

Dear Attorney General's Department,

Thank you for the opportunity to respond to the Consultation Paper, Strengthening Australia's Legislative Response to Modern Slavery in Supply Chains.

Question 1: Model: What are your views on the proposed legislative approach to the core components of a failure to prevent modern slavery offence?

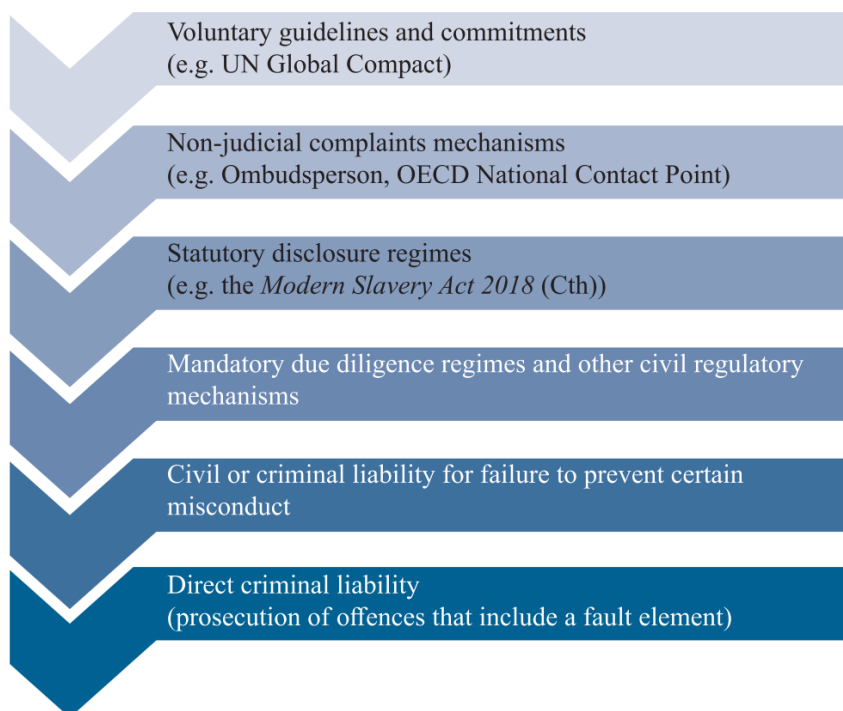
The proposed "failure to prevent" offence is part of a broader legislative framework that includes:

- the reporting obligations in the *Modern Slavery Act*, which currently doesn't provide any fines or other penalties for non-reporting or deceptive reporting; and
- the offences in Divisions 270 and 271 of the *Criminal Code*.

The Discussion Paper also refers to the introduction of civil penalties under the Modern Slavery Act, and further guidance for business.

As the Australian Law Reform Commission has noted, a failure to prevent offences can be an important addition to a "smart mix" looking to regulate transnational crime and corporate human rights impacts. However, this mix needs to include multiple interacting components, as set out in the diagram below.¹

Figure 10-1: Smart Regulatory Mix for transnational crime



¹ ARLC, Corporate Criminal Responsibility, ALRC Report 136 April 2020, page 470.

As the ARLC noted, changes to corporate behaviour are not achieved simply by adding more corporate criminal offences. After all, there at least 3100 of these corporate criminal offences scattered throughout Commonwealth law and very few are ever used.² Rather, what is needed is a regulatory *system* that pulls on a carefully calibrated set of interventions, designed to work together in a way that changes the behaviour of companies.

For transnational crime, the mix described by the ARLC included a civil regime, anchored around a mandatory due diligence regime, and backed up disclosure requirements. For instance, companies that fail to undertake due diligence, but in circumstances where no harm has been identified, might attract a civil penalty. In contrast, failure to prevent criminal offences would only become relevant in those relatively rare situations where an underlying offence has occurred, *and* it appears that the company involved has somehow benefited from this underlying offence, *and* the corporation failed to take reasonable measures to prevent such conduct by its associates. In these relatively rare situations, companies will be at risk of criminal responsibility.³

When the "failure to prevent" provision described in the Attorney General's Department Discussion Paper is considered as part of a wider regulatory system, it becomes clear that critical components of this system are currently missing, namely:

1. A civil regime imposing a mandatory due diligence obligation. This requires companies to undertake due diligence, in line with international standards, and then sets the standard for what constitutes the "reasonable steps" defence.
2. A stronger statutory disclosure regime (ie: the Modern Slavery Act). This needs to include civil penalties (eg.: for one-off instances of non-reporting) but also criminal penalties for deliberate wrongdoing. The current reporting regime needs to be better aligned with the UNGPs, particularly Principles 20 and 21 which focus on tracking effectiveness and external communication.

