

The background of the cover is an abstract artwork. It features two hands, one at the top left and one at the bottom right, rendered in warm, earthy tones of red, orange, and yellow. These hands are surrounded by a complex network of thin, dark, branching lines that resemble roots or tangled threads. The overall color palette is dominated by deep blues and teals, which contrast with the warmer tones of the hands. The artwork has a textured, almost painterly quality.

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Australia's Modern Slavery Act and COVID-19: a get out of jail free card?

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Fiona McGaughey

Law School, University of Western Australia

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Fiona McGaughey

Law School, University of Western Australia

Abstract

The COVID-19 pandemic increased modern slavery risk around the world, including in the operations and supply chains of Australian businesses. This article thematically analyses a sample of available business statements under Australia's Modern Slavery Act to assess how they engaged with modern slavery risks due to COVID-19. Overall, the statements acknowledged that COVID-19 had increased risks through rapidly altered supply chain profiles, urgent demand for items such as PPE, and yet there were widespread reports of reduced capacity to fully execute planned modern slavery risk assessment, training, and audit activities.

Keywords: Modern slavery, Australian Modern Slavery Act, COVID-19, supply chains, reporting

Introduction

It is widely understood and acknowledged that COVID-19 increases risks of modern slavery. The United Nations ('UN') Special Rapporteur on contemporary forms of slavery's report on the impact of COVID-19 on modern slavery identifies a number of new risks as well as impacts on those already in forms of modern slavery.¹ He notes the multifaceted social and economic impacts of the pandemic and the exacerbated risks of slavery and impacts on specific groups. The shifts in labour demand provided strong incentives for some businesses to exploit workers, including in industries that produce, process and provide essential items such as food, medicines and medical equipment, which have seen a sudden surge in the demand for workers as a result of COVID-19.² Migrant workers are particularly vulnerable to exploitation and decline in

¹ Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, *Impact of the coronavirus disease pandemic on contemporary forms of slavery and slavery-like practices*. UN Doc: A/HRC/45/8, 4 August 2020, Human Rights Council Forty-fifth session 14 September–2 October 2020 ('Report of the Special Rapporteur').

² Ibid, p.12.

migrant remittances is predicted to increase poverty, child labour and child marriage.³ The Special Rapporteur recommends that States ensure implementation of the UN Guiding Principles on Business and Human Rights ('UNGPs') and increase awareness of contemporary forms of slavery and the risks faced by the vulnerable workers among businesses.⁴ Global anti-slavery NGO Walk Free reports that widespread job losses, the shutdown of regular migration pathways, and reduced scrutiny of labour standards, increases vulnerability to forced labour, human trafficking and modern slavery.⁵

In Australia, awareness of modern slavery risk in the operations and supply chains of large businesses is growing since the introduction of the *Modern Slavery Act 2018 (Cth)* ('MSA').⁶ From 2020, businesses, not-for-profits and Australian Commonwealth government entities with an annual turnover of \$100 million or more were expected to publish their first statements under the MSA. COVID-19 not only impacts on modern slavery risks in these entities' operations and supply chains but may affect the entities' ability to engage with their obligations under the MSA. In light of this, Australian Border Force - the Government agency responsible for supporting the implementation of the MSA - firstly extended the deadlines for reporting, and secondly, issued an information sheet on COVID-19 and the MSA.⁷ The information sheet notes that as a result of COVID-19, entities may be unable to undertake planned activities to address modern slavery risks, may have limited capacity to prepare statements, and their normal supply chains may have been altered.⁸ Australian Border Force therefore encouraged reporting entities affected by COVID-19 to clearly explain in their statements under the MSA how COVID-19 has impacted their capacity to assess and address modern slavery risks.

One risk of this approach is that the extended deadline, and acknowledgment that COVID-19 may have impacted the reporting entities' capacity to tackle and report on modern slavery risks, could be used to avoid in-depth engagement with the obligations of the MSA. It has already been identified that the MSA lacks enforcement mechanisms, such as penalties for non-compliance.⁹ Rather than penalties, the Minister's view in the second reading speech when introducing the Modern Slavery Bill was: 'Businesses that fail to take action will be penalised by

³ Ibid, para 50.

⁴ Ibid, para 100.

⁵ Walk Free, 'Protecting People in a Pandemic', <https://cdn.walkfree.org/content/uploads/2020/10/06154059/Walk-Free-Foundation-COVID-19-Report.pdf>.

