmonization of anti-trafficking Legal Framework in India Bangladesh and Nepal with International Standards*, (2007).

Kerr, M., Janda R., and Pitts, C., Corporate Social Responsibility – A Legal Analysis, (LexisNexis Canada, 2009).

Lawson, S., and MacFaul, L., 'Illegal Logging and Related - Trade Indicators of the Global Response - Country report cards', Chatham House, (2010) <http://www.illegal-logging.info/approach.php?a_id=186>.

Lopz-Hurtado, C., 'Social Labelling and WTO Law', *Journal of International Economic Law* 5(3) (2002), 719-746.

Louche, C., Van Liedekerke, L., Everaert, P., LeRoy, D., Rossy, A., and d'Huart, M., 'Chapter 6: Belgium' in Samuel Idowu, and Walter Leal Filho, (eds), Global Practices of Corporate Social Responsibility (Springer-Verlag Berlin Heidelberg, 2009).

Luntz, H., Hambly, D., Burns, K., Dietrich, J., and Foster, N.J., Torts: Cases and Commentary (6th ed), (Chatswood, NSW: LexisNexis Butterworths, 2009)

Mares, R., The Dynamics of Corporate Social Responsibilities (Martinus Nijhoff, Publishers 2008).

Meeran, R., 'Liability of multinational corporations: a critical stage in the UK' in Menno T Kamminga and Saman Zia-Zarifi (eds), Liability of Multinational Corporations Under International Law (The Hague; London; Boston, Kluwer Law International, 2000), 251 – 264.

Meeran, R., 'Survey Response, Laws of Australia, Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, (2006).

Melckmans, B., 'Strengths and weaknesses of Belgium's social label in ILO', Corporate Social Responsibility: Myth or Reality? 1:130 (2003), 41-45.

Mitro, M., 'Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions', *American University Law Review* 51 (2001), 1223-1273.

Mobium Group, 'Living Lifestyles of Health and Sustainability Research Project', (2007) < http://www.mobium.com.au/>

Nolan, J., 'Corporate Responsibility in Australia: Rhetoric or Reality?' (Working Paper No 47, University of New South Wales Faculty of Law Research Series, 2007).

Norwegian Burma Council Salween Watch, From Scorched Earth To Flooded Earth - The Generals' Dam On Burma's Salween River, (Asia Society, April 2000) <http://asiasociety.org/policy-politics/environment/climate-change-and-energy/scorched-earth-flooded-earth>

Off, C., Bitter Chocolate: Investigating the Dark Side of the World's Most Seductive Sweet (New Press, 2006).

Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, A Summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region, Organization for Security and Co-operation in Europe (2007) <http://www.osce.org/publications/cthb/2008/01/23622_811_en.pdf>.

Office of the United Nations High Commissioner for Human Rights, Abolishing Slavery and its Contemporary Forms, UN Doc HR/PUB/02/4 (2002).

Office of United Nations High Commissioner for Human Rights, 'Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights' <http://www.ohchr.org/Documents/Publications/WTOen.pdf>.

Office of United Nations High Commissioner for Human Rights publication 'Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights' <http://www.ohchr.org/Documents/Publications/WTOen.pdf>.

Overland, J., 'Corporate Social Responsibility in Context: The Case for Compulsory Sustainability Disclosure for Listed Public Companies in Australia' *Macquarie Journal of International and Comparative Environmental Law* 4(2) (2007), 1-22.

Panel Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R

Parliament Joint Committee on Corporations and Financial Services, Parliament of Australia, Corporate Responsibility: Managing Risk and Creating Value (2006) <http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/report/report.pdf>.

Parliamentary Joint Committee on Corporations and Securities, Report on the Corporate Code of Conduct Bill, (June 2001), <http://www.aph.gov.au/senate/committee/corporations_ctte/corp_code/report/report.pdf>

Payson Centre for International Development and Technology Transfer, Tulane University, *Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labor in the Cocoa Sector in Côte d'Ivoire and Ghana,* (31 March 2011).

POD Maatschappelijke Integratie, Liste des produits ayant obtenu le label social Belge (2005) http://www.social-label.be/social-label/FR/liste_produits/produits.htm

Ramasastry, A., and Thompson R., 'Commerce. Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries', FAFO, 2006.

Redmond, P., Companies and Securities Law: Commentary and Materials (5th ed) (Lawbook Co 2009).

Report of the Panel of Experts appointed Pursuant to UN Security Council Resolution 1306 (2000), [1195] <http://www.globalsecurity.org/military/library/report/2000/s-2000-1195.pdf>.

Sampford, C., Lewis, M., and Berry, V., Submission to the Parliamentary Joint Committee on Corporations & Financial Services, Inquiry into Corporate Responsibility & Triple-Bottom-Line reporting.

Scarpa, S., Trafficking in Human Beings: Modern Slavery, Oxford Legal Information Institute, (2008).

Schloenhardt, A., The illegal trade in timber and timber products in the Asia–Pacific region, Australian Institute of Criminology, (2008).

Simmons, B., 'Corporate social responsibility: have recent reforms safeguarded the future?' *National Environmental Law Review* 1 (2008), 55 - 60.

Sislin, J., and Murphy, K., *Approaches to Reducing the Use of Forced or Child Labour: Summary of a Workshop on Assessing Practice* (National Research Council, 2009).

Skinner, M., and Robinson, T., 'Focus: Deterring bribery here and abroad' Allens Arthur Robinson, 2010, http://www.aar.com.au/pubs/ldr/foldrmar10_02.htm.

Spillemaeckers, S., 'The Belgian social label: a new and challenging concept of chain management', Forum Ethibel: Advancing Socially Responsible Investing (2006).

Spillemaeckers, S., and Vanhoutte, G., 'A Product Sustainability Assessment' in Jan Jonker and Cornelis de Witte (eds), Management Models for Corporate Social Responsibility (2006).

