



# Modern Slavery in Company Operation and Supply Chains:

Mandatory transparency, mandatory due  
diligence and public procurement due diligence

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# FOREWORD

**Sharan Burrow, General Secretary  
International Trade Union Confederation**

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Modern slavery is everywhere. From the construction of FIFA World Cup stadiums in Qatar to the cotton farms of Uzbekistan, from cattle ranches in Paraguay to fisheries in Thailand and the Philippines to agriculture in Italy, from sweatshops in Brazil and Argentina to berry pickers in Sweden. The production chains of clothes, food and services consumed globally are tainted with forced labour.

The world is three times richer in terms of global GDP than it was 30 years ago yet we have historic levels of inequality. Eighty percent of the world's people say that the minimum wage is not enough to live on, work is more insecure with a predominance of short term contracts or other non-standard forms of employment and both informal work and modern slavery are not only growing but increasingly prevalent in the supply chains of large corporations.

In the global private economy, the ILO calculates forced labour generates \$150 billion each year but it could be even higher. In all countries, unscrupulous employers and recruiters are increasingly exploiting gaps in international labour and migration law and enforcement. After drugs and arms, human trafficking is now the world's third biggest crime business.

Cleaning it up is possible.

No corporation or investor would blindly sign a contract, enter into a merger or risk large sums of capital without doing due diligence. Assessing risk is a corner stone of successful business practice and corporations expect the rule of law to protect their interests.

Yet when it comes to the very people companies rely on to produce their profits, few respect the rights of or take responsibility for decent work for workers. Up to 94 percent of the global workforce of 50 major corporations is a hidden workforce because responsibility has been simply outsourced many times over.

Due diligence and transparency is the key to ending modern slavery in supply chains. Where corporations take responsibility for due diligence and consequently make their supply chains transparent then it is possible to establish grievance procedures that can facilitate remedy of any violations of rights at work from forced labour to paying below the minimum wage.

The *Business Human Rights Resource Centre report, Modern Slavery in Company Operations and Supply Chains: Mandatory Transparency, Mandatory Due Diligence, and Public Procurement Due Diligence*, commissioned by the International Trade Union Confederation with support from Friedrich Ebert Stiftung gives an insight into the growing body of law and practice from international standards to emerging national legislation.

The critical ingredient to end slavery is political will. G20 Labour Ministers accept that the global economy cannot be built on oppression and rights violations, now we need government leaders to stare down corporate greed. Everybody's sons and daughters must be afforded the same rights, wages and decent work we want for our own.



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# FOREWORD

**Phil Bloomer, Executive Director  
Business and Human Rights Resource Centre**

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We live in disturbing times. Public trust in global markets is draining away. The vacuum is being filled by alternatives, including chauvinist nationalisms.

Mark Carney, Governor of the Bank of England, recently said “Citizens in rich and poorer economies are facing heightened uncertainty and stalled or declining prosperity, and lamenting a loss of control.....Rather than a new golden era, globalisation is associated with low wages, insecure employment, stateless corporations and striking inequalities.”

Those conditions are epitomised by the prevalence of modern slavery in almost every global supply chain. The rise in human trafficking, forced labour, and abusive child labour is a fundamental challenge to the reputation of governments and business. Their elimination is an essential first step if global markets are to deliver shared prosperity and shared security, and recover credibility with electorates.

A welcome unity may be emerging between diverse governments that they must come together to take action. The G20 leaders in June 2017 committed to “eliminate child labour by 2025, human trafficking and all forms of modern slavery” and emphasised that “fair and decent wages as well as social dialogue are other key components of sustainable and inclusive global supply chains.”

No reputable company wants the scourge of forced labour in its supply chain. No reputable government wants criminals trafficking workers into inhuman conditions in its territory. All working people want lives of dignity, respect and freedom. And yet the problem of modern slavery is growing. This paper demonstrates that this is far from inevitable. The paper highlights the successful, but disparate, initiatives by governments. It shows that, if brought together, and applied internationally, these initiatives would form a powerful global force to combat modern slavery.

The paper sets out a clear pathway for governments to deliver harmonised legislation, regulation, and corporate incentives. Together they would provide an international level playing field for business of mandatory transparency, mandatory due diligence, and public procurement incentives.

Responsible governments and businesses are coming to realise they must now act to humanise markets, or expect further public disenchantment. Acting on modern slavery is an essential start to making markets work for all.

# EXECUTIVE SUMMARY

There is no exact data on the prevalence of modern slavery, a term used to encompass exploitative practices including forced labour, bonded labour, human trafficking and child labour. [The 2017 Global Estimates of Modern Slavery and Child Labour](#) found in the past five years, 89 million people experienced some form of modern slavery. Of these, 82.7 million were victims of forced labour, including trafficking, largely in the private economy. Modern slavery is pervasive in corporate supply chains in all regions of the world and amounts to an estimated \$150 billion of illicit profits a year. Global conditions exist that help create a workforce that is vulnerable to these exploitative practices: weak legal frameworks that fail to protect and uphold labour standards; business operations driven by the search for ever-lower labour costs; and the increasingly complex nature of supply chains.

This paper sets out what leading governments are already doing to insist global business does more to eradicate modern slavery. It draws from this experience to set out how these uncoordinated actions could become a robust, and harmonised international standard for national legislations. Acting in concert, governments would have far greater impact on modern slavery and workers' rights, and raise the floor of minimum corporate behaviour. Acting together, governments would also avoid a 'spaghetti soup' of incoherent national legislations, and instead create the international predictability that global business seeks.

The fight to end modern slavery in all its forms has become a diverse global movement with an increasing number of successes. International and regional organisations have played an important role in setting standards. The [UN 2030 Agenda for Sustainable Development](#) features 17 Sustainable Development Goals (SDGs), three of which relate to various forms of modern slavery: SDG 5.2<sup>1</sup> SDG 8.7<sup>2</sup> and SDG 16.2<sup>3</sup>. After the adoption of the SDGs, Alliance 8.7 was formed, a global partnership committed to assist UN member

states to achieve SDG 8.7. The ILO functions as the secretariat.

The [ILO Protocol to the Forced Labour Convention of 1930 \(No. 29\)](#) offers governments specific guidance on measures to be taken against human trafficking for the purposes of forced or compulsory labour. Ratifying the Protocol will bind states under international law to consult with employers and workers to develop national laws or regulations to prevent and eliminate forced labour, provide victims with protection and access to appropriate and effective remedies and sanction perpetrators. In 2014, ITUC Congress in Berlin confirmed the elimination of modern slavery as one of the three '[frontline](#)' campaigns of the global trade union movement and promoted [broad ratification](#) of the ILO Protocol.<sup>4</sup>

The [ILO Forced Labour \(Supplementary Measures\) Recommendation, 2014 \(No. 203\)](#), a supplement to the ILO Protocol, encourages states to ensure that companies address the risk of forced labour being used in their operations or in operations to which they are directly linked (for example, by their suppliers). The [ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy](#), (MNE Declaration), like the ILO Protocol, states governments should develop national policies and plans of action to prevent and eliminate forced and child labour in consultation with employers' and workers' organizations, and is also aimed at both multi-nationals and national companies.

The Organization for Security and Co-operation in Europe's (OSCE) established the Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings. This Office is developing flexible model guidelines for governments of OSCE States on preventing trafficking in human beings in supply chains, with a focus on government procurement and transparency practices. The guidelines promote the harmonization of policies to prevent human trafficking in supply chains, leveraging efforts already underway. It is intended that these guidelines serve as the basis for a model law to be taken up at the

1 It targets the elimination of all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation

2 It has as a target to take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, and to end child labour in all its forms by 2025

3 It has as a target to end trafficking of children

4 Eighteen countries have ratified the Protocol as of June 2017 – the goal is to have 50 ratifications by the end of 2018: [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:3174672](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672).

global level through the Alliance 8.7.

Most recently, the G20 Leader's Declaration in June 2017 states: "We will take immediate and effective measures to eliminate child labour by 2025, forced labour, human trafficking and all forms of modern slavery."

Indeed, new legislation and public policy approaches to eradicate modern slavery in business operations and supply chains are gaining momentum in a number of countries, including in the US, the UK, the Netherlands, France and Australia. Trade unions, civil society organizations and leading companies are encouraging governments to build on this early momentum. The danger is that this uncoordinated approach could lead to a collection of laws with inconsistent requirements on companies across jurisdictions. Furthermore, laws are currently divergent on the issues of access to remedy for victims and the ability to pursue legal action against corporate perpetrators.

The ILO Protocol calls on member states to cooperate with each other to ensure the prevention and elimination of all forms of forced labour. Governments should adopt national laws that comply with the provisions set forth in the Protocol, including access to remedy, and to cooperate and coordinate efforts to set common minimum and consistent requirements for companies across jurisdictions. The ILO Protocol and the MNE Declaration provide a robust framework for states adopting legislation that requires companies to ensure that their supply chain is free from modern slavery.