⁶ Modern Slavery Act 2018 (Cth), <https://www.legislation.gov.au/Details/C2018A00153>

⁷ Australian Border Force, 'Modern Slavery Act Information Sheet: Coronavirus', <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-covid-19.pdf>

⁸ Ibid, 1.

⁹ See, eg, Justine Nolan and Nana Frishling, "Australia's Modern Slavery Act: Towards Meaningful Compliance" *C&SLG* 37 (2019) 104-126.

the market and consumers and severely tarnish their reputations'.¹⁰ The MSA then is based on a form of non-state regulation wherein regulatory arrangements are carried out by other actors, including consumers and civil society.¹¹

Drawing on publicly available statements at time of writing, this article analyses whether reporting entities appeared to grapple with COVID-19 related-risks, or, whether there are indications that COVID-19 challenges are being used as something of a 'get out of jail free card'. It begins with an overview of the Australian MSA and COVID-19 related guidance on the MSA, the method is presented, and the findings on the analysis of MSA statements is first presented, and then discussed. The concluding comments note that future years' statements may provide more comprehensive analysis.

Australia's Modern Slavery Act and COVID-19

Business reporting and due diligence laws on modern slavery, or broader human rights and environmental risks, are becoming more prevalent across jurisdictions.¹² Influenced by the UK's MSA,¹³ Australia's MSA was introduced in 2018, taking effect in January 2019 and with the first modern slavery statements due in 2020 or 2021 depending on the entity's reporting period. Australian businesses with operations in the UK have already published statements under the UK MSA,¹⁴ and some Australian companies already reporting under the UK MSA had begun to prepare a statement intended to meet the requirements of both Acts.¹⁵

Section 16 of the MSA specifies the mandatory criteria for modern slavery statements, these are as follows:

¹⁰ Commonwealth of Australia, 'Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia' (December 2017) 5.152.

¹¹ Natasha Tusikov, 'Transnational non-state regulatory regimes', in Drahos, P. (Ed.). (2017). *Regulatory theory: Foundations and applications* 339-354.

¹² Fiona McGaughey, "Australia's proposed Modern Slavery Act for business reporting - part of an international trend in business and human rights" 36 no. 3 *Australian Resources and Energy Law Journal* (2018) 29-35.

¹³ Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, Inquiry into establishing a Modern Slavery Act in Australia, 'Terms of Reference', https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Interim_Report/section?id=committees%2freportjnt%2f024092%2f24997 (accessed 4 June 2019).

¹⁴ See, e.g. Rio Tinto, 'Slavery and Human Trafficking Statement 2016', http://www.riotinto.com/documents/RT_Slavery_and_human_trafficking_statement.pdf (accessed 3 January 2021); Wesfarmers, 'Wesfarmers Human Rights And Modern Slavery Statement', <https://sustainability.wesfarmers.com.au/our-principles/sourcing/ethical-sourcing-and-human-rights/wesfarmers-human-rights-and-modern-slavery-statement/> (accessed 3 January 2021).

¹⁵ See, eg, Wesfarmers, '2019 Modern Slavery Act for Wesfarmers', <https://sustainability.wesfarmers.com.au/media/3118/wesfarmers-modern-slavery-statement-2019.pdf>.

- (1) A modern slavery statement must, in relation to each reporting entity covered by the statement:
 - (a) identify the reporting entity; and
 - (b) describe the structure, operations and supply chains of the reporting entity; and
 - (c) describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls; and
 - (d) describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes; and
 - (e) describe how the reporting entity assesses the effectiveness of such actions; and
 - (f) describe the process of consultation with:
 - (i) any entities that the reporting entity owns or controls; and
 - (ii) in the case of a reporting entity covered by a statement under section 14—the entity giving the statement;

Despite criticisms of the MSA such as the lack of enforcement mechanisms and absence of provision for an Anti-slavery Commissioner role, interviews with Australian businesses, civil society and other stakeholders identified a number of strengths in the MSA.¹⁶ These included its overt attempts to drive best practice and create a level playing field; requiring engagement from Directors; raising awareness of modern slavery; the inclusion of mandatory criteria (unlike the UK Act); and driving awareness of the need for businesses to have some level of responsibility for their suppliers' practices.¹⁷

To facilitate oversight by civil society and others, the Australian MSA differs from that of the UK and other comparable laws, such as the French Duty of Vigilance Law,¹⁸ in that Australia is the first jurisdiction with a Government repository (register) for MSA statements. The register is now open for reporting entities to submit their statements,¹⁹ and the first batch of statements was made available in November 2020.²⁰ Available MSA statements provide some early indications of engagement with the challenges of COVID-19 regarding modern slavery.