Spillemaeckers, S., 'The Belgian social label: A governmental application of Social LC' (CALCAS – Co-ordination Action for Innovation in Life-Cycle Analysis for Sustainability, 2007)

Steiner, H.J., and Alston, P., International Human Rights in Context: Law, Politics, Morals (2000).

Steinhardt, R.G., 'The internationalization of domestic law' in Ralph G Steinhardt and A D'Amato (eds) The Alien Tort Claims Act: An Analytical Anthology (1999).

Stephens, B., 'The Amorality of Profit: Transnational Corporations and Human Rights' Berkeley *Journal of International Law* 20 (2002), 322-344

Stewart, A., *Stewart's Guide to Employment Law* (The Federation Press, 2nd ed, 2009)

Sustainable Asset Management, Group Portrait (2010) <http://www.sam-group.com/htmle/about/portrait.cfm>.

Svensson, N.L., 'Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws' *Loyola of Los Angeles International and Comparative Law Review* 28 (2006), 641-664.

The Sydney Morning Herald, Industry yet to chase 'ethical consumer', 6 September 2007, accessed at <http://www.smh.com.au/news/business/industry-yet-to-chase-ethical-consumer/2007/09/05/1188783320949.html>.

United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons,* (2009).

UN News, Extending sanctions against Liberia, Security Council adds ban on timber exports, <www.un.org/apps/news/story/asp?NewsID=6976&Cr=liberia&Cr1=#>.

UNICEF East Asia and Pacific Regional Office, Child Trafficking in East and South-East Asia: Reversing the Trend, (August 2009).

United States Department of Labor, Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, The Department of Labor's List of Goods Produced by Child Labor or Forced Labor, (2009).

United States Department of Labor's Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, 'US Department of Labor's List of Goods Produced by Child Labor or Forced Labor', (2011).

United States Department of State, Bureau of Democracy, Human Rights, and Labor, *2008 Country Reports on Human Rights Practice: Bangladesh* <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119132.htm>.

U.S. Department of State, Office to Monitor and Combat Trafficking in Person, 'Trafficking in Persons Report' (2010).

UnitedStatesDepartment of State, *Trafficking in Person Report* (2009).

Urminsky, MD., 'Public policy, reporting and disclosure of employment and labour information by multinational enterprises (MNEs)', Working Paper No. 99, International Labour Office – Geneva, (2004).

Watson, G., (ed), 'Race to the Bottom, Take II: An Assessment of Sustainable Development Achievements of ECA-Supported Projects Two Years After OECD Common Approaches Review' (Report, ECA-Watch, September 2009)

World News, Hon Kate Ellis MP Talks Ethical Consumerism, available at <http://wn.com/Hon_Kate_Ellis_MP_talks_Ethical_Consumerism>.

World Trade Organization, United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services. (WT/DS285), Report of the Appellate Body, (2003) <http://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf>.

World Vision, 'Traffik Report: Thailand', <http://www.worldvision.com.au/Libraries/3_3_1_Human_rights_and_trafficking_PDF_reports/Trafficking_Report_Thailand.sflb.ashx>.

Zark, J.A., *Multinationals and Corporate Responsibility: Limitations and Opportunities in International Law,* Cambridge University Press (2006).

Case Law

Abdullahi v. Pfizer, Inc., (2009) Nos 05-4863-cv (L), 05-6768-cv (CON) WL 214649.

Briggs v James Hardie & Co Pty Ltd (1989)

Byrne v Australian Airlines (1995) 185 CLR 410.

Commonwealth Director Of Public Prosecutions v Wei Tang (2008), No M5.

Dagi v BHP and Ok Tedi Mining Ltd (No 2)

Doe I v Unocal Corporation, 395 US 978 (2003).

Hadijatou Mani Koraou v. The Republic of Niger (2008) App. No. ECW/CCJ/JUD/06/08; Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008 ECOWAS.

Hollis v Vabu Pty Ltd (2001) 207 CLR 21.

Industrial Equity Ltd v Blackburn (1977)

James Hardie Industries Pty Ltd v Grigor (1998) 45 NSWLR 20.

Lubbe v Cape PLC (2000) 4 All ER 268 (HL).

Ngcobo v Thor Chemicals Holdings Ltd (1995) TLR (10 November) (Unreported).

Polyukhovich v Commonwealth (1991) 172 CLR 501.

R v Dobie (2010) QCA 34.

R v McIvor and Tanuchit (2008) NSWDC 185.

R v Wei Tang (2008) 249 ALR 200.

R v Yogalingam Rasalingam (2007) District Court of New South Wales (Unreported, Puckeridge J, 2 November 2007).

Regie Nationale des Usiness Renault SA v Zhang (2002) 210 CLR 491.

Ruddock v Vardarlis (No 2) (2001) 115 FCR 229, 236.

Scott v Davis (2000) 204 CLR 333, 346.

Smith v Keal (1882)

Sieders v R; Somsri v R (2008) NSWCCA.

Sithole v Thor Chemicals (1999) TLR (15 February) (Unreported).

Sosa v Alvarez-Machain, (2004) 542 US 692.

Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161

The Shrimp Turtle Case (38 International Legal Materials 118), (1999).

Treacy v Director of Public Prosecutions (1971) AC 537, 561–2 (Lord Diplock)

Uren v John Fairfax & Sons Ltd (1966) 117 CLR 118, 129 (Taylor J).

