Australia’s New ‘Modern Slavery Act’ – virtue signaling or a real attempt to stamp out Australia’s involvement in ‘modern slavery’?

In late 2018 the Australian Parliament introduced the Modern Slavery Act 2018 (Cth) (Act). The purpose of the Act was to try to ensure that Australian corporations whose annual revenue exceeds $100 million (or foreign firms operating in Australia with the same revenue) do not assist in anyway the global ‘modern slave’ trade. The Act requires ‘around 3000 entities based or operating in Australia to prepare annual statements on potential modern slavery risks in their operations and supply chains’.

The Act is in response to the global phenomenon that, unbelievably, is still rampant across much of the globe. Even in this day and age it is difficult to believe that slaves are still a feature of the modern landscape in various insidious ways. But it is not just corporations that might be (inadvertently) involved with slavery—modern slavery is said to exist also with those who are subjected to forced marriages. For all we know, you and I could in some ways be inextricably linked to the practice due to the products we buy and the foods we consume. For these reasons it is very important that Australia’s position in relation to this practice is more than mere ‘virtue signaling’ but is a real attempt at combating slavery.

What is ‘modern slavery’?

There are quite a number of international legal instruments created since the abolition of slavery in the 19th century that attempt to define and prohibit the practice of ‘modern slavery’. According to article 1 of the International Convention to Suppress the Slave Trade and Slavery (signed at Geneva, 25 September 1926) (ICSSTS), slavery connotes a form of ownership of one person over that of another. Article 1 goes on to say that the slave trade includes,

all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

If you were glean from this definition that a big part of slavery presumes ownership over a person then you’d be correct. Slavery is everything to do with property rights – that is, treating human beings as property, the same way we would treat ownership over domestic animals. For most of us such an assumption runs counterintuitive, even somewhat grotesque, to think that one group of people are able to own another group of people much the same way as we can own a dog or a cat.

Other international conventions further strengthened the international community’s requirement to form policies and domestic laws to counteract the effects of global slavery and slave-like conduct. In response, the Australian Government initiated the *National Action Plan to Combat Human Trafficking and Slavery* in 2014. The Plan was centred around four pillars:

* Prevention and deterrence;
* Detection and investigation;
* Prosecution and compliance; and
* Victim support and protection.

Another feature was the introduction of several slavery-like practices and human trafficking offences into the Commonwealth Criminal Code 1995 (ss 270 and 271).

How large is the problem of ‘modern slavery’?

The size of ‘modern slavery’ is somewhat difficult to quantify. However, various organisations put the global figure at around 40.3 million people who are subjected to some form of slavery (see, eg, the International Labour Organization and Walk Free Foundation). Of that number, it is estimated that around 24.9 million people are in some form of forced labour and 15.4 million are in forced marriage. Although Australia is believed to have a very low number of people subjected to slavery (around 0.6 persons per 1000 – approximately 15,000 people), what is of greater concern for Australia and other developed nations is not what is occurring within the borders of the nation, but what is occurring outside its territorial borders within the product supply chains that service Australian firms and the Australian market. While the Australian Government cannot regulate overseas firms it can regulate Australian firms and the *Modern Slavery Act* provides an excellent opportunity to do so. The Act recognises that there is a risk that Australian corporations in operating in a globalized and interconnected world are, in some ways, aiding and abetting slavery and the slave trade in ways that are not necessarily obvious in the corporation. The industries that seem most at risk include agriculture (particularly fisheries), construction, electronics, fashion, hospitality, and interestingly, higher education.

In developing the Australian law, the Australian Government looked to the UK’s *Modern Slavery Act 2015* (UK Act) which was the first jurisdiction to introduce a national modern slavery reporting requirement. The UK Act requires corporations whose revenue exceeds approximately $AU63 million per annum to participate in mandatory reporting in relation to slavery. Several years after the UK Act was introduced, the Australian state of NSW followed suit and introduced the NSW equivalent of the UK Act, called the *Modern Slavery Act 2018* (NSW). The NSW scheme is quite progressive when compared to even the UK model. The NSW Act contains mandatory reporting thresholds of $AU50 million annual revenue for any corporations that have employees in NSW. Affected entities must report annual modern slavery statements that outline what steps they have taken to ensure that slavery is not part of its supply chains. One aspect of the NSW legislation that has received praise is that it contains penalty provisions (10, 000 penalty units = approximately $AU1.1 million) for non-compliance.