¹⁶ Justine Nolan, Jolyon Ford, M. Azizul Islam, 'Regulating Transparency and Disclosures on Modern Slavery in Global Supply Chains: a "Conversation Starter" or a "tick-box Exercise"?' (Report for CPA Australia, March 2019).

¹⁷ Ibid, 17.

¹⁸ *Modern Slavery Act 2015 (United Kingdom)*; Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

¹⁹ <https://modernslaveryregister.gov.au/>.

²⁰ Fiona McGaughey, Holly Cullen, Rebecca Faugno, 'Australia's world-first repository of 'modern slavery statements' a step in the right direction' (The Conversation, November 30, 2020), <https://theconversation.com/australias-world-first-repository-of-modern-slavery-statements-a-step-in-the-right-direction-151029>.

Method

The primary data source for this paper is a qualitative analysis of available Australian MSA statements to determine: a) whether COVID-19 is acknowledged, b) whether the entity reported reduced capacity to engage with their MSA obligations as a result, c) whether the entity identified specific, increased modern slavery risks as a result of COVID-19 and d) if so, how they responded. There are an anticipated 3,000 reporting entities under the MSA,²¹ and at time of writing, there were 391 statements in the modern slavery register. Using a simple keyword search of the register for “COVID”, there are 144 statements that refer to COVID in their text. From these 144 statements, 25 per cent (n=36) of the statements were selected randomly, but ensuring variety in terms of industry.²² All statements discussed here are available on the public register. Extracts of the statements discussing COVID-19 were subjected to qualitative analysis, and thematically coded using NVivo software. Thematic coding is a well-established method used to identify themes in various types of qualitative datasets.²³ The thematic coding was first carried out using a deductive approach – looking for answers to the research questions on whether and how COVID-19 was acknowledged, was reported to have increased modern slavery risks, and had impacted on reporting capacity. However, this was followed with an inductive approach to uncover themes the researcher may not have anticipated,²⁴ (in this study, ‘positive outcomes or actions related to COVID responses’ was one such theme). The themes are discussed below.

Modern Slavery Statements and COVID-19

Overall, there was widespread acknowledgement of COVID-19 and modern slavery risks in the selected sample. The extent of the impact though, varied. Some reporting entities appeared to indicate that COVID-19 had *significantly impacted on their entire modern slavery risk and reporting project*, for example:

Progress on most of the planned activities have been significantly impacted by the effects of Covid-19 on the business, leading to a delay in the completion. We have reviewed these priorities and reaffirm our commitment to deliver these outcomes progressively as the Group progresses through it's [sic] Strategic Covid-19 Recovery plan over the next 3 years.²⁵

²¹ Australian Government, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*, <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>.

²² <https://modernslaveryregister.gov.au/>.

²³ Carol Rivas, ‘Coding and Analysing Qualitative Data’ in Clive Seale (ed.) *Researching Society and Culture* (SAGE, 3rd ed. 2012) 366.

²⁴ Ibid, 368.

²⁵ Qantas Airways Limited.

With the onset of the COVID-19 pandemic during 2020, business resources had to be unexpectedly directed towards the formation of COVID safety plans and actions to ensure the continuity of the business in this new challenging environment. This impacted our capacity to make progress on building the modern slavery framework during the second half of the reporting period.²⁶

The development of our modern slavery program has been slowed by the affects [sic] of COVID-19 throughout 2020. A substantial portion of CDC's internal resources were directed toward minimising the impact of the pandemic on our day-to-day operations, which in turn has disrupted efforts to fully establish our supply chain risk assessment processes.²⁷

For other reporting entities, only one aspect of their activities was reported to be impacted. In some cases, the delays were at the supplier end, rather than with the reporting entity itself. For example:

...we had identified 65 suppliers who were deemed to present an elevated risk of slavery and human trafficking. We distributed a Slavery and Human Trafficking Questionnaire to these suppliers, in order to seek additional assurance. Of these 65 suppliers: - 15 provided a satisfactory initial response to the questionnaire; - 17 required further follow-up and we are working with these suppliers to obtain relevant assurances; - 15 are no longer JLR suppliers; and - In 18 cases no response has been received to date, which is in part due to the COVID-19 situation.²⁸

Table 1: Most prevalent themes (sorted in order of frequency)

1. Postponed (training, event, audit, other)
2. Hygiene and employee safety
3. Targeted COVID response
4. Identified a specific COVID-related risk
5. Impact on employees (e.g. reduced workforce, reduced income)
6. Deemed existing structures, processes suffice

²⁶ Emerald Grain Pty Ltd.