This report reviews existing or emerging legislation that addresses modern slavery in companies' operations and supply chains. It focuses on three related areas of legislation: mandatory transparency; mandatory due diligence; and public procurement.

## Mandatory Transparency

Mandatory transparency legislation requires companies to disclose what actions they are taking to address modern slavery in their operations and supply chains. The two leading pieces of mandatory transparency legislation, so far, are the California Transparency in Supply Chains Act and the UK Modern Slavery Act. Both require companies above certain global revenues to publicly disclose the actions, if any, they are taking to address modern slavery in their operations and supply chains. Both pieces of legislation seek to increase transparency around these issues in the hope that pressure from consumers, investors and advocates will encourage companies to take more ro-

bust action. A criticism of both legislations is that they do not require companies to take any steps to remedy risks that have been identified. In fact, companies can comply by simply stating they have taken no steps to address modern slavery in their operations and supply chains.

## Mandatory Due Diligence

A range of existing international standards emphasise the role of due diligence in identifying and preventing risks to human rights, including the risk of modern slavery. The UNGPs state companies should have in place 'a human rights due diligence process to identify, prevent, mitigate and account for how a company addresses their impacts on human rights'.<sup>5</sup> Article 2(e) of the ILO Protocol calls on member states to take measures 'supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour.' Mandatory due diligence laws put the onus on companies to demonstrate that they are taking all necessary measures to identify, prevent and mitigate incidences of modern slavery in their operations and supply chains. Some laws also include provisions that allow civil and criminal proceedings to be filed against companies that fail to carry out the required due diligence.

The French Duty of Vigilance Law, for example, requires companies of a certain size to have in place due diligence plans identify and mitigate the occurrence of violations of human rights and fundamental freedoms. The French law specifies the content of the due diligence plan and requires companies must publish them annually. The Dutch Child Labour Due Diligence Law is more targeted than the French law in that it requires companies to examine whether there is a reasonable suspicion that the goods or services have been produced with the use of child labour. If so, the company must develop and carry out an action plan to combat the use of child labour. The company must issue a due diligence statement on the investigation and plan of action. The US Trade Facilitation and Trade Enforcement Act requires companies importing to conduct supply chain due diligence to prove their products were not mined, produced or manufactured with forced labour.

Pressure is also mounting on European governments to develop EU-wide legislation on mandatory due diligence. In 2015, members of the European Parliament adopted a motion calling for a resolution on mandatory human rights due diligence for companies. In 2016,

<sup>5</sup> UN Guiding Principles on business and human rights, principle 15(b): [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

eight national parliaments launched a ‘green card’<sup>6</sup> initiative at the EU level calling for a human rights duty of care towards individuals and communities from EU-based companies whose human rights and local environment are affected by their activities.

### Public Procurement

Given the scale of public spending in the global economy, public procurement laws can play an important role in the prohibition of modern slavery. Public procurement globally accounts for €1000 billion (approximately £910 billion) per year. The UK government awards **£45 billion** (representing approximately 3% of the UK’s GDP) worth of central government contracts to private firms each year, some of which operate in high-risk sectors. The labour clauses to be inserted in public contracts according to Article 2(1) [ILO Convention concerning Labour Clauses in Public Contracts of 1949 \(No. 94\)](#) impose on the private party a contractual obligation to ensure equal treatment to its workers to those doing similar work in the same type of industry.

Some countries have succeeded in integrating modern slavery into public procurement practices, such as the US with the Federal Acquisition Regulation which prohibits the government from awarding a contract unless the company certifies that they will not sell a product suspected of being produced with forced or child labour, or that they have made a good-faith effort to determine whether forced or child labour was used. A recent amendment to the regulation requires government contractors to certify that they and their subcontractors are not engaged in human trafficking activities.

At the EU level, the 2014 Directive on Procurement the Directive requires member states to adopt measures to ensure that, in the performance of public contracts, suppliers comply with applicable obligations in the fields of environmental, social, and labour law established by, among others, international labour law provisions such as the ILO Core Conventions. The UK Public Contracts Regulations, which implement the EU Procurement Directive, excludes a bidder from further participation in procurement if it has been found guilty of any offense under the MSA.

### Model modern slavery legislation

In 2014, governments overwhelmingly supported the adoption of a new ILO Protocol to fight modern slavery. The ILO Protocol and MNE declaration, together with the UNGPs and the OECD Guidelines, provide government with clear international standards to address modern slavery in corporate operations and supply chains. This global momentum is also a chance for trade unions, broader civil society, and responsible business to call on governments to deliver on their international commitments. Governments should now ratify the ILO Protocol and develop strong national action plans to eliminate forced labour in consultation with social partners and other governments. The result should be the adoption of national legislation that incorporates mandatory transparency, mandatory due diligence and public procurement provisions in harmonised national legislation across key markets. Legislation should also provide victims with access to remedy and rehabilitation to help end exploitation and abuse. This concerted action will mutually reinforce governments’ drive to eliminate forced labour, empower workers to act, protect victims, and give business the common and predictable regulatory environments they seek.

### Process for Development of Provisions:

Learning lessons from the regulatory experience to combat modern slavery so far, there is a clear process and structure for effective action which builds on successful initiatives so far.

Governments can:

- *Create effective measures through consultation with key actors:*  
Consultation with employers and workers, as well as engagement with trade unions and civil society will ensure development of effective government measures to combat modern slavery.
- *Cooperate and coordinate with international counterparts:*  
Cooperation and exchange of information between and among governments’ representatives in combating modern slavery is essential given its global and cross-border dimensions.
- *Appoint national focal points:*

The MNE Declaration encourages governments, employers and workers to appoint national focal points on a tripartite basis to promote the

<sup>6</sup> The “green card” is a form of enhanced political dialogue through which EU national parliaments can jointly propose to the European Commission new legislative or non-legislative initiatives, or changes to existing legislation.



use of the Declaration in the national context.

- *Provide appropriate guidance:*

Governments have the responsibility to give businesses clear guidance on how to comply with national laws that establish obligations for companies to eliminate modern slavery in their operations and supply chains.

*Model public procurement provisions:*

- Mandatory due diligence reporting obligations for relevant public bodies;
- Inclusion of modern slavery provisions in social clauses of public procurement;
- Include mandatory exclusion provisions for certain suppliers.

**Content of Provisions to Combat Modern Slavery:**

The regulatory provisions which model legislation would include are:

*Model mandatory transparency provisions:*

- Disclosure of instances of modern slavery in operations and supply chains;
- Application to large and medium-sized companies above a certain revenue threshold;
- Have extra-territorial reach regardless of where headquarters is located;
- Require appropriate-level approval and sign-off and prominent disclosure of the statement on the company’s website;
- Require annual statements;
- Provide monitoring and enforcement mechanisms and impose sanctions where appropriate;
- Provide clear official guidance prior to the law taking effect.

*Model mandatory due diligence provisions:*

- Refer to the human rights due diligence standards set forth in the ILO Protocol, the UNGPs and the OECD Guidelines;
- Require large companies to publish an effective due diligence plan;
- Provide for corporate liability where appropriate;
- Allow individuals, trade unions and NGOs to file complaints in case of company non-compliance;
- Apply mandatory due diligence to companies’ activities abroad, sub-contractors and suppliers;
- Seizure of goods if a company fails to demonstrate due diligence from high-risk regions;
- Enable victims of modern slavery to access civil and criminal remedy.

# I. INTRODUCTION

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The term modern slavery encompasses various forms of severe human rights abuses, including human trafficking, slavery, servitude, forced and bonded labour, and child labour. The principle that no one shall be held in slavery is embedded in international human rights law.<sup>7</sup> Slavery, forced labour, and human trafficking are also criminal offences under the national laws of most countries. The [Sustainable Development Goal 8](#) commits the international community to ‘take immediate and effective measures to eradicate forced labour, end modern day slavery and human trafficking’. The 2014 ILO Protocol to the Forced Labour Convention is now the new international legal standard on modern slavery and offers governments guidance on effective measures for its elimination. [G20 Leaders](#) have also recently committed ‘to take immediate and effective measures to eliminate child labour by 2025, forced labour, human trafficking and all forms of modern slavery.’

States have obligations under international law to respect, protect and fulfil human rights, including the right to be free from slavery. States’ duties include the obligation to protect people from violations by others, including business enterprises. Global standards such as the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) and the [OECD Guidelines for Multinational Enterprises](#) (OECD Guidelines) set up expectations for businesses to respect all internationally recognised human rights, including rights enshrined in the [ILO Declaration on Fundamental Principles and Rights at Work](#). The UNGPs reinforce the need for states to enact national laws that effectively protect against business involvement in modern slavery.

The UK, the US, European countries and Australia have acted on their duty to protect by adopting or proposing legislation to address modern slavery in business operations and supply chains. This legislation falls into three categories: 1) mandatory transparency 2) mandatory due diligence and 3) public procurement.