Voth v Manildra (1990) 171 CLR 538, 557

Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson

Woolworths v Kelly (1991) 4 ACSR 431

Legislation

Alien Tort Claims Act, (1789) (USA)

Anti-Money Laundering Act

Anti-Trafficking in Persons Act 2007

Bonded Labour System (Abolition) Act

Child Labour (Prohibition and Regulation) Act 1986 No. 61

Child Labour (Prohibition and Regulation) Act 2000
Competition and Consumer Act 2010 (Cth)

Corporate Code of Conduct Bill 2000 (Cth)

Corporations Act 2001 (Cth)

Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002 (Cth)

Crimes Legislation Amendment (Serious and Organised Crime) Act (No.2) 2010 (Cth)

Criminal Code Act 1995 (Cth)

Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth)

Criminal Code Amendment (Slavery and Sexual Servitude)

Customs Act Regulation 4Q of the Principal Regulations

Danish Financial Statements Act 2001 (Denmark)

Danish Financial Statements Act 2008 (Denmark)

Executive Order 13126 of June 12, 1999. (USA)

Export Finance and Insurance Corporation Act 1991 Cth.

Fair Labor Standards Act, (USA)

Financial Management and Accountability Act 1997

Food and Energy Security Act 2007

Human Trafficking Act 2005

Human Trafficking (Control) Act 2007

Independent Contractors Act 2006

Indian Penal Code 1860

Jaensch v Coffey

Lacey Act (USA)

Malaysian Penal Code Act

Nouvelles Régulations Économiques, Decree Number 2002-221, 2002-221, Feb. 20, 2002 (France)

Prevention of Oppression against Women and Children Act 2000

Statute of Westminster 1931 (UK)

Statute of Westminster Adoption Act 1942 (Cth)

Supply Chain Transparency Act

Tariff Act of 1930,(USA)

Trafficking Victims Protection Reauthorisation Act 2005 (USA)

Walsh-Healey Public Contracts Act, (USA).

Treaties

Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

United Nations Security Council Resolution 1521 (2003).

United Nations Convention Against Corruption

United Nations Convention against Transnational Organised Crime

Other Sources

Allison, L., 'How do we reconcile our desire for trade growth with Australian values?' (Speech delivered at the Asialink Leadership Program 2006, Canberra, 19 June 2006).

Annual Meeting of the National Contact Points Report by the Chair, OECD, 18 September 2009

Attorney General's Department, Australian Government, Australian Approach to Fighting Corruption, <http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~n0000Info+paper.pdf/$file/n0000Info+paper.pdf>.

Attorney General's Department, Fact Sheet 2: The Offence <http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~3Fact+Sheet+2+-+as+updated+2+May+2008.pdf/$file/3Fact+Sheet+2+-+as+updated+2+May+2008.pdf>.

Australian Customs Notice No. 2007/46, Amendments to the Customs (Prohibited Imports) Regulations 1956 – Heavy metal levels, Marked Fuel, Liberia sanctions (August 2007), <http://www.customs.gov.au/webdata/resources/notices/ACN4607.pdf>

Australian Government, Department of Climate Change and Energy Efficiency, Government buildings, (08 October 2010),< http://www.climatechange.gov.au/what-you-need-to-know/buildings/government.aspx>.

Australian Government, Department of Climate Change and Energy Efficiency, Government buildings, (09 December 2010), <http://www.climatechange.gov.au/government/initiatives/eego.aspx>.

Australian Government, Department of Education, Employment and Workplace Relations, Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry-Implementation guidelines, (August 2009), < http://www.deewr.gov.au/WorkplaceRelations/Policies/BuildingandConstruction/Documents/ImplementationGuidelines2009.pdf>

Australian Government, Department of Education, Employment and Workplace Relations, 'Reconciliation Action Plan (RAP) – Indigenous Opportunities Policy', (2011), <http://www.deewr.gov.au/Indigenous/Employment/Pages/IndigOpportunitiesPolicy.aspx>.

Australian Government, Department of the Environment, Water, Heritage, and the Arts, 'Waste and recycling', (13 June 2010), < http://www.environment.gov.au/archive/settlements/waste/index.html>.

Australian Government Department of Finance and Deregulation, Commonwealth Procurement Guidelines (1 December 2008) < http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html>.

Australian Government Department of Finance and Deregulation, Guidance on Complying with Policies of the Commonwealth in Procurement (July 2010) <http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html>.

Australian Government Department of Finance and Deregulation, Model Clauses for Tender Documentation (July 2010) <http://www.finance.gov.au/publications/fmg-series/tender_clauses.html#ewr>.

Australian Government Department of Finance and Deregulation, Selling to the Australian Government: A Guide for Business (February 2009) < http://www.finance.gov.au/publications/selling-to-the-australian-government/index.html>.

Australian Government Department of Finance and Deregulation, Selling to the Australian Government, (2009) <http://www.finance.gov.au/publications/selling-to-the-australian-government/docs/A_guide_for_business.pdf>.

Australian Government, Complied Accounting Standard AASB 137 Provisions, Contingent Liabilities and Contingent Assets (2008) <http://www.aasb.com.au/admin/file/content105/c9/AASB137_07-04_COMPdec07_07-08.pdf>.

Australian Government, 'Contract Compliance Policy', Equal Opportunity for Women in the Workplace Agency, (2010), <http://www.eowa.gov.au/Reporting_And_Compliance/Complying_with_the_Act/sanctions_for_not_complying/Contract_Compliance_Policy.asp>.

Australian Government, 'Environment Policy', Export Finance & Insurance Corporation, (2007), <http://www.efic.gov.au/corp-responsibility/envr-responsibility/environmentpolicy/Pages/environmentpolicy.aspx#content>.

Australian Government, 'Less waste, more resources', Department of Sustainability, Environment, Water, Population and Communities, (24 December 2010), <http://www.environment.gov.au/wastepolicy/index.html>.

Australian Government, 'Policy on environmental and social review of transactions - Draft for Consultation', Export Finance & Insurance Corporation, (August 2010), <http://www.efic.gov.au/corp-responsibility/envr-responsibility/Documents/Policy%20on%20environmental%20and%20social%20review%20Consultation%20draft%20August%202010.pdf>.