²⁷ Canberra Data Centres Proprietary Limited.

²⁸ Jaguar Land Rover Australia Pty Ltd.

7. Acknowledgement of COVID
8. Alternative ways of working
9. Costs (e.g. reduced expenditure, consideration of payment terms etc.)
10. Little or no impact due to COVID identified
11. To be considered in next year's statement
12. Altered supply chain due to COVID
13. Collaboration to tackle COVID risks
14. Positive outcomes / actions related to COVID response

Table 1 presents the list of themes from the thematic coding, sorted in order of frequency of the theme in modern slavery statements. Although the same theme could arise more than once in any particular statement, due to the overall brevity of discussion of COVID-19 in the statements, this was rarely the case. As Table 1 indicates, postponement was the most common theme and incorporates three sub-themes: postponements of actions related to modern slavery risk assessment in general, postponement of modern slavery training or related events, and postponement of audits.

Several references to postponed training initiatives and events (such as supplier conferences) were noted in the statements (Table 1, no.1).²⁹ Some of these had potential to raise awareness among staff who would be well positioned to identify potential modern slavery 'victims',³⁰ such as the training of airline staff.³¹ However, the very significant travel restrictions into and around Australia may have reduced trafficking into the country during the pandemic. Given the common transition to online working, including online training and education during COVID-19, there was surprisingly little transition to online training on modern slavery, with a few exceptions.³²

Some reporting entities noted that factory and/or supplier audits had continued even during COVID-19,³³ but more commonly, postponing audits and factory visits due to COVID-19 was a common theme. Globally, audits have been described as 'the main strategy that companies

²⁹ For example, South 32; Jaguar Land Rover Australia Pty Ltd.

³⁰ Brisbane Airport Corporation Pty Limited.

³¹ Including Brisbane Airport Corporation Pty Limited; Qantas Airways Limited.

³² See, eg, ANA Holding Inc..

³³ Group Zara Australia Pty Limited.

use to detect and address labour exploitation in their supply chains'.³⁴ Audits of this kind (also known as 'social audits') involve a process for monitoring labour conditions in operations and supply chains. They are sometimes carried out internally but often by third-party auditors. Targeted audits can be effective in detecting modern slavery,³⁵ but are only one tool in identifying risks.³⁶

In some cases, audits were paused only temporarily and had resumed by the time the statement was being finalised.³⁷ Whereas some reporting entities noted a widespread postponement of all audit activities, for others the impact was more constrained, for example:

A portion of our FY20 planned responsible sourcing audits (21%) were impacted by the pandemic with 10% of audits postponed to FY21.³⁸

One reporting entity attempted to put a positive spin on the postponement of audits, noting that:

As a result of the recent crisis, we paused physical supplier audits until they were safe to resume. This global pause on audits initially created a weakness in our control process. However, we consequently identified an opportunity to broaden our approach, including developing our anonymous grievance hotline.³⁹

Of course, audits and a grievance hotline are not mutually exclusive so without further context, this assertion appears somewhat tenuous.

As noted in Table 1 (no. 2), COVID-19 related concerns for employee safety and a focus on hygiene measures introduced featured heavily in the statements with many reporting entities describing at length the measures they had put in place. Many reporting entities also identified one or more *specific* COVID-19 related modern slavery risks in their operations and/or supply chains (Table 1, no.4). This relates to several other themes including 'targeted responses', discussed further below. It also relates to the concern for hygiene, as several entities reported that cleaning (often subcontracted) had already been identified as a risk pre-COVID-19 and then the

³⁴ Genevieve LeBaron and Andreas Ruhmkorf, "The domestic politics of corporate accountability legislation: struggles over the 2015 UK Modern Slavery Act" 17 no. 3 *Socio-Economic Review* (2019) 709–743, 720.

³⁵ Amy V. Benstead, Linda C. Hendry and Mark Stevenson, 'Detecting And Remediating Modern Slavery in Supply Chains: A Targeted Audit Approach' *Production Planning & Control* (2020).

³⁶ Justine Nolan and Jolyon Ford, 'Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy Between Human Rights Due Diligence And The Social Audit' vol 26 no.1 *Australian Journal of Human Rights* (2020) 27-45.