The next sections review and offer recommendations on improving these three areas of law. The report proposes model modern slavery legislation based on the stronger elements of the various existing and proposed national laws, within the framework of the ILO Protocol and Recommendation, the MNE Declaration and other global standards.

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<sup>7</sup> This includes the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights. The 1926 Convention to Suppress the Slave Trade and Slavery and the 1930 ILO Forced Labour Convention confirmed the international community’s commitment to abolish all forms of slavery and to suppress the use of forced or compulsory labour. In 2014, the ILO adopted the [Protocol to the Forced Labour Convention](#): [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:3174672](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_INSTRUMENT_ID:3174672), setting out new obligations to prevent forced labour, to protect victims, and to provide access to remedy

## 2. MANDATORY TRANSPARENCY

### Key information

Mandatory transparency allows consumers, employees and investors to know what steps a company is taking to tackle modern slavery in its operations and supply chains. Under the California Transparency in Supply Chain Act of 2010 and the UK Modern Slavery Act of 2015, certain businesses are required to publicly disclose their actions on modern slavery.

This chapter compares the models of mandatory transparency required of companies under the [California Transparency in Supply Chains Act](#) (California Act), and the [UK Modern Slavery Act](#) (MSA). It also discusses the proposed legislation being considered by Australia.

In 2010, Senate Bill 657, now the California Act, was signed into law. The Act went into effect on 1 January 2012 and applies to all retailers and manufacturers with an annual global revenue of more than US\$100 million that 'do business' in California. The Act requires these businesses to disclose on their websites any actions they are taking to 'eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.' Its purpose is 'to educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, to improve the lives of victims of slavery and human trafficking.'

The US federal bill, [Business Transparency in Trafficking and Slavery Act](#) (HR 3226), would require that all business (not just retailers and manufacturers) with global receipts in excess of US\$100 million submit an annual report to the Securities and Exchange Commission describing the steps taken to assess and address slavery within their supply chains. The bill has been referred to the House of Representatives Committee on Financial Services in 2015 but has not moved forward in the legislative process.

The UK Modern Slavery Act was passed into law on 26 March 2015 and was based on the California Act. It is a criminal law that defines modern slavery as including the offences of 'slavery, servitude and forced or compulsory labour' and 'human trafficking.' Section 54 (Transparency in Supply Chains) of the MSA requires any commercial organisation, which supplies goods or services, carries on a business or part of a business in the UK, and whose annual turnover is £36 million or above, to produce a 'slavery and human trafficking statement' for each financial year. This statement should detail what companies are doing to 'ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business.'

In February 2017, the Australian Parliament's Joint Standing Committee on Foreign Affairs [established an inquiry into adopting a Modern Slavery Act in Australia](#). The Committee sought to identify international best practice to prevent modern slavery in domestic and global supply chains. In particular, it is examining provisions in the MSA that have proven effective in addressing modern slavery, and whether similar or improved measures should be introduced in Australia. On 16 August 2017, the Australian Government announced its intention to introduce legislation, and draft of which is anticipated to be brought forward in the first half of 2018.

### Impacted companies

Companies impacted by the California Act are selected based on their California State Tax Classification ('retail seller' or 'manufacturer').

The MSA affects a wider range of companies, in four ways: (i) it applies to all sectors, not just retail and manufacturing; (ii) it applies to both the sale of goods and the supply of services; (iii) the turnover threshold is lower (MSA £36 million v California Act \$100 million); and (iv) there is no minimum 'footprint' threshold for 'carrying out business'.

It is estimated that around 12,000 companies are covered by the MSA, whereas the California Transparency in Supply Chains Act with its \$100 million threshold covers only around 2,500 companies. This limits its effectiveness.

The proposed Australian legislation will apply to all entities having any part of their operations in Australia with a total annual revenue of AUD \$100 million (approximately £60 million). In its consultation paper, the government recognises that some entities below the threshold may also wish to comply with the reporting requirement and will allow these entities to 'opt in' to the reporting requirement.

### Compliance requirements

The California Act requires companies to publicly disclose a 'conspicuous and easily understood' document on their websites' homepage. The document should describe the extent of engagement towards eliminating human trafficking and slavery in their supply chains.

The MSA requires statements to: 1) be approved by the board; 2) be signed by a director; and 3) be accessible via a link that is prominently displayed on the homepage of the organisation's website.

The requirement of prominently publishing the statement on a company's website increases transparency: the statement can be easily accessed by anyone, including trade unions, workers, consumers, or investors. The requirement that the statement be approved and signed by top-level decision makers ensures senior level accountability, leadership and responsibility. A [report by ETI and Hult International Business School](#) found that a year after the MSA came into effect, twice as many CEOs and other senior executives reported to be actively involved

in addressing modern slavery as a result of the Act. This process provides an important check on the information contained in the statement. It also offers the opportunity for senior management to plan on the resources and expertise needed to ensure that the company's response is appropriate.

As with the UK reporting requirement, Modern Slavery Statements published by entities under the proposed Australian law must be approved at the equivalent of board level. Statements will also need to be signed by a director.

### Substance of disclosures and limitations

The California Act requires a company to disclose to 'what extent, if any,' it: 1) verifies its product supply chains to evaluate and address risks of human trafficking and slavery; 2) audits its suppliers to evaluate their compliance with company standards for human trafficking and slavery; 3) requires certifications from direct suppliers confirming that materials incorporated into the products comply with laws regarding human trafficking and slavery in the countries in which the suppliers operate; 4) maintains internal accountability through internal standards and procedures for employees and contractors that fail to meet company standards regarding human trafficking and slavery; and 5) trains company employees and management who have direct responsibility for supply chain management on human trafficking and slavery.

The MSA does not prescribe what the statement must include or how it should be structured, but it provides a non-exhaustive list of six issues that the statement 'may' cover: 1) the organisation's structure, its business and its supply chains; 2) its policies in relation to slavery and human trafficking; 3) its due diligence processes in relation to slavery and human trafficking in its business and supply chains; 4) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; 5) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators; and 6) the training and capacity building about slavery and human trafficking available to its staff.



Both laws also allow companies considerable freedom on what to include in a statement. Both the UK Home Office and the California Attorney General's guidance on reporting encourage clear, detailed and informative statements; however, neither law requires that companies report on the prevalence or known incidences of modern slavery in their operations or supply chains, nor do they include any positive obligation for a company to implement measures or introduce any policies or operational changes to ensure that their operations and supply chains are free from slavery. In fact, under both laws companies can comply by stating they have taken no steps to address the risk of modern slavery in any form in their business and supply chain. Transparency is strengthened substantially if governments require companies to report on risks identified, and their due diligence plans that address modern slavery risks in their operations and supply chains. Such a requirement would be in line with more progressive legislation on mandatory due diligence, such as the French Duty of Vigilance Law and the Dutch Child Labour Due Diligence Law (analysed in the next section), and the current first proposal from the Australian Government.

The Australian government is considering the risk to the business community of having to comply with inconsistent regulation across jurisdictions, and therefore, the Australian reporting requirement will require entities to report against substantially the same criteria set by the UK reporting requirement. In the UK, reporting against criteria is optional. Subject to feedback received through this consultation process, the Australian Government proposes that entities will be required to report against a consolidated set of four criteria. These four criteria cover all of the optional criteria set out in the UK and mean an entity's modern slavery statement must, at a minimum, include information about: 1) The entity's structure, its operations and its supply chains; 2) The modern slavery risks present in the entity's operations and supply chains; 3) The entity's policies and process to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff); and 4) The entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness. Notably, it is proposed that the definition of supply chains extend beyond first tier suppliers.

## Annual reporting

The California Act does not specify how often a company needs to update its statement. A company would be in compliance with the law just by posting a statement once and never revisiting it again.

The MSA requires companies to publish annual statements, and this is the proposed approach by the Australian government. The tactics of traffickers and exploiters are constantly evolving, which requires employers to be alert to new risks and develop new strategies. Annual reporting allows responsible companies to demonstrate their continued commitment, and for laggard companies to learn quickly from it. It also allows the broader modern slavery movement to identify trends and highlight progress, and challenges.

## Monitoring and Enforcement

The California Attorney General has exclusive authority to enforce the California Act and may file a civil action for injunctive relief. This means companies will not face a monetary penalty for failure to disclose, but that they will receive an order from the Attorney General to take specific action.

The California Act does not grant citizens a private right of action. Yet, several punitive class action lawsuits by consumers have been filed against several companies, including Costco, Hershey, Iams, Mars, and Nestlé based on their disclosure. Claimants alleged that in disclosures under the California Act and other corporate social responsibility statements, companies falsely represented that they forbid modern slavery in their supply chains, even though they sold products tainted by modern slavery. They claimed that such practices violate consumer protection and unfair competition statutes under California law and sought injunctive relief and monetary damages. Though these cases were dismissed, they raise questions regarding the scope, application and enforcement of the California Act. For example:

- whether consumers are allowed to pursue civil claims under the Act using California's unfair competition laws since the Act itself has no civil consumer enforcement provision, or;
- whether companies are protected from potential lawsuits brought under other laws and based on their supply chains disclosures if they are complying with the California Act.