Australian SAM Sustainability Index, (2010) <http://www.aussie.net.au/>.

Australian Securities Exchange, A document setting out the differences between the 2003 and 2007 editions of the Principles and Recommendations (2007) <http://www.asx.com.au/supervision/pdf/amended_principles_2003_comparison.pdf>.

Castan Centre for Human Rights <http://www.law.monash.edu.au/castancentre/events/2003/meeranpaper.html>.

Castan Centre for Human Rights, *Transnational Human Rights Litigation against Companies* (2009) <http://www.law.monash.edu.au/castancentre/projects/mchr/trans-hr-litigation.html>.

Central Point of Expertise on Timber, Evidence of Compliance for Category A Evidence (December 2008) <http://www.cpet.org.uk/evidence-of-compliance/category-a-evidence/approved-schemes>

Central Point of Expertise on Timber, Executive Summary of UK Government Timber Procurement Advice Note (April 2010) <http://www.cpet.org.uk/files/TPAN%20April%2010.pdf>.

Central Point of Expertise on Timber, UK Government Timber Procurement Policy (January 2010) <http://www.cpet.org.uk/documents >

'Charter of the Consultative Group to Eliminate Child Labor and Forced Labor in Imported Agricultural Products' (September, 2009), <http://www.fas.usda.gov/info/speeches/102309ChildLaborReport.pdf>.

Commonwealth, Parliamentary Debates, Senate, 24 June 2004, 24844 (Senator Natasha Stott Despoja).

Concern Universal, Bangladesh & India: Cross Border Anti-Trafficking Programme <http://www.concernuniversal.org/images/uploads/File/Bangladesh/CU%20Anti-Trafficking%20On%20a%20Page.pdf>

Corporate Responsibility Index, About Us <http://www.corporate-responsibility.com.au/content/about-us>.

Corporate Responsibility Index, History of the Index <http://www.corporate-responsibility.com.au/content/history-index>.

Corporate Responsibility Index, How it works <http://www.corporate-responsibility.com.au/content/how-it-works>.

Correspondence from South and Central Asia Branch, Department of Foreign Affairs, 15 June 2010.

Council of Anti-Trafficking in Persons, Summary Statistics on Trafficking Cases (28 Feb 2008 – 11 July 2010)

Danish Commerce and Companies Agency on Corporate Social Responsibility, Statutory requirements on reporting CSR <http://www.csrgov.dk/sw51190.asp>.

Danish Commerce and Companies Agency, About the Danish law: Report on social responsibility for large businesses, <http://www.eogs.dk/graphics/Samfundsansvar.dk/Dokumenter/About%20the%20Danish%20law.pdf>.

Danish Commerce and Companies Agency, Reporting on corporate social responsibility – an introduction for supervisory and executive boards < http://www.eogs.dk/graphics/publikationer/CSR/Reporting_CSR_L5_UK_05.pdf>.

Department of Foreign Affairs and Trade, Australian Diamonds and the Kimberley Process <http://www.dfat.gov.au/publications/stats-pubs/downloads/diamond.pdf>

Department of Labor, Office of the Secretary of Labor, Notice of Initial Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor Pursuant to Executive Order 13126 of 11 September 2009.

Department of Labor, Office of the Secretary of Labor, Notice of Final Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Pursuant to Executive Order 13126 of 20 July 2010.

Department of Labor, Office of the Secretary, Bureau of International Labor Affairs, Procedural Guidelines for the Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Under 48 CFR Subpart 22.15 and E.O. 13126 of 18 January 2001.

Export Finance and Insurance Corporation, *Overcoming Financial Barriers for Exporters* (2009) <http://www.efic.gov.au/Pages/finance.aspx>

Fafo, Business and International Crimes Project, http://www.fafo.no/liabilities/CCCSurveyFrance06Sep2006.pdf and http://www.fafo.no/liabilities/CCCSurveyBelgium06Sep2006.pdf.

Fafo, The Project-Belgium & France, Business and International Crimes <http://www.fafo.no/liabilities/project-descr.htm>

Federal Public Planning Service Sustainable Development (Belgium), Sustainable Public Procurement (March 2008) <http://www.guidedesachatsdurables.be/en>.

Federal Register Notice: January 21, 2009 (Volume 74, Number 12).

Federal Register /Vol. 66, No. 12 /Thursday, January 18, 2001 / Rules and Regulations

Food Standards Australia and New Zealand, Part 3. Labelling of GM Foods, (16 April 2010), <http://www.foodstandards.gov.au/consumerinformation/gmfoods/frequentlyaskedquestionsongeneticallymodifiedfoods/part3labellingofgmfo4659.cfm>

Foreign Agricultural Service, *Consultative Group To Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products* (12 April 2011) Federal Register: The Daily Journal of the United States Government < http://www.federalregister.gov/articles/2011/04/12/2011-8587/consultative-group-to-eliminate-the-use-of-child-labor-and-forced-labor-in-imported-agricultural>.

FTANZ, < http://www.fta.org.au/about-fairtrade/facts-figures>

FTANZ, < http://www.fta.org.au/about-fairtrade/label>

Global Reporting Initiative G3 Sustainability Reporting Guidelines (2006) <http://www.globalreporting.org/ReportingFramework/G3Guidelines/>.

Global Witness,< www.globalwitness.org/library/dodd-frank-act-%E2%80%93-recent-developments-and-case-urgent-action>

Global Witness, Conflict Diamonds <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds>

Global Witness and Partnership Canada Africa, Paddles for Kimberley: An Agenda for Reform, June 2010 <http://www.pacweb.org/Documents/diamonds_KP/Paddles_for_Kimberley-June_2010.pdf>

Halsbury's Laws of Australia (online), *Negligence* (2006), [300-1] <www.lexisnexis.com.au>.