This is the package that the ALRC described, that may lead to corporate behaviour change. Without addressing the "missing middle" of this mix, there is a risk that simply introducing the "failing to prevent" offence will result in a lopsided system that fails to achieve the change required. Specifically, it seems like that the existing reporting obligations in the *Modern Slavery Act* will be too vague and weak to shift the behaviour of the worst offenders, and the proposed failure to prevent offence will be so severe as to discourage companies from continuing existing due diligence efforts and risk disclosures, for fear this may expose them to liability.

Recommendation: The "failure to prevent" offence needs to sit alongside law reform to:

² As above, ARLC, page 34-35.

³ ARLC, Corporate Criminal Responsibility, 202, pages 480-481.

- **Impose a legal requirement on companies to undertake human rights due diligence**, in line with the UN Guiding Principles on Business and Human Rights (UNGPs). Professor Surya Deva has outlined options for this in his Discussion Paper of 2025.⁴
- **Strengthen the existing Modern Slavery Act disclosure regime by ensuring it clearly aligns to the UNGPs and adding in both civil and criminal penalties**, reflecting different types of conduct. For example, *criminal penalties* for individuals are appropriate in the case of deliberate wrongdoing, such as officers making false and misleading statements (eg: see s490.1 of the Criminal Code). While civil penalties may be appropriate for one-off instances of simple omissions like failing to report, repeated failures should attract more serious sanction.

In terms of the elements of the proposed "failure to prevent" offence:

- **Underlying criminal conduct:** As shown by the low numbers of prosecutions in Australia, it is incredibly difficult to prove any of the offences in Divisions 270 and 271 to a criminal standard (even if a conviction is not required). Accordingly, there is no reason to artificially exclude some offences from these Divisions, such as deceptive recruitment. I recommend including all offences from these Divisions, and give prosecutors more latitude to select the most appropriate offence, reflecting the specifics of the case, with questions about whether a prosecution is in the public interest left to the CDPP in line with the Commonwealth Prosecution Policy.
- **Connection to a corporation's sourced product or service:** The UNGPs refer to "value chains", rather than supply chains.
- **Nexus between the offence and the corporation:** As a matter of principle, it makes sense for the legislation to reflect the "cause or contribute" approach outlined in the UNGPs. Of the four options presented in the Discussion Paper on page 12, option 2 strikes a balance between clarity and culpability. That is, *"the corporations act or omission was an important or substantial contributing factor in the exploitation occurring, even if it was not the sole or predominant cause"*.
- **Fault element:** Given the complexity of the situations that this offence will likely relate to, it makes sense to apply absolute liability to the relevant physical elements of offence.
- **Defence:** For this defence to be sufficiently clear and understood such that business can operationalise it, the parameters of this defence need to be clear and knowable. The "reasonable steps" *defence* should be clearly linked to the mandatory due diligence *obligation* (yet to be established) on companies to undertake human rights due diligence in line with the UNGPs.

⁴ Surya Deva, Macquarie Law School, Discussion Paper: Options for Action: Building an Effective Response to Modern Slavery in Australia, December 2025.

- **Guidance:** Ministerial Guidance on what constitutes "reasonable steps" is insufficient given the seriousness of the offence in question, the importance of the defence, and the need for companies to be clear on how to operationalise these expectations. I strongly recommend that there is a need for a regulatory scheme that requires in scope companies to undertake human rights due diligence, as set out in the UNGPs, overseen by a properly resourced and mandated regulator. The presumption should be that if a company has undertaken human rights due diligence consistent with the UNGPs, then it should be presumed to have taken the reasonable steps.

Question 2: Impact: What measures could be adopted to minimise costs for affected corporations, while ensuring the offence remains effective in achieving its objective?

Large Australian companies operate within a global marketplace. In line with shifting investor and consumer expectations, many are already aligning their practices with the UN Guiding Principles on Business and Human Rights ("UNGPs").