Under the MSA, if a company fails to produce a slavery and human trafficking statement for a particular financial year the UK Secretary of State may seek an injunction through the High Court requiring the organisation to comply. If the company fails to comply with the injunction, it will be in contempt of a court order, which is punishable by an unlimited fine. To date, there have been no consumer cases brought against companies reporting under the MSA. Yet, the reasoning of the Californian Court that companies are protected by the 'safe harbour' doctrine may equally hold true for the MSA.

### Case summaries

On 9 December 2015, in *Barber v. Nestlé*, the Central District of California dismissed a claim that Nestlé was obliged to inform consumers that some proportion of its cat food products might include seafood sourced from Thai fishing ships that use forced labour. The court held that the California Act had created a 'safe harbour', under which companies are shielded from liability when they truthfully and accurately comply with the limited disclosure obligations that the law mandates: disclosure is only required by companies to the extent provided for in the California Act and no further.

In *Wirth v. Mars*, the court found no legal duty to disclose information regarding the likelihood of forced labour on product packaging. The court noted that the California Act 'does not actually require covered retailers to do any of the five things listed above: they must simply say on their websites whether or not they do them.'

The Australian consultation paper states that as in the UK, the Australian Government will not include punitive penalties for non-compliance. It will monitor general compliance with the reporting requirement and entities that do not comply with the reporting requirement may be subject to public criticism. The government is considering options for oversight of the reporting requirement, including the feasibility of and requirement for independent oversight. If implemented, any oversight mechanism could perform a number of functions, including: maintaining the central repository of statements, raising awareness about modern slavery risks, and/or providing a single point of contact for businesses seeking advice and assistance.

Governments should provide monitoring and enforcement mechanisms to encourage a high level of reporting and ultimately, due diligence by companies. Without statutory sanctions in place, companies, in particular non-public facing companies, may not feel the pressure to report, much less implement robust due diligence processes. Sanctions can be imposed where companies fail to produce a modern slavery statement, produce statements that fail to meet the minimum requirements of being signed and approved by the appropriate entities, and provide a link to the statement on the company website homepage, produce statements that lack mandatory information on due diligence practices, or report they have not taken any steps to address their modern slavery risks.

The UK Joint Committee on Human Rights recommended the UK government to propose legislation to make reporting on due diligence for all human rights compulsory for large businesses, with a monitoring mechanism and an enforcement procedure, and the strengthening of the UK National Contact Point.

A public list of companies required to comply would improve transparency and increase the level of compliance. Each year, the California Franchise Tax Board evaluates information from tax returns to determine which companies must comply with the California Act, and provides the list to the Attorney General. The UK government follows no such process. Neither the California Act nor the MSA requires their respective governments to make public the list of the companies subject to the law.

The June 2017 report of the UK Joint Committee on Human Rights identified a number of shortcomings in the MSA including that there is no central list of those companies that are required to comply, which is proving an obstacle to those who would monitor compliance. Examples of initiatives and projects that seek to ensure corporate compliance with the law are [KnowTheChain](#) which provides a search tool to locate disclosure statements under the California Act, and the [Modern Slavery Registry](#) operated by the Business & Human Rights Resource Centre which currently holds over 2,700 company statements prepared pursuant to the MSA.

It is critical for the effectiveness of a reporting provision, that the government publishes a list of all companies that are captured by the reporting requirement. Stakeholders, including trade unions, can only hold companies accountable if they know which are required to report, and can find this information in a place and format that is easily accessible such as a central registry.

## Guidance

Companies subject to the California Act were required to comply from 1 January 2012. The California Attorney General only released a [Resource Guide](#), which addresses the Act's requirements and provides model disclosures, in April 2015.

The UK Home Office published its [guidance](#) on the basic requirements of the MSA and advice on model disclosures in October 2015, a few months after the law was passed and before the first group of companies were required to publish statements. NGOs are complementing official government guidance. CORE Coalition has published [guidance](#) for businesses reporting under the MSA and a year after the MSA was passed, CORE Coalition, Anti-Slavery International, Unicef UK and Business and Human Rights Resource Centre released [four shorter guides](#) for businesses and investors.

The Australian government plans to provide guidance about the nature and extent of the information that should be included in statements. It will also provide clear and detailed guidance and awareness-raising materials for the business community, including a reporting template, best-practice examples and information about how the business community can remedy and report instances of modern slavery identified in their supply chains or operations. The guidance will also support smaller entities to 'opt in' to the reporting

requirement. Government will develop this guidance in consultation with the business community and civil society and will make the guidance available as soon as practicable, prior to the reporting requirement taking effect.

Clear and timely official guidance released prior to the law taking effect is key to avoid misinterpretation of the legal requirements. Governments should publish guidance for companies on how to comply with their reporting obligations. Governments should also engage with and seek input from experts on corporate responsibility and labour exploitation, particularly civil society organisations and trade unions, when preparing this guidance. They should carry out effective campaigns to raise awareness among companies that are required to report, as there may be companies unaware of their reporting obligations.

## Extraterritoriality

The UK Modern Slavery Act, under pressure from UK companies, investors and civil society, introduced a key provision – that the Act would apply to all companies around the world with turnover over £36 million that operate in the UK market. This has immensely increased its power, and created a more level playing field in the UK. Future legislation should have extra-territorial reach and apply to all companies of a certain size operating in the country, regardless of where their country of headquarters is located, and indeed the Australian government plans to have its legislation apply to all entities headquartered in Australia, or entities that have any part of their operations in Australia, and meet the revenue threshold. As the UK Joint Committee on Human Rights points out, companies often source or manufacture goods in less developed countries where there are weaker mechanisms for protecting human rights, and should take action to respect human rights wherever they operate.

## The Laws in Action

[Research by KnowTheChain](#) published in 2015 found significant inconsistencies between the California Act's requirements and what companies disclosed. Of 500 companies identified as being required to report under the California Act, only 31% had a disclosure statement that complied with the requirements set forth in the law.

In 2016, [Business & Human Rights Resource Centre published an analysis](#) of statements published by 27 FTSE 100 companies under the MSA. At the time of the report, only 15 of the 27 statements analysed (56%) complied with the minimum requirements (link on homepage, approval and sign-off). The analysis showed patchy compliance with the substantive provisions of the MSA and revealed that only a small number of the 27 FTSE 100 companies analysed, including Marks & Spencer (M&S) and SAB Miller, provided information on risks they identified in their operations and supply chains, and explained how they addressed them. Most companies provided little information on the structure and complexity of their supply chains, and even less information on specific risks therein. Companies' reporting on efforts to measure their effectiveness to ensure that slavery and human trafficking are not taking place in business or supply chains was generally weak. Only two companies (M&S and Vodafone) reported developing performance indicators.

This analysis corresponds with subsequently published research. A [briefing](#) released in June 2017 by CORE Coalition shows that only around 14% out of over 2,100 statements under the MSA comply with the minimum requirements and most of them provide little information on the six areas the Act suggests companies to report on. According to a 2016 [review by Ergon Associates](#) of 230 MSA company statements, most fail to comply with minimum requirements. For example, at the time of research 40% had not been signed by a director, and about 30% were not accessible via a link easily found on the company's website. Ergon's review also noted poor reporting on key performance indicators, and that 35% of statements 'say nothing on the question of their risk assessment processes'.

Despite the overall poor quality of statements in this first year of reporting, the MSA is changing how some companies think about modern slavery internally and address it in practice. A 2016 [research by ETI and Hult International Business School](#) illustrated that as a result of the MSA, modern slavery has become an important issue in many of the largest companies which are starting to integrate it in their operations. Further research by Business & Human Rights Resource revealed that since the MSA was enacted, some companies have amended, developed or implemented new policies or processes on modern slavery.

*For recommendations on model mandatory transparency provisions see page 25*



## Steps companies have taken to comply with MSA

**Structure and Supply Chain:** ASOS gave a breakdown of its supply chain structure, with details of the five different tiers involved in its production process, starting from the acquisition of raw materials through to the shipment of products. It also promised to provide a list of names and addresses of all its first tier suppliers, which it did in March 2017.

**Policies in Relation to Slavery and Human Trafficking:** Vodafone developed a Code of Ethical Purchasing (Code), which applies to every supplier and specifically addresses slavery and human trafficking. Severn Trent updated its corporate code of conduct to state that the company should always comply with the MSA and ensure that slavery and human trafficking is not taking place in any part of its business or supply chain.

**Due Diligence and Risk Assessment:** Sky conducted a specific modern slavery risk assessment across its own operations and suppliers. BT decided to assess its business operations, particularly recruitment, to identify risks of slavery and human trafficking.