'The Hub of Responsible Business Practice', an initiative of the St. James Ethics Centre and funded by the Australian Government, available at <http://thehub.ethics.org.au/>.

Industrial Relations, NSW Government, Establishing and maintaining a business, (2009) <http://www.industrialrelations.nsw.gov.au/Employers/Employer_responsibilities.html>.

International Cocoa Initiative, Community Sensitization, (2010) <http://www.cocoainitiative.org/en/what-we-do/community-sensitization>.

International Cocoa Initiative, Micro-projects, (2010) <http://www.cocoainitiative.org/en/what-we-do/micro-projects>.

International Cocoa Initiative, Radio Programmes, (2010) <http://www.cocoainitiative.org/en/what-we-do/radio-programmes>.

International Cocoa Initiative, Training Activities, (2010) <http://www.cocoainitiative.org/en/what-we-do/training-activities>.

International Cocoa Verification Board, Cocoa Verification, (2011), <www.cocoaverification.net>.

International Finance Corporation, Performance Standards and guidance Notes, (2011), <http://www.efic.gov.au/corp-responsibility/envr-responsibility/environmentpolicy/Pages/environmentpolicy.aspx#content>.

International Labor Rights Forum, Stop Child & Forced Labor Child Labor Free Certification Initiative, <http://www.laborrights.org/stop-child-labor/child-labor-free-certification-initiative>.

International Labor Rights Forum, *The Cocoa Protocol: Success or Failure?* (2008) <http://www.laborrights.org/stop-child-labor/cocoa-campaign/resources/10719>

International Labour Organization, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, (entered into force November 1977), <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/triparti.htm> .

Kimberley Process, Background < http://www.kimberleyprocess.com/background/index_en.html>.

Kimberley Process Certification Scheme, <http://www.kimberleyprocess.com/documents/basic_core_documents_en.html>.

Kimberley Process, Structure < http://www.kimberleyprocess.com/structure/index_en.html>.

Macnamara, K., Extortion and confusion mar Thailand's migrant crackdown (Mekong Migration Network 7 September 2010) <http://www.mekongmigration.org/?p=764>.

Meridan Finance Group, *Export Credit Insurance* <http://www.meridianfinance.com/export_credit.html>.

NSW Government, Industrial Relations: Information for the Clothing Industry <http://www.industrialrelations.nsw.gov.au/Employers/Employer_responsibilities/Information_for_the_Clothing_Industry.html >.

Nuzhat, 'Malaysia Launches National Anti-Trafficking in Persons Action Plan', Newsdawn (Malaysia), 2 April 2010 < http://newsdawn.blogspot.com/2010/04/malaysia-launches-national-anti.html>.

OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,* OECD Publishing, (2011), <http://dx.doi.org/10.1787/9789264111110-en>.

OECD Guidelines for Multinational Enterprises (2000).

OECD, OECD Guidelines for Multinational Enterprises (2011), OECD Publishing, <http://dx.doi.org/10.1787/9789264115415-en>.

Office of Industrial Relations, NSW Department of Commerce; Australian Business Limited; and TCFUA, Guide to Employment in the NSW Clothing Industry, (November, 2003).

Partnership Canada Africa, Zimbabwe, Diamonds and the Wrong Side of History, March 2009 <http://www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-Eng.pdf>.

RepuTex, RepuTex Sustainability Index Series <http://www.reputex.com.au/page/view/reputex-sustainability-index-series-40/>.

Ruggie, J., Engaging Export Credit Agencies in Respecting Human Rights, (Speech delivered at OECD Export Credit Group's "Common Approaches" Meeting, Paris, 23 June 2010).

Second Reading Speech, Senator V. Bourne, 6 September 2000, Senate Hansard, 17, 457.

Security Council, SC/8856, 20 October 2006, <http://www.un.org/News/Press/docs/2006/sc8856.doc.htm>.

Standards Australia, About Us <http://www.standards.org.au/cat.asp?catid=21>.

Standards Australia, Benefits of Standards <http://www.standards.org.au/cat.asp?catid=150>

Standards Australia, Corporate Governance – Corporate Social Responsibility 8003-2003.

Standards Australia, Standards and the Law <http://www.standards.org.au/DevelopingStandards/Standardsandthelaw.aspx>.

Statement by the representative of the Government of India to the International Labour Conference, Geneva, June 2008.

The Guardian, *Indian Slave Children Found Making Low Cost Clothes Destined for the Gap, 28* October 2007 < http://www.guardian.co.uk/world/2007/oct/28/ethicalbusiness.retail>

Tenaganita, The Global Catch – Modern Day Slavery Fishermen (2009) 45.

UN Global Compact Communicating Progress <http://www.unglobalcompact.org/COP/index.html>.

UN Global Compact Participants and Stakeholders <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>.

UN Global Compact The Ten Principles <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html>.

United States Department of Labor, Bureau of International Labor Affairs, Frequently Asked Questions <http://www.dol.gov/ILAB/faqs.htm#eo>.

United States Department of State, Bureau of Democracy, Human Rights, and Labor, *2008 Country Reports on Human Rights Practice: Ghana* <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119004.htm>.

Weil, Gotshal & Manges LLP, Weil Briefing: Mass Torts/Appellate (2009) <http://www.weil.com/files/upload/Briefing_Mass_Torts_Feb_09.pdf>.

World Vision, Big lessons from "Big Chocolate", <http://www.worldvision.com.au/Libraries/AnnualProgramReview09_CaseStudies/Big_Lessons_from_Big_Chocolate.sflb.ashx>.