³⁷ See, eg, Retail Apparel Group.

³⁸ Microsoft Pty Ltd.

³⁹ Retail Apparel Group.

services were more under pressure due to increased demand for cleaning during the pandemic. One referenced the Cleaning Accountability Framework as a useful resource for risk mitigation,⁴⁰ and another included a case study on 'Addressing Risks in our Cleaning Services'.⁴¹ Case studies in general were not prevalent in the sample.

Another common theme was 'targeted COVID response' (Table 1 no. 3) with regard to modern slavery risks. For example:

To respond to these emerging risks, we have incorporated questions about the impact of COVID-19 into our engagement with portfolio companies and externally appointed investment managers. From an investment perspective we perceive the risks are higher for certain industries such as hospitality, medical supplies and the garment industry.⁴²

In general, there was little differentiation of modern slavery risks due to COVID-19 across different countries of a reporting entities' operations or supply chain. However, a few entities did discuss suppliers in China. For example,

The COVID-19 outbreak posed unique challenges for our supply chain. From the start of the outbreak in early 2020, we worked with our China-based supplier factories to ensure the safety of their workers and continued compliance with our human rights and labor standards.⁴³

Consistent with other findings on modern slavery reporting, disclosures were rare in the sample, but one reporting entity did refer to grievances raised in China as a result of COVID-19:

Our Workers' Voice Hotline was a valuable tool for monitoring worker concerns attributed to COVID-19. During the outbreak in China, we received four grievances related to excessive working hours and pay. We applied robust processes to investigate and remedy these grievances and we put corrective actions in place at the impacted factories.⁴⁴

In terms of specific risks with products or services identified related to COVID-19 (Table 1, no.4), the most common themes were procurement of personal protective equipment (PPE) and sanitisation products, increased use of subcontracted cleaning services, and shipping (with

⁴⁰ QIC Limited.

⁴¹ Australian Postal Corporation.

⁴² QIC Limited.

⁴³ Microsoft Pty Ltd.

⁴⁴ Microsoft Pty Ltd.

regard to the situation of crew). Of these, the most common risk identified was the procurement of PPE. Reporting entities noted that the market for these products was generally disrupted,⁴⁵ that the market pressure could lead to worker exploitation, that some new suppliers were required to be contracted with at short notice, and that businesses' capacity to undertake standard risk assessments was constrained in the circumstances.⁴⁶ Despite widespread media and NGO reports of modern slavery in PPE manufacturing, most entities did not directly engage with this, with one exception. They reported:

Analysis has identified that some of the gloves purchased were manufactured in a country where migrant labour exploitation has been alleged. At the time of publishing this Statement, our inquiries had not identified any of the glove manufacturers to be associated with forced labour claims. We will continue to consider avenues to gain further information.⁴⁷

Others reported trying to purchase predominantly from existing suppliers, or where possible, only used Australian suppliers, or reinforced the steps they had taken to ensure suppliers were aware of modern slavery risks such as through their existing 'Supplier Code of Conduct'.⁴⁸ Some referred to 'tailored human rights due diligence' in response to high demand for PPE and medical supplies, to identify risks and drive responsible decision-making for rapid sourcing of these items.⁴⁹ There were reports of engaging with existing suppliers about any changes to their supply chain that could pose additional risks and where new suppliers were brought on board quickly to meet demand, that 'rapid vendor onboarding checks', including UN Security Council Sanction checks were performed.⁵⁰

With regard to shipping, one entity reported worked closely with shipping suppliers as travel restrictions were creating additional risks for seafarers such as impacting the ability for crew changes and repatriation, resulting in physical and mental exhaustion.⁵¹ The company report that they are continuing to work in partnership with ship-owners to address these impacts, reviewing fatigue and safety controls, crew change protocols and providing safe and accessible ways for seafarers to communicate grievances. Although COVID-19 has created specific risks in relation to travel restrictions for shipping suppliers, it is noteworthy that grievance mechanisms

⁴⁵ Lendlease Corporation Limited.

⁴⁶ Regis Group.

⁴⁷ Australian Postal Corporation.

⁴⁸ Lendlease Corporation Limited.

⁴⁹ South 32.

⁵⁰ See, eg, Cadia Holdings Pty Limited (Newcrest).