**Effective Action Taken to Address Modern Slavery:** Mothercare reported difficulties obtaining genuine data through audits and in response set up a team of in-country sourcing specialists and multi-stakeholder groups to provide feedback on risk mitigation.

**Training on Modern Slavery and Trafficking:** John Lewis Partnership provided a diverse and targeted training programme, including planned training in countries where it has a large manufacturing base, and delivered trainings to workers and managers on their rights and workplace grievance mechanisms

## Mandatory due diligence

Law	Date into effect	Purpose of legislation	Application	Supply chain due diligence	Enforcement and sanctions	Extraterritorial obligations
<b>US Trade Facilitation and Trade Enforcement Act</b>	16 March 2016	Prohibits the import into the USA of all products made by forced labour	All importers to the U.S.	Where U.S. Customs and Border Protection authorities given information that reasonably but inconclusively indicates that imported merchandise has been made with forced labor, the Commissioner may detain goods. Importing company must conduct supply chain due diligence to prove to their products were not mined, produced or manufactured with forced labor.	If an importer cannot establish by satisfactory evidence that the merchandise is not a product of forced labor, the goods may be subject to exclusion or seizure by the USA Customs and Border Protection and violation of the regulation may lead to criminal prosecution	Importing companies must investigate global supply chains
<b>EU conflict minerals regulation</b>	17 March 2017	Requires those importers to perform due diligence in an effort to promote responsible sourcing of those minerals and metals to ensure that their supply chains do not contribute to funding of armed conflict	Importers into the EU of at least 95% of all minerals or metals containing or consisting of tin, tantalum, tungsten or gold	Establishes due diligence obligations for EU importers of minerals and metals that include management system obligations, risk management obligations, and independent third party audits. Covered companies will be required to use the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (or other guidelines that may be approved in the future) as the framework for their supply chain due diligence procedures.	authorities from EU Member States will be responsible for ensuring and enforcing compliance and will determine any sanctions for non-compliance	Importing companies must investigate global supply chains
<b>French devoir de vigilance law</b>	27 March 2017	Requires certain French companies to have a due diligence plan to identify and address adverse human rights impacts in their operations, supply chains and business relationships	France's largest companies – those registered in France with either: (a) more than 5,000 employees working for the company and its direct or indirect French-registered subsidiaries, or (b) more than 10,000 employees working for the company and in its direct or indirect subsidiaries globally.	Requires companies to develop and implement a 'plan de vigilance' to identify and mitigate (i) violations of human rights, (ii) severe bodily or environmental damage, or (iii) health risks	Companies may be subject to sanctions on three grounds: if they default on commitments made in their plan; if there are faults in the plan or its implementation; or if they fail to produce a plan at all	Companies must investigate activities of its direct or indirect subsidiaries globally
<b>Swiss responsible business initiative</b>	To be approved in a referendum	Requires certain Swiss companies to incorporate respect for human rights and the environment in all their activities	Swiss based corporations	Refers to the UNGPs and requires that companies: review all their business relationships and activities to identify potential human rights risks; take effective measures to address the negative impacts identified; and report transparently on the violations and mitigation measures	Swiss based firms will be liable for human rights abuses and environmental violations caused abroad by companies under their control. Companies who haven't complied with their due diligence obligations will be held accountable in front of Swiss Courts.	Mandatory due diligence will also be applied to Swiss based companies' activities abroad.
<b>Dutch bill on child labour due diligence</b>	7 February 2017	Requires companies selling products or services to Dutch end-users to identify whether child labour is present in their supply chain and, if this is the case, to develop a plan of action to address it and issue a due diligence statement	Companies registered in the Netherlands, as well as companies that sell to a Dutch consumer	Refers to the UNGPs and requires companies to examine whether there is a reasonable suspicion that the goods or services have been produced with the use of child labour. If so, the company must develop and carry out an action plan to combat the use of child labour in line with the UNGPs' and OECD Guidelines' standards. Companies are required to issue a statement declaring that they have exercised due diligence to prevent their goods and services being made using child labour. A supervising authority will be appointed to monitor compliance with the Bill. The statement will be recorded in a public register, which will also be held by this supervising authority.	Individuals and NGOs can file complaints in the event their interests are affected by a company non-compliance. In case of non-compliance, the Consumer and Market Authority can fine companies up to €820,000 or, alternatively, 10% of their annual turnover. Being fined twice within five years will constitute an economic offence, which may lead to criminal proceedings.	Requires companies selling goods and services to Dutch end-users to determine whether there is a reasonable suspicion that the goods or services are being made using child labour. This includes an examination of the production or supply chain globally.
<b>Model mandatory due diligence law</b>		Require large companies to publish an effective due diligence plan	Swiss based corporations	Specifically refer to the ILO Protocol and to the UNGPs and the OECD Guidelines' standards of human rights due diligence	Provides for corporate liability if companies default on commitments made in their plan, if there are faults in the plan or its implementation or if they fail to produce a plan at all. Impose an adequate fine in the event of non-compliance. Allow individuals, trade unions and NGOs to file complaints with the relevant government authority in case of a company non-compliance	Apply mandatory due diligence to companies' activities abroad and to the activities of all subcontractors and suppliers

## III. MANDATORY DUE DILIGENCE

### Key information

Article 2 of the ILO Protocol establishes that member states should take measures ‘supporting due diligence by both the public and private sectors to prevent and respond to risk of forced or compulsory labour’.

The UNGPs introduced the concept of corporate human rights due diligence to describe the continual process that all companies should undertake to identify, prevent, mitigate and account for how they address their impact on human rights. This process includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed. Human rights due diligence requires direct engagement with stakeholders on the ground including people who are or may be affected by the company’s activities, trade unions, NGOs. Due diligence is primarily a procedural concept, but its link with the duty to respect in the UNGPs brings in a substantive aspect that requires that ‘companies should look at a minimum to the international bill of human rights and the core conventions of the ILO’ when determining the scope of their due diligence responsibilities.

This section reviews legal developments in the US and proposed legislation in European countries that place mandatory human rights due diligence obligations (which would encompass modern slavery) on companies.

In February 2016, President Obama signed the [US Trade Facilitation and Trade Enforcement Act of 2015](#) (HR 644) into law. Section 910 of the Act closed a loophole in the Tariff Act of 1930, by removing the ‘consumptive demand’ clause. This clause allowed the import of goods produced by forced labour, as long as the goods could not be produced in sufficient quantities in the US to meet the domestic demand. By removing the clause, the new law prohibits the import into the US of all products made by forced labour. The burden is placed on the importing company to conduct supply chain due diligence to prove their products were not mined, produced or manufactured with forced labour. Failing this, the company risks having its imports excluded or seized.

Pressure is mounting at the EU level to develop legislation on mandatory human rights due diligence. In April 2015, members of the European Parliament adopted a motion calling for mandatory human rights due diligence for companies. [Motion 2015/2589 \(RSP\)](#) requests the European Council to consider new

EU legislation to ‘create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency.’ In May 2016, eight EU parliaments launched a [‘green card’ initiative](#) proposing that EU-based companies operate under a duty of care towards individuals and communities whose human rights and local environment are affected by the companies’ activities.

On 17 May 2017, the EU passed [Regulation 2017/821](#) laying down supply chain due diligence obligations for EU importers of ‘conflict minerals’ (tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas). It will apply from 21 January 2021. The regulation stems from the guidance in the [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#) of 2016. The regulation establishes obligations related to management systems, risk management, and independent third party audits. Importers must prepare annual public reports on the steps taken to implement these obligations, as well as their supply chain due diligence policies and practices for responsible sourcing. EU importers should make available to their governments’ competent authorities the reports of third-party audits

carried out in accordance with the regulation or evidence of conformity with a supply chain due diligence scheme. They should make available to their immediate downstream purchasers all information gained and maintained pursuant to their supply chain due diligence.

On 27 March 2017, the French Parliament adopted [Law No. 2017-399](#) on corporate ‘duty of care’ (*devoir de vigilance*) for parent and subcontracting companies. The law requires the largest French companies that have more than 5,000 employees in France, or more than 10,000 employees globally, to have a due diligence plan to identify and address adverse human rights impacts in their operations, supply chains and business relationships. Despite the limited scope of the law – around 150 companies will be affected by the law – it represents a major development in transparency in corporate operations and supply chains. Other countries in the EU, including Belgium and Spain, have already expressed interest in developing similar legislation.

In Switzerland, the [Responsible Business Initiative](#), a coalition of 80 non-governmental organisations and trade unions led by the Swiss Coalition for Corporate Justice asks for the introduction of article 101(a) ‘Responsibility of Business’ in the Federal Constitution. The campaign gathered enough signatures and the initiative was subsequently considered by the Federal Council and the Parliament. The initiative will be put to the Swiss people in a referendum. If successful, Swiss companies will be legally obliged to incorporate respect for human rights and the environment in all their activities. This mandatory due diligence would also apply to Swiss-based companies’ activities abroad.