APPENDIX 1

Provisions for the Recovery of Unpaid Remuneration in the Victorian Outworkers (Improved Protection) Act 2003

Division 2 – Unpaid remuneration

6 Claims by outworkers for unpaid remuneration

1. An outworker may make a claim under this section for any unpaid remuneration against the person the outworker believes is his or her employer (the ***apparent employer***) if the employer has not paid the outworker all or any of the remuneration for work done by the outworker for the employer (the ***unpaid remuneration***).
2. The claim must be made within 6 months after the work is completed.
3. The claim is to be made by serving a written notice on the apparent employer that—
   a. claims payment of the unpaid remuneration; and
   b. sets out the following particulars
      i. the name of the outworker;
      ii. the address at which the outworker may be contacted;
      iii. a description of the work done;
      iv. the date on which the work was done;
      v. the amount of unpaid remuneration claimed in respect of the work.
4. The particulars set out in the unpaid remuneration claim must be verified by statutory declaration.
5. This section applies only in respect of remuneration for work carried out after the commencement of this section.

7 Liability of apparent employer for unpaid remuneration for which an unpaid remuneration claim has been made

1. Except as provided by subsection (4), an apparent employer served with an unpaid remuneration claim under section 6 is liable (subject to any proceedings as referred to in section 9) for the amount of unpaid remuneration claimed.
2. An apparent employer may, within 14 days after being served with an unpaid remuneration claim, refer the claim in accordance with this section to another person the apparent employer knows or has reasonable grounds to believe is the person for whom the work was done (the ***actual employer***).
3. An apparent employer refers an unpaid remuneration claim in accordance with this section by—
   a. advising the outworker concerned in writing of the name and address of the actual employer; and
   b. serving a copy of the claim (a ***referred claim)*** on the actual employer.
4. The apparent employer is not liable for the whole or any part of an amount of unpaid remuneration claimed for which the actual employer served with a referred claim accepts liability in accordance with section 8.

(S. 7(5) inserted by No. 9/2005 s. 5.)

5. An apparent employer cannot refer an unpaid remuneration claim under this section to a person that is a business or body corporate owned or managed by the outworker who made the claim.

8 Liability of actual employer for unpaid remuneration for which an unpaid remuneration claim has been made

1. An actual employer served with a referred claim under section 7 may, within 14 days after the service, accept liability for the whole or any part of the amount of unpaid remuneration claimed by paying it to the outworker concerned.
2. An actual employer who accepts liability must serve notice in writing on the apparent employer of that acceptance and of the amount paid.
3. If the apparent employer has paid to the outworker concerned any part of the amount of unpaid remuneration claimed for which the actual employer served with the referred claim has not accepted liability, the apparent employer may deduct or set-off the amount the apparent employer has paid to the outworker from any amount that the apparent employer owes to the actual employer (whether or not in respect of work the subject of the referred claim).

9 Recovery of amount of unpaid remuneration

1. Sections 60 and 61 apply to recovery of an amount payable to an outworker from an apparent employer who fails to make a payment in respect of an amount of unpaid remuneration for which the employer is liable under section 7.
2. In proceedings referred to in subsection (1), an order for the apparent employer to pay the amount concerned must be made unless the apparent employer proves that the work was not done or that the amount claimed for the work in the unpaid remuneration claim is not the correct amount in respect of the work.

10 Offences relating to unpaid remuneration claims and referred claims

A person must not—

a. make any statement that the person knows is false or misleading in a material particular in any referred claim under section 7 or any notice served for the purposes of section 8; or
b. serve a referred claim on a person under section 7 that the person does not know, or have reasonable grounds to believe, is an actual employer.

Penalty: 120 Points

11 Effect of sections 5 to 10

(S. 11(1) amended by No. 24/2009 s. 21.)

1. Sections 5 to 10 do not limit or exclude any other rights of recovery of remuneration of an outworker, or any liability of any person with respect to the remuneration of an outworker, whether or not arising under this Act or any other law.

Note

An outworker may, for example, seek an order from the Magistrates' Court under section 60 instead of making an unpaid remuneration claim under section 6.

2. Nothing in section 8(3) limits or excludes any right of recovery arising under any other law with respect to any amount of money owed by the apparent employer to the actual employer.

12 Liability of principal contractor for remuneration payable to outworkers of subcontractor

1. This section applies where—
   a. a person (the ***principal contractor***) has entered into a contract for the carrying out of work by another person (the ***subcontractor***); and
   b. outworkers employed or engaged by that subcontractor are engaged in carrying out the work (the ***relevant outworkers***); and
   c. the work is carried out in connection with a business undertaking of the principal contractor.
2. The principal contractor is liable for the payment of any remuneration of the relevant outworkers that has not been paid for work done in connection with the contract during any period of the contract unless the principal contractor has a written statement given by the subcontractor under this section for that period of the contract.
3. The principal contractor may withhold any payment due to the subcontractor under the contract until the subcontractor gives a written statement under this section for any period up to the date of the statement. Any penalty for late payment under the contract does not apply to any payment withheld under this subsection.

(S. 12(4) amended by No. 9/2005 s. 6(1).)

4. Sections 60 and 61 apply to the recovery of remuneration payable by a principal contractor under this section as if a reference in those sections to an employer were a reference to the principal contractor.

13 Written statements for the purposes of section 12

1. The written statement referred to in section 12 is a statement by the subcontractor that all remuneration payable to relevant outworkers for work under the contract done during that period has been paid.
2. The regulations may prescribe the form and content of the written statement.
3. The subcontractor must keep a copy of any written statement under this section for at least 6 years after it was given.
4. The written statement is not effective to relieve the principal contractor of liability under section 12 if the principal contractor had, when given the statement, reason to believe it was false.
5. A subcontractor must not give the principal contractor a written statement knowing it to be false.

Penalty: 120 Points

14 Operation of section 12

1. Section 12 does not apply in relation to a contract if the subcontractor is in receivership or in the course of being wound up or, in the case of an individual, is bankrupt and if payments made under the contract are made to the receiver, liquidator or trustee in bankruptcy.

