THE UNIVERSITY of ADELAIDE

POLICY BRIEF 27
MENGIE, OCT 2024

Due Diligence Legislation and Policies: Australia's Transparency-Based Approach to Addressing Risks of Modern Slavery in Supply Chains

Institute for International Trade

Policy challenge

Australia has joined the global fight against modern slavery by enacting its Modern Slavery Act in 2018. This due diligence legislation is different to its counter parts in North America and Europe in many ways. Its most distinguishing feature is its transparency-based approach to combating modern slavery. This approach does not include penalties for non-compliance. Nor does it impose positive human/labour rights due diligence obligations besides the reporting requirement. These and other distinct features of Australia's due diligence legislation raise the question as to whether the Modern Slavery Act has adopted a feasible due diligence approach or needs substantial change to accommodate best practices. Studies including government's own reports indicate significant limitations and compliance challenges with this due diligence approach. This suggests that a substantial change to Australia's supply chain regulatory landscape is inevitable. Given the complex and increasingly globalised nature of modern product supply chains and the myriads of interests that need to be considered in addressing the limitations with the current regulatory system, the task of augmenting the Modern Slavery Act is no doubt going to be remarkably challenging. Many jurisdictions in the Global North are tightening their due diligence legislation, while some authoritarian states have continued to challenge the values that necessitated such legislation. The question then is how Australia's due diligence legislation can be optimised to properly respond to the legitimate demand for protection of important values such as human rights, while maintaining market opportunities for corporations. Addressing this issue necessitates a collaborative and intensive research involving a range of stakeholders, including government, corporations, academia, human rights institutions and CSOs.

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make history.

Policy response

Australia needs to overhaul its sustainability due diligence system to address the major limitations with this system and cope with worldwide developments in relation to corporate sustainability due diligence. Bringing about such a change requires a concerted effort to explore options and help reform the existing regulatory system in a manner that satisfies the legitimate demands for protection of certain values, while sustaining corporations' ability to compete globally. In studying options, Australia's business outlook and its strategic position in the complex global geopolitical landscape should be considered.

This paper explores Australia's approach to supply chain due diligence with relevant worldwide developments in mind. It analyses legislative and other materials including the Modern Slavery Act, the statutory review of this Act, submissions made to this review, different reports on compliance with the Act, and other jurisdictions' due diligence laws. It suggests that Australia needs to introduce legislative changes to optimise its due diligence system considering its strategic position in the global supply chain landscape, the legitimate demands for protection of human rights, and the need to maintain market opportunities for corporations. It further highlights the need for collaborative research to inform such changes.

Introduction

Due diligence in a supply chain context denotes steps taken by an entity to identify and address actual and potential consequences of harmful practices to human beings and the environment. Among the most important global issues that supply chain due diligence regimes aim to address is modern slavery. According to recent estimates, 50 million people are languishing in modern slavery around the world, the largest host being the Asia-Pacific.[i]

Jurisdictions have taken different approaches to addressing the risks of modern slavery. Yet, most of the due diligence legal regimes share some common features such as compliance enforcement mechanisms similar to civil penalties and/or injunction. The Australian transparency-based approach to combating modern slavery is distinct in this regard. *Australia's Modern Slavery Act 2018* (Cth) (MSA) does not contain offences, penalties, or injunction for non-compliance.

While it differs from other due diligence legal regimes in many more ways, two MSA features are its most salient distinguishing elements. First, it relies upon a system of transparent reporting and subsequent public scrutiny, with the assumption that companies strive to address risks of modern slavery within their supply chains to avoid the risk of being identified and exposed to the public as non-compliant. Second, the MSA does not impose positive due diligence duties beyond the reporting requirement. To be precise, while the MSA requires companies to report actions taken to address risks of modern slavery, it does not require them to take specific actions to address those risks. These features sparked diverse views among the organisations and individuals that submitted their statements for the statutory review of the MSA in 2022/2023.

The review of the Modern Slavery Act

The MSA required the Minister (the Attorney-General's Department) to prepare a report reviewing its operation and compliance three years after it came to force (on the 1st of January 2019).[ii] This requirement is appropriate for at least two reasons. First, modern slavery is a complex phenomenon because of the high level of internationalisation and interdependence in supply chains. Second, the idea of fighting modern slavery through supply chain due diligence legislation is relatively new and requires regular review to optimise regulatory settings, considering the legitimate demand to tackle modern slavery and the burden due diligence requirements impose on business, particularly small and middle scale companies.