On 7 February 2017, the Dutch Parliament adopted a bill ([Wet zorgplicht kinderarbeid](#)) introducing a duty of care to prevent child labour. The bill requires companies selling products or services to Dutch end-users to identify whether child labour is present in their supply chain and, if this is the case, to develop a plan of action to address it and issue a due diligence statement. The bill is currently before the Senate and if approved will come into effect after 1 January 2020.

On 16 August, the Australian Government announced its intention to introduce a Modern Slavery in Supply Chains Reporting Requirement in 2018. The consultation paper released by the government in connection with this announcement states that this mandatory reporting requirement will also require entities to publish information on their “due diligence processes re-

lating to modern slavery in its operations and supply chains and their effectiveness”.

### Due diligence standard

The French duty of care law requires companies to develop and implement a public ‘*plan de vigilance*’ setting out the oversight mechanisms the company has in place to identify and mitigate the occurrence of: (i) violations of human rights and fundamental freedoms, (ii) severe bodily or environmental damage, or (iii) health risks resulting from the company’s activities, the activities of the companies it controls or the activities of its subcontractors or suppliers. The law does not explicitly refer to the UNGPs’ standard of human rights due diligence, but it specifies the content of the due diligence plan, which must include: a risk mapping to identify, analyse and prioritise risks; processes for regular evaluation of subsidiaries, subcontractors and suppliers; appropriate actions to mitigate and prevent human rights and environmental violations; alert and whistleblowing mechanisms related to existing and potential risks; mechanisms for monitoring and assessing the effectiveness of the measures implemented. Companies must disclose their due diligence plan yearly. A decree providing further details on the content of the plan and the means of implementation of the obligations under the law is due to be published.

Under French social security and labour laws, an obligation of care already existed for companies that hired subcontractors, though this was limited to verifying the registration of subcontractors, their compliance with French social security obligations, and only when the contract is worth more than €5,000. The company must require a document certifying the subcontractor’s registration and a certificate issued by the social security authorities providing the number of employees and the total remuneration to the subcontractor. The company must verify the validity of the certificates provided by the subcontractor. In the event it breaches of its obligation of care, the company may be prosecuted and ordered to pay taxes, social security contributions, and remuneration of its subcontractor, and may be exposed to criminal and civil liability.

The Swiss initiative explicitly refers to the UNGPs and translates the principle of due diligence as described in the UNGPs into Swiss law. Accordingly, if the initiative is successful, article 101(a)(b) of the Constitution will require that companies: review all their business relationships and activities to identify potential human rights risks; take effective measures to address the



negative impacts identified; and report transparently on the violations and mitigation measures.

The Dutch bill on duty of care for child labour also refers to the UNGPs standards of due diligence. The bill requires companies to examine whether there is a reasonable suspicion that the goods or services have been produced with the use of child labour. If so, the company must develop and carry out an action plan to combat the use of child labour in line with the UNGPs' and OECD Guidelines' standards, and issue a due diligence statement on the investigation and plan of action. Detailed rules for the investigation and plan of action will be determined by secondary legislation, which will refer to the [ILO-IOE Child Labour Guidance Tool for Business](#). The statement will be recorded in a public register held by the Dutch Authority on Consumers and Markets, the supervising authority.

One of the controversial issues that was discussed during the negotiations of the EU Conflict Mineral Regulation was whether the due diligence system would be mandatory or voluntary. The EU Parliament was successful in converting the original voluntary self-certification scheme proposed by the Commission into a mandatory requirement for importers of conflict minerals from all conflict-affected and high-risk areas. The due diligence review must be developed in accordance with the OECD Guidelines.

## Enforcement and sanctions

The US *Trade Facilitation Act* has a robust enforcement mechanism. Imported goods from high-risk countries that cannot demonstrate due diligence may be subject to exclusion or seizure by the [US Customs and Border Protection \(CBP\)](#) and violation of the regulation may lead to criminal prosecution. In the event US customs issues a 'withhold release order', companies have 90 days to prove the product was not mined, produced or manufactured using forced labour. To do so, companies must provide a certificate of origin signed by the foreign seller of the product, and proof of the efforts they made to determine the type of labour used in the production. The Act requires the CBP to report annually on the implementation of the law by stating what has been denied entry into the US. Since the Act has come into effect, the CBP has issued four 'withhold release' orders, preventing goods from entering the US because of suspicions that they were made using forced labour. On 29 March 2016, for example, the CBP issued a [detention order](#) for chemical and fibre products mined and manufactured by Tangshan Sanyou Group and its subsidiaries in China, based on information that the companies used

convict labour in their production. Effective enforcement of this provision provides incentives to business to protect their supply chains from forced labour and guarantee that all their imports are cleared for entry into the US. It also provides enforcement agencies with more room to investigate companies suspected of using forced labour.

The French and Dutch bills and proposed Swiss initiative also include enforcement mechanisms. Under the French bill, companies may be subject to sanctions on three grounds: if they default on commitments made in their plan; if there are faults in the plan or its implementation; or if they fail to produce a plan at all. In case of non-compliance, a formal notice is sent to the company; if the company does not take the necessary measures within three months of the formal notice, any person with a legitimate interest (for example a trade union, as well as a victim, or an NGO) can request the competent court to order that the company complies with its obligations. The burden of proof, however, still falls on the victim or person with a legitimate interest. Moreover, the company does not have to guarantee results: if victims prove the damage but the company can demonstrate it has implemented an adequate plan, it will not be liable. The bill initially provided a maximum fine of €30 million in the event of damage due to failure to publish or implement a plan, but on 23 March the French Constitutional Court ruled that such fine was unconstitutional on grounds that the wording of the law is vague. Despite the removal of the financial sanctions, however, non-compliant companies remain liable in the event they cause harm to another company and may be ordered to compensate for damages. The original version of the bill also included criminal prosecution for company directors who fail to comply with the bill, but the provision was removed after the debate.

The Dutch bill requires companies to develop and carry out an action plan to combat the use of child labour which must be approved by the government. Companies must also issue a due diligence statement on the investigation and plan of action to the Dutch Consumer and Market Authority. Failure to submit the declaration on due diligence or the action plan is punishable with a fine. Both individuals and NGOs are entitled to file complaints against a company in the event their interests are affected by non-compliance with the bill. The complaint must be first filed through the company grievance mechanism, then with the Dutch National Contact Point, and finally with the Dutch Consumer and Market Authority, if the previous steps do not lead to a solution. In case of a finding of

non-compliance, the Consumer and Market Authority can fine companies up to €820,000 or, alternatively, 10% of their annual turnover. Being fined twice within five years will constitute an economic offence, which may lead to criminal proceedings.

In relation to the EU Conflict Mineral Regulation, authorities from EU Member States will be responsible for ensuring and enforcing compliance, and will determine any sanctions for non-compliance as well.

On 5 April 2017, the UK Joint Committee on Human Rights published a [report on human rights and business](#) condemning a number of aspects of the UK government's approach to the requirements of UNGPs, highlighting evidence of serious labour rights abuses taking place in factories in the UK. The Committee recommended that the government propose legislation to make reporting on due diligence for all human rights compulsory for large businesses, with a monitoring mechanism and an enforcement procedure, and the strengthening of the UK National Contact Point. The Committee also recommended the government impose a duty on all companies to prevent human rights abuses and to establish a criminal offence of 'failure to prevent' human rights abuses, including parent companies for their subsidiaries and across their whole supply chains. The committee proposed that this offence would be similarly structured to the failure to prevent offence in the Bribery Act 2010. If a company was charged with a failure to prevent, the burden would fall on the company to provide a defence to demonstrate that they have conducted effective human rights due diligence, as set forth in the UNGPs.

## Global Supply Chain and Extraterritoriality

To be most effective, mandatory due diligence obligations should cover a company's operations domestically and abroad, the operations of its subsidiaries and across the global supply chains. If the Swiss initiative is successful, Swiss-based firms will be liable for human rights abuses caused abroad by companies under their control. This provision will enable victims of human rights violations to bring a civil claim for damages against the Swiss company in Switzerland. The French bill applies to the company's own activities, the activities of the companies it controls, its subcontractors and suppliers. A review clause in the EU Conflict Minerals Regulation leaves open the possibility of expanding the regime in the future to impose mandatory due diligence to the company's supply chain.

The French bill requires companies to develop the plan 'in consultation with the legitimate trade unions operating within the company'. In particular, the vigilance plan must include an alert mechanism related to potential or existing risks, drawn up in consultation with the representative trade union organizations in the company. Under the Dutch bill, the government can approve a joint plan of action in cooperation with workers' and employers' organizations. A company implementing such plan will be considered to have exercised due diligence under the bill.