Globally, and in the Asia-Pacific region, the expectations set out in the UNGPs instruments are rapidly being translated into national laws. The EU Corporate Sustainability Due Diligence Directive ("CSDDD") will require in-scope large businesses to integrate human rights and environmental due diligence into their operations and chain of activities. EU Member States must transpose the CSDDD into their respective national legal systems by 26 July 2028, with company compliance beginning 26 July 2029, and public reporting from 1 January 2030. It is estimated that these requirements will apply to at least 2900 companies, with huge global footprints.⁵

In addition, the EU Forced Labour Regulation lays down rules prohibiting economic operators from placing and making available on the European Union market or exporting from the Union Market products made with forced labour, with a view to improving the functioning of the internal market, while contributing to the fight against forced labour. Unlike the CSDDD, the Forced Labour Regulation applies to companies of any size.

These obligations will be cascaded through supplier relationships in our region, not only through the companies that are within scope of the CSDDD but also by bilateral trade agreements, including many between EU and countries in our region. For example, the EU-Malaysia Trade Agreement, and the EU-Philippines Trade Agreement aims to include "robust and enforceable disciplines on trade and sustainable development [in line with supporting] high levels of protection for workers' rights, environmental standards, and ambitious climate goals. Law reform is underway on these issues in countries including South Korea, Japan, Thailand and Indonesia.

⁵ David Ollivier de Leth, "Updated Datahub shows 1,400 corporate groups covered by weakened CSDDD", 14 April 2026, available at: <https://www.somo.nl/updated-datahub-shows-1400-corporate-groups-covered-by-weakened-csddd/>

It is in Australia's economic interests to ensure its response to modern slavery risk is aligned with broader global efforts to achieve responsible business practices. This will reduce the cost of compliance for companies and increase our ability to trade on a competitive footing in key markets. Indeed, the Australian Government has established a National Contact Point under the OECD Guidance on Multinational Enterprises, which is a key part of this international system.

Recommendation: Ensure Australia's law reform efforts align with the UNGPs, thereby ensuring efficiency and minimising costs, while also ensuring effectiveness.

Question 3: Support: What support might corporations need to effectively understand and comply with the proposed offence and defence, including to help business more broadly take action to combat modern slavery?

The UNGPs provide the benchmark for what is expected of companies in this regard. As a touchstone that is already applied globally, by integrating this standard into our law, Australian businesses will be able to draw on and benefit from an enormous range of guidance and material, including that published through the OECD.

Ministerial guidance on the meaning of reasonable steps is not sufficient to meet the needs of corporations to understand and comply with the proposed offence and defence. Rather, there is a need for a regulatory regime to be introduced, requiring mandatory human rights due diligence, overseen by a regulator. They would then be the organisation mandated to provide further locally relevant soft guidance on applying the hard law.

The NSW Modern Slavery Act obligation, which in effect includes a mandatory due diligence regime for public buyers, is already supported by a suite of relevant resources. These include the *Guidance on Reasonable Steps*, which seek to operationalise what “reasonable steps” means in the NSW context, and the Inherent Risk Identification Tool, which signals which goods and services are considered high risk, such that heightened due diligence is required.⁶

Recommendation: By aligning any law reform on this topic with the UNGPs, Australian businesses stand to benefit from being able to tap into a wealth of pre-existing material on how to operationalise the UNGPs. The Commonwealth will need to develop resources equivalent to those developed in NSW, for broader application.

Thank you for considering this submission. I'd be delighted to discuss further or answer any questions you may have.

Fiona David

⁶ Office of the Anti-slavery Commissioner, *Guidance on Reasonable Steps: NSW Anti-slavery Commissioner's Guidance on Reasonable Steps to Manage Modern Slavery Risks in Operations and Supply-Chains*, version 1.0, December 2023, available at: <https://dcj.nsw.gov.au/documents/legal-and-justice/anti-slavery-commissioner/due-diligence-and-reporting/guidance-on-reasonable-steps.pdf>. See also, GRS Announcement: Release of Inherent Risk Identification Tool V2.0 May 2025, <https://dcj.nsw.gov.au/documents/legal-and-justice/anti-slavery-commissioner/grs-announcement-release-of-inherent-risk-identification-tool-irit-version-2.0.pdf>.

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