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Australia passes Modern Slavery Act into law

Australia's Modern Slavery Act (MSA), only the second such national legislation in the world, is now the law of the land. The act is modeled after the United Kingdom's Modern Slavery Act (2015), which requires organizations that meet a certain threshold to provide annual reports on human trafficking and modern slavery in their supply chains, as well as describe the actions they have taken to eradicate the problem.

Nongovernmental organizations and other observers have generally applauded the Australian government for passing the bill into law, but they caution that the MSA alone is not nearly enough to combat the scourge of modern slavery in global supply chains.

Critics say that the MSA is weakened by both the decision to not appoint an independent statutory anti-slavery commissioner, who would have the authority and resources to oversee compliance, and the lack of a penalty for noncompliance; annual reports will, therefore, most likely become lower priorities for organizations with sprawling supply chains. Instead of fines, the Australian government will rely on a "name and shame" strategy by leveraging the power of consumer pressure and nongovernment associations. Amendments to the bill empowered the responsible minister to both request an explanation from businesses that fail to report or improve their compliance and to publish the names of these companies and the details of their transgressions.

The MSA also places the responsibility of eradicating modern slavery from supply chains on the businesses, not the government. Such an onus of responsibility may be too much, given the challenges of jurisdiction and the sprawling, interweaving nature of global supply chains. Even the largest companies may not have the resources to effectively map and assess every last element of their supply chains; smaller businesses will be even harder pressed.

The basics of the MSA

The MSA applies to Australia-based entities doing business in Australia with at least AUD 100 million in annual, consolidated revenue for the reporting year. An entity that does business in Australia is defined as any entity that: (1) has a place of business in Australia; (2) establishes or uses a share transfer office or share registration office in Australia; or (3) administers, manages or otherwise deals with property situated in Australia as an agent, legal personal representative or trustee, whether by employees, agents or otherwise.

Annual reporting statements will be required to, at a minimum, identify the reporting entity and describe or include the following:

- The structure, operations and supply chains of the reporting entity.
 - The modern slavery risks in the operations and supply chains of the reporting entity and any entities it owns or controls.
 - The actions taken by the reporting entity and any entities that it owns or controls to assess and address modern slavery risks, including its due diligence and remediation processes, such as developing and implementing policies and processes and providing training to staff.
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- How the reporting entity assesses the effectiveness of those actions.
- The process of consultation with any entities that the reporting entity owns or controls and, in the case of joint statements, between each reporting entity and the entity preparing the joint statement.
- Any other information that the reporting entity, or the entity preparing the statement, considers relevant.
- Details of the approval of the statement.

Leaving out “those in the middle”

One issue that critics have identified is the use of the term “modern slavery” as an umbrella term for a variety of different offenses. According to the MSA, modern slavery is defined as:

- (a) an offence under Division 270 or 271 of the Criminal Code; or
- (b) an offence under either of those Divisions if the conduct took place in Australia; or
- (c) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27); or
- (d) the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).

Section 270.1 of the Criminal Code defines the term “slavery” as “the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.” It is an offence under section 270.3(1) to:

- possess a slave, or exercise over a slave any of the other powers attaching to the right of ownership;
- engage in slave trading;
- enter into any commercial transaction involving a slave; or
- exercise control or direction over, or provide finance for, any act of slave trading or any commercial transaction involving a slave.

These offenses leave out several crimes that aren’t as sensational as slavery. Crimes that constitute egregious violations — such as child sex trafficking or large numbers of laborers forced to work for dismal wages — are investigated and prosecuted on a much greater frequency than other, more common and perhaps more mundane crimes.

“Framing the issue as ‘slavery’ changes the agenda which becomes about campaigning for a public response to the problem,” writes Dr. Ramona Vijayarasa, a Chancellor’s Post-Doctoral Research Fellow in the Faculty of Law at the University of Technology Sydney. “It quickly becomes an issue of numbers and scale and less about individual cases and legal redress. The end result is the exclusion of victims’ stories when they sit in the middle rather than the extreme end of the exploitation spectrum. The narrative shifts to one of ‘slaves’ and ‘enslavement’ rather than about the labour rights and violations of personal freedoms that are actually experienced, in different ways, by the individuals involved: from excessive work hours to underpayment of wages, from hazardous work to complete disregard for human dignity.”

Takeaways

- Australia joins the U.K. in passing its own Modern Slavery Act, requiring disclosures from companies that meet a certain threshold.
- The act relies on “name and shame,” as opposed to penalties or fines, to police disclosures, shifting the responsibility of compliance from the government to the business’s own policies and procedures.

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