(S. 14(2) amended by No. 24/2009 s. 22.)

2. Nothing in section 12 or this section limits or excludes any liability with respect to payment of remuneration by a person who is a principal contractor arising under this Act or any other law.
3. A principal contractor is not excluded from liability for the payment of any remuneration of a relevant outworker under section 12 only because the subcontractor is a business or body corporate owned or managed by the relevant outworker.

APPENDIX 2

US Contractual terms - forced and indentured labor

Federal Register /Vol. 66, No. 12 /Thursday, January 18, 2001 / Rules and Regulations

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

...

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. In section 52.212–3, revise the date of the provision; add, in alphabetical order, in paragraph (a) the definition "Forced or indentured child labor"; and add paragraph (i) to read as follows:

52.212–3 Offeror Representations and Certifications—

Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (February 2001)

(a) * * * * * * * * *

Forced or indentured child labor means all work or service—

Exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or

Performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.

* * * * *

(i) Certification Regarding Knowledge of Child Labor for Listed End Products (Executive Order 13126). [The Contracting Officer must list in paragraph (i)(1) any end products being acquired under this solicitation that are included in the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor, unless excluded at 22.1503(b).]

(1) Listed end products. Listed End Product llllllllllllllllllllllllllllllllllllllllllllllll Listed Countries of Origin lllllllllllllllllllllllllllllllllllllllllll

(2) Certification. [If the Contracting Officer has identified end products and countries of origin in paragraph (i)(1) of this provision, then the offeror must certify to either (i)(2)(i) or (i)(2)(ii) by checking the appropriate block.]

b (i) The offeror will not supply any end product listed in paragraph (i)(1) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product.

b (ii) The offeror may supply an end product listed in paragraph (i)(1) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any such end product furnished under this contract. On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor.

3a. Effective March 12, 2001, the date of the clause at 52.212–3 is amended by removing "(February 2001)" and adding (MAR 2001) in its place).

4. In section 52.212–5, revise the date of the clause and the introductory text of paragraph (b); redesignate paragraphs (b)(16) through (b)(27) as (b)(17) through (b)(28), respectively, and add new paragraph (b)(16) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

*** * * * ***

Contract Terms and Conditions Required to Implement Statues or Executive Orders—Commercial Items (February 2001)

* * * * *

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement applicable to acquisitions of commercial items or components:

[*Contracting Officer must check as appropriate.*]

* * * * *

ll(16) 52.222–19, Child Labor— Cooperation with Authorities and Remedies (E.O. 13126).

* * * * *

5. In section 52.213–4, revise the date of the clause; redesignate paragraphs (b)(1)(vii) through (xi) as (b)(1)(viii) through (xii), respectively, and add new paragraph (vii) to read as follows:

52.213–4 Terms and Conditions— Simplified Acquisitions (Other than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (February 2001)

* * * * *

(vii) 52.222–19, Child Labor—Cooperation with Authorities and Remedies (JAN 2001) (E.O. 13126). (Applies to contracts for supplies exceeding the micro-purchase threshold.)

* * * * *

5a. Effective March 12, 2001, the date of the clause at 52.213–4 is amended by removing "February 2001" and adding "(MAR 2001)" in its place).

6. Add new sections 52.222–18 and 52.222–19 to read as follows:

52.222–18 Certification Regarding Knowledge of Child Labor for Listed End Products.

As prescribed in 22.1505(a), insert the following provision:

Certification Regarding Knowledge of Child Labor for Listed End Products (February 2001)

(a) *Definition. Forced or indentured child labor* means all work or service—

(1) Exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or

(2) Performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.

(b) *Listed end products.* The following end product(s) being acquired under this solicitation is (are) included in the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor, identified by their country of origin. There is a reasonable basis to believe that listed endproducts from the listed countries of origin may have been mined, produced, or manufactured by forced or indentured child labor.
Listed End Product lllllllllllllllllllllllllllllllllllllllllll Listed Countries of Origin lllllllllllllllllllllllllllllllllllllllllll

(c) *Certification.* The Government will not make award to an offeror unless the offeror, by checking the appropriate block, certifies to either paragraph (c)(1) or paragraph (c)(2) of this provision.
b (1) The offeror will not supply any end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in a corresponding country as listed for that end product.
b (2) The offeror may supply an end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture such end product. On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor. (End of provision)

52.222–19 Child Labor—Cooperation with Authorities and Remedies.

As prescribed in 22.1505(b), insert the following clause:
Child Labor—Cooperation With Authorities and Remedies (February 2001)

(a) *Applicability.* This clause does not apply to the extent that the Contractor is supplying end products mined, produced, or manufactured in—
(1) Canada, and the anticipated value of the acquisition is $25,000 or more;
(2) Israel, and the anticipated value of the acquisition is $50,000 or more;
(3) Mexico, and the anticipated value of the acquisition is $54,372 or more; or
(4) Aruba, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, or the United Kingdom and the anticipated value of the acquisition is $177,000 or more.

(b) *Cooperation with Authorities.* To enforce the laws prohibiting the manufacture or importation of products mined, produced, or manufactured by forced or indentured child labor, authorized officials may need to conduct investigations to determine whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under this contract. If the solicitation includes the provision 52.222– 18, Certification Regarding Knowledge of Child Labor for Listed End Products, or the equivalent at 52.212–3(i), the Contractor agrees to cooperate fully with authorized officials of the contracting agency, the Department of the Treasury, or the Department of Justice by providing
reasonable access to records, documents, persons, or premises upon reasonable request by the authorized officials.