The review engaged many stakeholders and diverse views, encompassing "136 submissions, 30 responses to [an] online questionnaire, 496 responses to [an] online survey, ...38 consultation meetings attended by 285 organisations, and ...another 65 meetings with government officers."[iii]

The review revolved around three main questions: Whether the MSA is designed to be effective; whether legislative change is necessary to make it effective; and whether the Act is being taken seriously

by reporting entities. Respondents' views reflected are diverse and mostly diverging, but there was overall agreement that the MSA should be made more effective, including legislative and administrative changes. Considering these views, and the operation of and compliance with the MSA, the review produced a report with 30 recommendations.

Key findings

The review suggests that the MSA has brought a significant cultural change and commitment to combat modern slavery. While acknowledging this positive development, it concludes that the compliance level is much lower than expected and the MSA has various limitations that call for legislative and administrative changes. The review emphasises that:

- MSA's lack of concrete compliance enforcement mechanisms like civil penalties and sanctions makes compliance farfetched
- MSA's failure to include positive and specific due diligence obligations beyond the reporting requirement weakens its potential to effectively respond to modern slavery
- The reporting threshold of $100 million excludes thousands of entities that should be required to report
- The implementation guidelines developed by the Minister are not sufficiently clear

Enforcement mechanisms

The review's emphasis on the MSA's lack of concrete enforcement mechanisms, seen from the perspective of other jurisdictions' due diligence regimes, is appropriate. There is growing acceptance of the idea of employing penalties, sanctions, or injunctions as due diligence legislation enforcement mechanisms. The US, Canada, the UK, Germany, France, and recently, the EU have introduced one or other forms of these enforcement mechanisms. Canada uses offence/penalty provisions to enforce its supply chains due diligence legislation.[iv] Injunction is among the main enforcement mechanisms in the UK and the US. Germany and the EU rely primarily on monetary penalties and sanctions. Violating the German Supply Chains Act[vi] can result in a fine of up to 8 million Euros. In addition, non-compliant entities can be barred from participating in public tenders. Similarly, companies that fail to observe the EU's Corporate Sustainability Due Diligence Directive (CSDDD) may, in serious cases, face monetary penalties up to 5% of their worldwide revenue. The CSDDD also includes a provision for exclusion of non-compliant companies from public tenders.

Given this global trend, and the significantly low level of compliance with the MSA which is, according to the review and other reports[vii], associated with the weak compliance mechanism in place, it is very likely that Australia will introduce legislative changes to incorporate concrete enforcement mechanisms. The question then will be which enforcement mechanism could ensure compliance with the MSA without adversely impacting the competitiveness of reporting entities. To help inform the prospective reform, the advantages and disadvantages of one or a combination of the above-mentioned enforcement mechanisms need to be further explored with the global and Australian context in mind.

There are three possible options depending on the objective we want to achieve through due diligence laws and policies. If the objective is to achieve the highest possible level of human and labour rights protection at any cost, we will opt for strict enforcement mechanisms. If the objective is to advance these rights in a manner that least interferes with business, lenient enforcement measures, and even the current MSA approach, will appeal. If the objective is to strike a balance between business and human/labour rights, a moderate enforcement mechanism will be opted for. A thorough investigation into the implementation of compliance mechanisms in other jurisdictions is key to optimising Australia's approach to enforcing its supply chain due diligence legislation.

Due diligence obligations

The second conclusion of the review is that lack of positive due diligence obligations under the MSA, beyond the reporting requirement, weakens its potential to effectively address modern slavery. In their submissions to the review, many organisations, including the Australian Human Rights Commission and Australian Council of Trade Unions, stress the importance of including specific and positive human/labour rights due diligence obligations.[viii] These organisations also urge for extension of the scope of the reporting obligation to include requirements in relation to high-risk locations.

The call for inclusion of positive due diligence obligations and extension of the scope of the reporting obligation seems to be consistent with the growing importance of comprehensive due diligence legislation around the world, particularly in Europe.

Imposing specific and positive due diligence obligations can help reporting entities better understand what is required of them. This can also help the government in monitoring compliance. Yet, it should be noted that such specificity could also remove the flexibility under the current legislation that allows different companies to tailor their report to their business context.

Reporting threshold

The review's call for a lower reporting threshold can be seen from different perspectives. Considering the recent development in the EU, one may argue in support of the existing $100 million, or even higher, reporting threshold. As per the draft CSDDD, a company would be required to report if it has over 500 employees and over AUD 242 million annual revenue. After a series of negotiations, member states reached agreement on a new threshold of 1000 employees and AUD 728 million annual revenue; these elements of the threshold are cumulative and satisfying only one of them does not make a company a reporting entity. This threshold is thus significantly higher than Australia's. Australia's threshold is, however, higher than, for example, the UK's AUD 70 million.