*Modern Slavery Act 2018* (Cth) – a mere ‘virtue signal’ or something more?

The Commonwealth’s new *Modern Slavery Act* was (and still is) a cause of great concern for both sides of the political spectrum and business in general. The arguments are binary in nature. Some argue that the legislation does not go far enough and others (particularly business) assert that the revenue threshold at $AU100 million are too low. The reality is that the Commonwealth Act is far more lenient on corporations than the NSW and UK Acts. For instance the reporting threshold for the Cth Act is currently set at $AU100 million per annum revenue which is substantially below that of the UK and NSW schemes. In addition, there are currently no penalty provisions built into the Commonwelath Act for non-compliance. Another criticism of the Act is that there is currently no Independent Anti-Slavery Commissioner to oversee the implementation of the Act and compliance thereof. So, what happens if an Australian firm identifies that slavery is in its supply chain – what then? The Commonwealth Act is unclear whether the Australian firm must cease trading with that firm or whether reporting the information is merely “FYI”. Not ideal.

The private sector has made several complaints against the legislation stating that compliance costs for those corporations subject to mandatory reporting (estimated at around 3000 firms) will cost approximately $AU21,950 per annum, per firm, at a minimum. Attempts were made by various interest groups (eg the Australian Chamber of Commerce and Industry) to increase the threshold from $AU100 million to a higher amount so as to capture only the top 100-200 firms. This attempt was made on the basis that reporting would be too onerous on many firms. It seems, however, that the current threshold of $100 million receives the support of various other industry groups such as the Business Council of Australia, the Australian Industry Group and the Australian Retailers Association. Various ‘civil society’ groups that support the threshold amount are Walk Free Foundation, the Salvation Army and various church groups. There are others, such as Greens, who have come out and attacked the threshold on the basis that they do not believe that the current threshold would support meaningful change in relation to slavery.

Although it is quite early days at the moment, it could be argued that one of the biggest issues in relation to Act is the higher rate of revenue threshold reporting. Although the Act would capture over 3000 corporations, it is arguable that an arbitrary amount of revenue is somewhat illogical. What about the corporations that are regarded as small to medium that are engaged in international trade that would not be compelled to report? Is it that these entities are deemed less likely to engage with slavery? Or is it an acknowledgement from the Government that it must impose arbitrary monetary limits because it is unable to cope with all the reporting and administrative operations that such a reporting scheme requires? Or, is it a situation whereby the Government is torn between the need to eradicate global slavery on the one hand (and thereby fulfilling its international legal obligations) and the imperative to ensure that Australian businesses are not stifled too much, on the other? Truth be told, it is probably because of all of those reasons.

Further criticisms regarding the lack of enforcement are also of concern for many. Even the lack of a requirement to publish lists of non-compliant entities together with other deficiencies point to the argument that the legislation is effectively a compromise that seems to raise more concerns than it addresses. In this regard, the Australian Modern Slavery Act could be said to be a ‘virtue signal’—aka ‘lip service’, or a signal that shows to the world that Australia is, to some extent, addressing the global scourge of slavery, but only so far as it does not affect the majority of Australian businesses. Some have suggested that in placing the legislative settings it has, the Government is engaging in classic sovereignty politics by putting Australian corporate interests ahead of human rights protections. On the flipside, of course, equally plausible arguments could be made that protecting Australian jobs and industry is precisely what the Government *should* be doing.

In any event, the Act will be reviewed three years from when it commenced in 2019 and perhaps this will provide an opportunity to better understand whether it should be amended or left as is. One thing is for sure whether one is critical of the Act or not, the introduction of such legislation is a major step in the fight against slavery.