*For recommendations on model mandatory due diligence provisions see page 25*

## Mandatory transparency

Law	Date into effect	Application	Requirement	Compliance	Disclosure	Reporting periodicity	Enforcement and sanctions	List of companies	Guidance	Extrajurisdictionality
<b>California Transparency in Supply Chain Act</b>	1 January 2012	All retailers and manufacturers with an annual global revenue of more than US\$100 million that 'do business' in California	Disclose on their websites any actions they are taking to 'eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale'	Publicly disclose a 'conspicuous and easily understood' document on the homepage of the company website	Requires to disclose to 'what extent, if any,' the company: 1) verifies its product supply chains; 2) audits its suppliers; 3) requires certifications from direct suppliers; 4) maintains internal accountability; and 5) trains company employees and management	Does not specify how often a company needs to update its statement	California Attorney General has exclusive authority to enforce the Act and may file a civil action for injunctive relief	Each year, the California Franchise Tax Board evaluates information from tax returns to determine which companies must comply with the California Act, and provides the list to the Attorney General	California Attorney General released a resource guide in April 2015	No
<b>UK Modern Slavery Act</b>	26 March 2015	Any commercial organisation, which supplies goods or services, carries on a business or part of a business in the UK, and whose annual turnover is £36 million or above	Produce a 'slavery and human trafficking statement' for each financial year detailing what companies are doing to 'ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business'	Statements must be: 1) approved by the board; 2) signed by a director; and 3) accessible via a link that is prominently displayed on the homepage of the organisation's website	Provides a non-exhaustive list of six issues that the statement 'may' cover: 1) the company's structure and supply chains; 2) policies; 3) due diligence processes; 4) risk assessment; 5) performance indicators; and 6) training and capacity building	Requires companies to publish annual statements	If a company fails to produce a statement the UK Secretary of State may seek an injunction through the High Court requiring the company to comply	No public list of companies required to comply	UK Home Office released guidance in October 2015	Yes
<b>Model mandatory transparency law</b>		Should not limit its scope to large companies, but should require reporting by medium sized companies as well. It should apply to public bodies as well.	Should include requirements to report on known instances of modern slavery in a company's operation and supply chains, and to provide information about whether the measures companies are taking are effective or not	Should require statements to be: 1) approved by the board; 2) signed by a director; and 3) accessible via a link that is prominently displayed on the homepage of the organisation's website	Should require companies to put in place and report on due diligence processes, in particular on processes to assess and address modern slavery risks in their own operations and supply chains	Should require companies to publish modern slavery statements annually	Should impose sanctions where companies fail to produce a modern slavery statement, produce statements that fail to meet the minimum requirements of being signed and approved by the appropriate entities, and provide a link to the statement on the company website homepage, produce statements that lack mandatory information on due diligence practices, or report they have not taken any steps to address their modern slavery risks.	Should require government bodies to disclose a public list of companies required to comply and to maintain an official central registry of statements	Should require government bodies to publish clear and timely official guidance prior to the law taking effect	Should have extra-territorial reach and apply to all companies of a certain size operating in the country, regardless of where their country of head-quarters is located

# IV. PUBLIC PROCUREMENT

## Key information

Public procurement is the purchase by the public sector of the goods and services it needs to carry out its functions. Such purchasing represents a significant share of the total economy. Public procurement globally accounts for €1000 billion per year, and 12% of GDP on average **across OECD countries**. The USA is the largest single purchaser in the global economy, with an annual spending between USA\$350 and USA\$500 billion. Public procurement measures can help make supply chains free from modern slavery both directly, via contract terms that safeguard labour rights, and indirectly, by establishing a competitive advantage for responsible companies. This potential, however, has been left largely untapped.

The state's positive obligations to protect human rights arguably extend to their own supply chains in the context of public procurement. Article 2(1) of the ILO Convention concerning Labour Clauses in Public Contracts of 1949 (No. 94) establishes that contracts in which at least one of the parties is a public authority should include clauses ensuring that the workers' wages, hours of work and other conditions of labour are not less favourable than those established for work of the same type in the same industry. Sustainable Development Goal 12.7 calls on all countries to implement sustainable public procurement policies and action plans. The UNGPs affirm that the 'state duty to protect' extends to situations where a 'commercial nexus' exists between public actors and businesses through public procurement. National Action Plans on Business and Human Rights (NAPs) provides further support to the interpretation of the state duty to protect as encompassing procurement. To date, [the UK, the US, and 10 European countries](#) have published NAPs, and the majority refer to human rights and public procurement.

Despite such commitment, a survey across 20 jurisdictions by the [International Learning Lab on Public Procurement and Human Rights](#) found that public bodies are not meeting their duty to protect, including the responsibility to avoid abuses through their purchasing practices. There are however, some legal and policy developments in the US, the UK and the EU, which are integrating human rights considerations, in particular freedom from forced labour and human

trafficking, into the purchasing process. This section reviews these four areas of integration: 1) disclosures; 2) social clauses; 3) mandatory exclusions; and 4) due diligence.

## Disclosures

While the MSA requires companies to disclose their efforts to eradicate modern slavery from their supply chains, the UK government has not yet established similar transparency requirements in public procurement. [Baroness Young's Private Member's Bill](#) - the Modern Slavery (Transparency in Supply Chains) Bill 2017-19 - seeks to amend the MSA to require public bodies to undertake and report on due diligence into their own supply chains.

Procurement is being considered by the Australian Government. A report by the Attorney-General's Department states the government will not propose that the reporting requirement under its modern slavery legislation apply to Commonwealth or state and territory procurement. Commonwealth procurement is already governed by a legislative framework that sets out rules for spending public money, including in relation to ethical sourcing. The Australian Government is considering ways to demonstrate leadership on modern slavery through procurement, including through consideration of an appropriate Procurement Connected Policy on Human Rights. However, in its interim report, the Joint Standing Committee on Foreign Affairs, Defence and Trade gives support for a provision that the government only engages with compa-



nies, businesses, organisations and other Australian governments that have submitted modern slavery statements. The Committee considers that this would encourage smaller companies to also report via the opt-in option.

## Social clauses

The primary source of procurement law for EU member states is the [EU Procurement Directive of 2014/24/EC](#), which superseded EU Directive 2004/17/EC and EU Directive 2004/18/EC. The new Directive strengthens the integration of human rights into public procurement and describes how public authorities should purchase works, supplies, and services. In particular, the Directive requires EU member states to adopt measures to ensure that, in the performance of public contracts, suppliers comply with applicable obligations in the fields of environmental, social, and labour law established by the EU, national law, collective agreements, or by international labour law provisions, including the ILO Core Conventions.

In Spain, the [Ley de Contratos del Sector Público](#) (*Law of Public Contracts*), revisited in 2011, establishes that public authorities can include social conditions in contracts in order to respect basic labour rights in the supply chain in compliance with the ILO Conventions. A [draft law on public procurement](#) intended to implement the 2014 EU Procurement Directive into Spanish law would establish an obligation on contracting authorities to include social conditions, including measures to ensure suppliers respect national labour laws and international obligations of the state.

## Mandatory exclusions

The EU Procurement Directive contains a range of mandatory and discretionary grounds of exclusion for suppliers from public procurement. Article 57 excludes suppliers that have been convicted for child labour or human trafficking. The UK [Public Contracts Regulations](#) of 2015, which implement the EU Procurement Directive, excludes a bidder from further participation in procurement if it has been found guilty of any offense under the MSA (slavery, servitude, forced or compulsory labour, and human trafficking). In [case the supplier has not prepared a slavery and human trafficking statement under the MSA](#) and has been required to do so, the public body may, at its discretion, exclude the bidder from the procurement. The public body must ask the supplier for the reasons they have not complied with the requirement and consider carefully those reasons, taking into account the gravity

and particular circumstances of the non-compliance. If the evidence is considered inadequate and shows that the supplier is not complying with MSA requirements then it should be excluded from the procurement process.

## Due diligence

In 2012, the US government emphasized the importance of due diligence in preventing forced labour and trafficking with [Executive Order No. 13627 'Strengthening Protections against Trafficking in Persons in Federal Contracts'](#). The Order, and its subsequent federal regulations, set out strict requirements for contractors and subcontractors that receive federal contracts. It forbids fraudulent or abusive recruitment practices and mandates contractors and subcontractors permit compliance audits and report any unlawful activities. Where large contracts are performed outside the United States, contractors must also maintain a compliance plan for the full duration of the contract, including: awareness programmes, a complaints reporting process, a recruitment and wage plan, a prohibition against charging recruitment fees to workers, and procedures to prevent subcontractors from engaging in trafficking and to monitor, detect and terminate contracts with any that have.

The [Federal Acquisition Regulation](#) (FAR), which governs procurement by US federal agencies, prohibits the use of forced child labour and reliance on human trafficking in relation to federal contracts sourced abroad. US law requires the Department of Labor to prepare a 'List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor.' The government will not award a contract unless the company certifies that they will not sell a product on the list, or that they have made a good-faith effort to determine whether forced child labour was used.