(c) *Violations.* The Government may impose remedies set forth in paragraph (d) for the following violations:
(1) The Contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor for listed end products.
(2) The Contractor has failed to cooperate, if required, in accordance with paragraph (b) of this clause, with an investigation of the use of forced or indentured child labor by an Inspector General, Attorney General, or the Secretary of the Treasury.
(3) The Contractor uses forced or indentured child labor in its mining, production, or manufacturing processes.
(4) The Contractor has furnished under the contract end products or components that have been mined, produced, or manufactured wholly or in part by forced or indentured child labor. (The Government will not pursue remedies at paragraph (d)(2) or paragraph (d)(3) of this clause unless sufficient evidence indicates that the Contractor knew of the violation.)

(d) *Remedies.* (1) The Contracting Officer may terminate the contract.
(2) The suspending official may suspend the Contractor in accordance with procedures in FAR Subpart 9.4.
(3) The debarring official may debar the Contractor for a period not to exceed 3 years in accordance with the procedures in FAR Subpart 9.4.

(End of clause)

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BILLING CODE 6820–EP–P

APPENDIX 3

Current EO List of products

Product	Countries
Bamboo	Burma
Beans (green, soy, yellow)	Burma
Brazil Nuts/Chestnuts	Bolivia
Bricks	Burma, China, India, Nepal, Pakistan
Carpets	Nepal, Pakistan
Charcoal	Brazil
Coal	Pakistan
Coca (stimulant plant)	Colombia
Cocoa	Cote d'Ivoire, Nigeria
Coffee	Cote d'Ivoire
Cotton	Benin, Burkina Faso, China, Tajikistan, Uzbekistan
Cottonseed (hybrid)	India
Diamonds	Sierra Leone
Electronics	China
Embroidered Textiles (zari)	India, Nepal
Garments	Argentina, India, Thailand
Gold	Burkina Faso
Granite	Nigeria
Gravel (crushed stones)	Nigeria
Pornography	Russia
Rice	Burma, India, Mali
Rubber	Burma
Shrimp	Thailand
Stones	India, Nepal
Sugarcane	Bolivia, Burma
Teak	Burma
Tilapia (fish)	Ghana
Tobacco	Malawi
Toys	China

APPENDIX 4

UK Model Contractual Terms - Timber and Wood-derived Products

Please note that terms in square brackets will need to be defined according to the relevant contract in which the model contract condition is used.

1. **Requirements for Timber**
   - 1.1 All Timber and wood-derived products supplied or used by [the Contractor] in performance of [the Contract] (including all Timber and wood-derived products supplied or used by sub-contractors) shall comply with [the Contract Specification].
   - 1.2 In addition to the requirements of clause 1.1 above, all Timber and wood-derived products supplied or used by [the Contractor] in performance of [the Contract] (including all Timber and wood-derived products supplied or used by sub-contractors) shall originate from a forest source where management of the forest has full regard for:
     Identification, documentation and respect of legal, customary and traditional tenure and use rights related to the forest;
     Mechanisms for resolving grievances and disputes including those relating to tenure and use rights, to forest management practices and to work conditions; and
     Safeguarding the basic labour rights and health and safety of forest workers.

2. **Requirements for Proof of Timber Origin**
   - 2.1 If requested by [the Contracting Authority], and not already provided at the tender evaluation stage, [the Contractor] shall provide to [the Contracting Authority] evidence that the Timber and wood-derived products supplied or used in the performance of [the Contract] complies with the requirements of [the Contract Specification]. If requested by [the Contracting Authority] [the Contractor] shall provide to [the Contracting Authority] evidence that the Timber and wood-derived products supplied or used in the performance of [the Contract] complies with the requirements of the social criteria defined in section 1.2 above.
   - 2.2 [The Contracting Authority] reserves the right at any time during the execution of [the Contract] and for a period of 6 years from final delivery under [the Contract] to require [the Contractor] to produce the evidence required for [the Contracting Authority's] inspection within 14 days of [the Contracting Authority's] written request.
   - 2.3 [The Contractor] shall maintain records of all Timber and wood-derived products delivered to and accepted by [the Contracting Authority]. Such information shall be made available to [the Contracting Authority] if requested, for a period of 6 years from final delivery under [the Contract].

3. **Independent Verification**
   - 3.1 [The Contracting Authority] reserves the right to decide whether the evidence submitted to it demonstrates legality and sustainability, or FLEGT-licence or equivalent, and is adequate to satisfy [the Contracting Authority] that the Timber and wood-derived product complies with [the Contract 16 Specification]. [The Contracting Authority] reserves the right to decide whether the evidence submitted to it is adequate to satisfy [the Contracting Authority] that the Timber and wood-derived products complies with the requirements of the social criteria defined in section 1.2 above. In the event that [the Contracting Authority] is not satisfied, [the Contractor] shall commission and meet the costs of an "independent verification" and resulting report that will (a) verify the forest source of the timber or wood and (b) assess whether the source meets the relevant criteria.
   - 3.2 In [this Contract], "Independent Verification" means that an evaluation is undertaken and reported by an individual or body whose organisation, systems and procedures conform *to ISO Guide 65:1996 (EN 45011:1998) General requirements for bodies operating product certification systems* or equivalent, and who is accredited to audit against forest management standards by a body whose organisation, systems and procedures conform to *ISO 17011: 2004 General Requirements for Providing Assessment and Accreditation of Conformity Assessment Bodies* or equivalent.

4. **[Contracting Authority's] Right to Reject Timber**
   - 4.1 [The Contracting Authority] reserves the right to reject any Timber and wood-derived products that do not comply with [the Contract Specification]. [The Contracting Authority] reserves the right to reject any Timber and wood-derived products that do not comply with the requirements of the social criteria defined in section 1.2 above. Where the [Contracting Authority] exercises its right to reject any Timber and wood-derived products, [the Contractor] shall supply alternative Timber and wood-derived products, which do so comply, at no additional cost to [the Contracting Authority] and without causing delay to [the Contract] completion period.

Signed Name in Capitals (as in tender)

For and on behalf of Date.