Both higher and lower thresholds are arguable. A higher threshold may be praised for targeting large multinational corporations that have the capacity both to pose a high risk of human/labor rights violation and to manage this risk. A lower threshold, or even requiring all companies, big and small, to report may equally be supported from the perspective of effective human rights protection. There are challenges with setting both high and low thresholds. A very high threshold risks tolerating human rights violations, and a very low threshold risks requiring an unmanageable number of entities to report which makes administering due diligence legislation difficult. Too low thresholds can also result in small-scale and midscale companies spending a significant portion of their profit to fulfill the reporting requirements though they are significantly less threatening to human rights than large multinational corporations. Determining the appropriate threshold, therefore, requires further investigation into the operation of different thresholds around the globe.

Implementation guidelines

The review's conclusion that the due diligence implementation guidelines developed by the Minister need further clarification is plausible. These guidelines need to go a step further to define what due diligence best practice is, explain an acceptable standard of reporting through illustrations, and indicate targets to be met. As regulating due diligence in the supply chain is a relatively complex issue, simplifying the meaning of MSA through administrative guidelines, notes and forms should be given due attention.

The review's proposals to enhance Australia's current approach, and other models of due diligence

The review's proposals point Australia towards practices in other developed country jurisdictions. This is perhaps owing to the extensive debate on the human/labour rights and environmental obligations of multinational corporations over the past decade. This debate was ignited by the addition of human rights to the OECD Guidelines on Responsible Business Conduct in 2011 and the endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2016. The influence of these international due diligence standards in the development of supply chain due diligence legal regimes is best reflected in the recently approved EU CSDDD.[ix] The CSDDD expressly points companies towards the UNGPs and OECD guidelines as indications of supply chain due diligence best practices. Indeed, the supply chains of modern-day companies have become highly internationalised[x] meaning that there is a good incentive for states to harmonise their due diligence regimes by adopting international best practices.

As indicated, Australia's current approach to combating modern slavery is substantially different to other states' due diligence models. It differs from most due diligence legal regimes in that it does not contain concrete enforcement mechanisms. However, it resembles the models in the UK and Canada in terms of being a regulatory regime specific to modern slavery. Indeed, this similarity between the UK and Australia is not surprising as the MSN has been mainly inspired by the *Modern Slavery Act* of the UK. The due diligence legal regimes of the EU, Germany and France are distinguishable in this regard, as they regulate both human rights and environmental due diligence in a single statute.

There seems to be considerable support for more comprehensive due diligence legislation in Australia. Many organisations that submitted statements for the review, including the Australian Human Rights Commission, Australian Council of Trade Unions and the University of Sydney proposed a human rights due diligence regime as an alternative to the existing modern slavery specific regime. Some of these submissions also suggested that the scope of the MSA needs to be extended beyond supply chains to include value chains. The submission by the University of Sydney, for example, emphasises modern slavery risks present not only in supply chains but also in "an

entity's downstream...diversity of direct and indirect business relationships."[xi] This can be contrasted with the submission by the University of Queensland, for instance, which essentially supports MSA's current scope and approach.

The review proposes 30 recommendations to enhance the effectiveness of MSA. Some of the recommendations are made based on other jurisdictions' experience and their implementation could thus bring the Australian supply chain due diligence regime closer to other models, particularly the ones that use concrete mechanisms of due diligence enforcement. The recommendations could be categorised into three distinct groups. First, changes to the terminologies used in the MSA and call for further clarification and simplification of the Minister's guidelines. Second, those suggesting substantive changes to the MSA to improve compliance. These include introducing civil penalties and going beyond the reporting requirement to impose positive due diligence duties. And third, proposed changes to the administrative structure, the main suggestion being establishment of the Australian Anti-Slavery Commissioner.

The review's suggestion for further clarification and simplification of the Minister's guidelines is not controversial, although there can be diverging views as to how this should be done. Substantive changes to the MSA, however, are arguable. On the one hand, it could be argued that the propositions aim to tighten the MSA to ensure its compliance and that is consistent with the global trend. On the other hand, these recommendations could be considered somewhat inflexible and thus not suited to the diverse business operation and supply chain contexts. To respond to the legitimate demand for the protection of human/labour rights and allow some level of legislative flexibility that reflects diverse operational and supply chain contexts, possible options need to be further explored.

The recommendations regarding the Australian Anti-Slavery Commissioner are discussed below, under Latest Steps.

Compliance challenges

Both the review and other scholarship on the effectiveness of the MSN indicate a considerable degree of non-compliance: An examination of modern slavery statements submitted by 92 companies shows "that 66% of entities had failed to address all mandatory reporting criteria."[xiii] Given the complex nature of regulating due diligence in supply chains, there are a myriad of compliance challenges. The major ones include cost of reporting, administrative difficulty to track a huge number of reports, and competitiveness issues.