In January 2015, the government released a [final rule](#) that amends FAR to include new anti-human trafficking requirements. The new rule came into effect on 2 March 2015, and requires government contractors to certify that they and their subcontractors are not engaged in human trafficking activities. In addition, contractors must also prepare a 'certification and compliance plan' for contracts that are performed outside the US and exceed US\$500,000 in value. Agencies must insert a clause in all contracts that imposes obligations on suppliers to prevent human trafficking, use of forced labour, confiscation of employee identity or immigration documents, and use of misleading or fraudulent recruitment or employment practices. It



also stipulates the contractor's obligation to terminate subcontractors that engage in trafficking, and protect employees who are harmed by trafficking.

The [Walsh-Healey Public Contracts Act](#) (of 1936 also prohibits US federal agencies from purchasing sweatshop goods in contracts of more than US\$10,000 of value. Sweatshop goods are defined with respect to compliance in the country of production with applicable rules regarding minimum wages, maximum working hours, child and convict labour. The Secretary of Labor, however, has exempted imported goods or services, so protections do not extend to government supply chains abroad.

The first revised draft of the Swiss [Federal Act of Public Procurement](#) (FAPP), published in April 2015, reiterates the conditions concerning compliance with ILO Core Conventions for services provided abroad. According to the Sustainable Procurement Recommendations, ensuring compliance with ILO Conventions should require a bidder to submit a self-assessment of compliance including existing evidence of the way they and their key third parties comply with the minimum social standard.

In Sweden, County Councils require that contractors have due diligence processes in place to identify and mitigate risks of adverse impacts in the production of goods or services. Specifically, the contract performance clauses used by the County Councils require suppliers to implement procedures to ensure that the production of goods or services delivered during the term of the contract takes place under conditions that are compatible with the Councils' Code of Conduct. Sweden's County Councils and the municipality of Stockholm include a question regarding knowledge of their supply chain in their sustainability assessment questionnaire for contract awardees.

In Denmark, all suppliers signing a contract with SKI (Denmark's central purchasing body) commit to follow SKI's Framework Agreement, which provides a basis for requesting that suppliers undertake due diligence based on the OECD Guidelines.

Amongst others the [International Learning Lab on Public Procurement and Human Rights made a submission](#) to the Australia parliament recommending that an Australian Modern Slavery Act should include a 'Transparency in Supply Chains' provision modelled on Section 54 of the MSA, but should be improved upon and apply not only to corporations, but also to public bodies. In particular, the submission recommends that such a provision should: contain prescrip-

tive transparency requirements, rather than suggestions; make it compulsory for all public bodies over a threshold size to publish an annual statement reporting on their efforts to identify, prevent and mitigate risks of modern slavery in their supply chains; and include mandatory exclusions through which public buyers can exclude suppliers who fail to uphold their human rights in the supply chain obligations from tendering processes. In their [Submission](#) to the Australian inquiry, the Freedom Partnership to End Modern Slavery, Uniting Church in Australia Synod of Victoria and Tasmania, ACRATH & FECCA noted that the Commonwealth of Australia signed over 70,000 contracts with a combined value in excess of \$56 billion in 2015-16 and that public procurement spending represents approximately 10% of Gross Domestic Product. The submission recommended that the government be subject to the same anti-slavery requirements that apply to businesses.

*For recommendations on model public procurement provisions see page 25*

# V. PROCESS FOR DEVELOPMENT OF MODERN SLAVERY PROVISIONS

New legislation and public policy approaches to address modern slavery in business operations and supply chains are gaining momentum globally. New and proposed laws in the US, the UK and several European countries variously address mandatory transparency, mandatory due diligence and public procurement due diligence. The time is right for governments to ratify the 2014 ILO Protocol and accordingly cooperate and coordinate efforts to set common minimum and consistent requirements for companies across jurisdictions. Governments could take multilateral action through the G20, OECD, or the legislative endeavours of the top 10 economies to coordinate and ensure coherence and consistency in regulation. Indeed, the G20 Leaders' recent commitment to eliminate modern slavery in supply chains by 2015 provides momentum for action in this direction. Common regulation would set coherent expectations and minimum grounds of corporate behaviour and allow better monitoring by workers, trade unions, NGOs and investors and, in case of non-compliance, targeted litigation.

## Key recommended elements of a common Modern Slavery law

Using the framework set forth by the ILO Protocol, MNE Declaration and pursuant to international human rights standards, governments developing modern slavery legislation should:

- *Create effective measures through consultation with key actors:*  
Consultation with employers and workers, as well as engagement with trade unions, and civil society will ensure development of effective government measures to combat modern slavery. Article 1(2) of the ILO Protocol expects member states to apply the provisions of the Protocol through national laws or regulations after consultation with

employers' and workers' organizations. States must also develop the national policy and plan of action in consultation with those organizations.<sup>8</sup>

- *Cooperate and coordinate with international counterparts:*  
Cooperation and exchange of information between and among governments' representatives in combating modern slavery is essential given its global and cross-border dimensions. Article 5 of the ILO Protocol requires member states to cooperate with each other to ensure the prevention and elimination of all forms of forced or compulsory labour. Recommendation No. 203 provides ways in which Members and relevant international and regional organizations can assist each other in achieving the effective and sustained suppression of forced or compulsory labour including, among other things, mobilizing resources for national action programmes, international technical cooperation and assistance, and mutual legal and technical assistance.<sup>9</sup>
- *Appoint national focal points:*  
The MNE Declaration encourages governments, employers and workers to appoint national focal points on a tripartite basis to promote the use of the Declaration in the national context. These national focal points could be linked to the OECD National Contact Points, a non-judicial grievance mechanism to which NGOs and trade unions can [file complaints](#) of breaches of the OECD Guidelines. For example, the UK Joint Committee on Human Rights [recommended](#) the UK government propose legislation to make reporting on human rights due diligence compulsory for large businesses, which would include a monitoring mechanism and an enforcement procedure, and would strengthen the UK OECD National Contact Point.

<sup>8</sup> ILO Protocol to the Forced Labour Convention, Article 6 and ILO Recommendation No. 203 paragraph 1.

<sup>9</sup> ILO Recommendation No. 203 paragraph 14.

- *Provide appropriate guidance:*  
Governments have the responsibility to give businesses clear guidance on how to comply with national laws that establish obligations for companies to eliminate modern slavery in their operations and supply chains. Recommendation No. 203 recommends member states provide guidance and support to employers and businesses on addressing the risks of forced labour in their operations or in products, services or operations to which they may be directly linked.<sup>10</sup> The MNE Declaration echoes this stating governments should provide guidance and support to employers and enterprises to take effective measures to identify, prevent, mitigate and account for how they address the risks of forced and compulsory labour in their operations or in products, services or operations in which they may be directly linked.<sup>11</sup>

### Content of Provisions to Combat Modern Slavery

The regulatory provisions which model legislation would include are:

#### *Model mandatory transparency provisions:*

- Require companies to report on instances of modern slavery in operations and supply chains;
- Apply to large and medium-sized companies above a certain revenue threshold rather than base the reporting requirement on companies' tax classification;
- Have extra-territorial reach and apply to all companies of a certain size operating in the country, regardless of where their country of headquarters is located;
- Require approval of the board of directors, sign-off by senior management and prominent disclosure of the statement on the company's website;
- Require annual statements that demonstrate progress over time;
- Provide monitoring and enforcement mechanisms and impose sanctions where companies fail to produce a modern slavery statement, produce statements that fail to meet the minimum requirements, or report they have not taken any steps to address their modern slavery risks; and
- Provide clear official guidance prior to the law taking effect.

#### *Model mandatory due diligence provisions:*

- Refer to the human rights due diligence standards set forth in the ILO Protocol, the UNGPs and the OECD Guidelines;
- Require large companies to publish an effective due diligence plan;
- Provide for corporate liability if companies if there are faults in the plan, or its implementation, or if they fail to produce a plan at all;
- Allow individuals, trade unions and NGOs to file complaints with the relevant government authority in case of company non-compliance;
- Apply mandatory due diligence to companies' activities abroad, and to all sub-contractors and suppliers;
- Seizure of goods if a company fails to demonstrate due diligence from high-risk regions; and
- Enable victims of modern slavery to access civil and criminal remedy.

#### *Model public procurement provisions:*

Mandatory due diligence reporting obligations for relevant public bodies;

Inclusion of modern slavery provisions in social clauses of public procurement; and

Include mandatory exclusion provisions for suppliers involved in modern slavery violations or that fail to report under mandatory reporting provisions.

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<sup>10</sup> ILO Recommendation No. 203 paragraph 4(j).

<sup>11</sup> ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, paragraph 24.

# CONCLUSION

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Global markets must respond to the collapse of public trust. Putting human rights, and especially workers' rights at the core of business practice is a powerful tool to build more inclusive economic growth and equality. Eliminating modern slavery in global markets is a basic step in this process. This paper demonstrates that the tools to achieve this are already out there. Governments must now work together to deliver harmonised national legislation that builds on existing effective action to create a robust international environment that combats modern slavery.