Producing a compliant report that includes all the required information about a reporting entity's operations and its supply chains is not an inexpensive undertaking, particularly for relatively small entities. Lowering the reporting threshold (and hence requiring a more significant number of entities to report) and including positive due diligence duties, as the review proposed, could pose a significant financial challenge to such entities. An increase in the number and complexity of the reports can also present an administrative challenge, making effective scrutiny of each submission difficult. Lastly, entities that operate, or rely on suppliers, in jurisdictions with weak or no due diligence legislation might be least incentivised to comply with due diligence requirements, because that may make them less competitive. For example, a company established and operating in such jurisdictions may export its products to a third country with no human/labour rights due diligence legislation and avoid all reporting and compliance related costs. These challenges need to be further explored to help optimise the compliance mechanisms.

Latest steps

The review's proposal to establish the Office of the Australian Anti-Slavery Commissioner has already materialised through the enactment of the *Modern Slavery Amendment (Australian Anti-Slavery Commissioner)* Act on 28 May 2024. While the Commissioner has a long list of functions, none of them empower it to investigate or resolve complaints. Nonetheless, the establishment of the Commissioner is a step in the right direction to enhance compliance with the MSA. It will help strengthen the initiatives and activities being undertaken by the government, reporting entities, civil society, and academia to address modern slavery.

However, the Commissioner is modelled after the UK Anti-Slavery Commissioner whose role is mainly limited to "encourag[ing] good practice in the prevention, detection, investigation and prosecution of modern slavery offences, [and] the identification of victims of those offences."[xiv] As per s 44 of the *Modern Slavery Act 2015*, the UK Anti-Slavery Commissioner cannot "exercise any function in relation to an individual case."[xv] Similarly, Australia's Anti-Slavery Commissioner is designed to function largely as a government watchdog. Its roles include promoting compliance with the MSA by supporting a range of stakeholders including governmental bodies, business, and victims, and by implementing awareness strategies. Yet, "the Commissioner may not investigate, or resolve complaints concerning, individual instances or suspected instances of modern slavery."[xvi]

The Commissioner's functions, as they stand now, reflect Australia's transparency-based approach to fighting modern slavery. However, it is very likely that the Commissioner's role will expand over time, given the continued call for substantive changes to the MSA, as indicated earlier.

Concluding remarks

Australia will introduce substantial changes to its supply chain due diligence legislation given the growing request for such changes, significant level of non-compliance, and enactment of relatively more comprehensive due diligence laws over the last few years, particularly in Europe. The analysis of the relevant primary and secondary sources suggests that both the flexible (Australian) and strict forms of due diligence regimes present opportunities and challenges to effective supply chain governance. Therefore, the substantial reforms proposed by the statutory review including lowering the reporting threshold, introducing penalties, and imposing positive due diligence obligations need to be further considered through the lens of compliance challenges facing the MSA and global due diligence best practices.

About the author

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Endnotes

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ii Modern Slavery Act 2018 (Cth), s 24.

iii John McMillan, 'Report of the Statutory Review of the Modern Slavery Act 2018 (Cth): The First Three Years' (2023), 7.

iv Fighting Against Forced Labour and Child Labour in Supply Chains Act (Canada)

v Modern Slavery Act 2015 (UK); California Transparency in Supply Chains Act (Cal)

vi Act on Corporate Due Diligence Obligations in Supply Chains of July 16, 2021 (Germany)

vii https://www.humanrights.unsw.edu.au/news/new-report-shows-companies-failing-comply-modern-slavery-laws

viii https://consultations.ag.gov.au/crime/modern-slavery-act-review/consultation/published_select_respondent; Also see Ramona Vijeyarasa, 'A Missed Opportunity: How Australia Failed to Make Its Modern Slavery Act a Global Example of Good Practice' (2019) 40(3) *Adelaide Law Review*, The 857.

ix EU Directive on Corporate Sustainability Due Diligence (CSDDD), 2024.

x Vijeyarasa (n 8) 857.

xi University of Sydney Submission on issues paper- Review of Australia's *Modern Slavery Act* (Cth) 2018, 3.

xii University of Queensland Submission on issues paper- Review of Australia's *Modern Slavery Act* (Cth) 2018, 1.

xiii Dinshaw, Freya, Justine Nolan, Amy Sinclair, Shelley Marshall, Fiona McGaughey, Martijn Boersma, Vikram Bhakoo, Jasper Goss, and Peter Keegan. "Broken promises: Two years of corporate reporting under Australia's Modern Slavery Act." (2022), 16.

xiv Modern Slavery Act 2015 (UK), s 41.

xv Ibid, s 44.

xvi Modern Slavery Act 2018 (Cth), s 20C (2).

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