⁵¹ South 32.

do not appear to have been in place and so the pandemic may have expedited this process. Grievance mechanisms are recommended in the government guidance on the MSA, drawing on Principle 31 of the UNGPs.⁵²

The other general theme on increased COVID-19 risks of modern slavery related to the altered profile of global supply chains (Table 1, no. 12) and the widespread economic impacts of the pandemic and resultant effects on employees (Table 1, no. 5), including redundancies, reduced hours, increased demand for some products (such as PPE) leading to risk of exploitation, and reduced procurement leading to financial pressure on suppliers and potential inability to pay their staff (Table 1, no. 9). With regard to dealing with suppliers, several reporting identities discussed revisiting their payment terms with suppliers and opting to pay early where appropriate to avoid hardship on workers (Table 1, no. 9).⁵³

Others called on stakeholders more broadly to take appropriate action. For example, with regard to the global garment industry, governments and financial institutions were called on to accelerate access to credit, unemployment benefits and income-support.⁵⁴ Less common in the statements was reporting on COVID-19 related collaboration (Table 1, no. 13), with a few exceptions, for example:

Inditex has been proactive from the very beginning, joining forces with the main organizations that advocate workers' rights. The Group collaborates with IndustriALL Global Union, the International Labour Organization, Ethical Trading Initiative and ACT (Action, Collaboration, Transformation), among others.⁵⁵

There were also some examples of positive outcomes or actions to respond to COVID-19 (Table 1, no. 14), for example:

The reduction in the number of flights from the effect of COVID-19 had given rise to unused in-flight meals. Through Save the Children Japan, the ANA Group donated rice crackers, apple juice, etc. to children from single-parent households in May 2020. To keep children's spirits up while they had to stay out of school due to COVID-19, the ANA Group also donated some 20,000 chocolates to municipalities in the environs of Narita Airport.⁵⁶

⁵² Australian Government, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*, <<https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>>.

⁵³ Australian Postal Corporation.

⁵⁴ Group Zara Australia Pty Limited.

⁵⁵ Group Zara Australia Pty Limited.

⁵⁶ ANA Holding Inc.

Conversely, a few reporting entities stated that increased risk of modern slavery in their operations and supply chains due to COVID-19 were minimal or that they had not noticed increased risks (Table 1, no. 10).⁵⁷ Finally, several entities acknowledged the increased risk due to COVID-19 but provided no detail on what the *specific* risks are in their operations and supply chains and the steps being taken to address them (Table 1, no. 7).⁵⁸

Discussion

Australian MSA statements as of February 2021 reveal a number of tensions. The first is that despite the increased risks posed by COVID and the guidance provided by Australian Border Force encouraging reporting entities to clearly explain in their MSA statements how COVID-19 has impacted their capacity to assess and address modern slavery risks, only 37 per cent of statements had addressed the topic of COVID-19. Secondly, COVID-19 did not impact on all businesses – and industries – equally. Some entities, such as those in the aviation sector, described the devastating effect of the pandemic on their operations; others reported minor changes and little to no perceived increased risk of modern slavery.

Further, a sample of MSA statements analysed show that of those which discussed COVID-19, many of them acknowledge the heightened risk of modern slavery in operations and supply chains; yet also report delays to risk assessment, training, audit and other activities that could have identified such risks and provided a baseline for action. Nonetheless, the imprimatur for this approach came from Australian Border Force whose COVID-19 information sheet noted that as a result of COVID-19, entities may be unable to undertake planned activities to address modern slavery risks, may have limited capacity to prepare statements, and their normal supply chains may have been altered.⁵⁹ Similarly, failure to use online systems for training and events related to modern slavery indicates that these were given a lower priority than other business activities during the period.

This aligns with the light-touch approach taken with regard to the MSA so far, which is one of 'carrot' rather than 'stick' and risks limiting the effectiveness of an already somewhat weak law. As Nolan and Frishling point out,

Superficial compliance with the Act is of course entirely possible. Given that the Act mandates reporting and not the act of due diligence itself, a company could technically fulfill its reporting obligations while having undertaken only cosmetic changes, or without having implemented any measures at all.⁶⁰

⁵⁷ See, eg, Fuji Xerox Document Management Solutions.

⁵⁸ See, eg, KPMG.

⁵⁹ Ibid, 1.

⁶⁰ Nolan and Frishling (n 9), 116.

In this analysis, statements tended to take a broad approach to modern slavery with regard to COVID-19, reporting more commonly on employee wellbeing initiatives, and relatively little on high risk modern slavery situations *per se*. Preliminary indications are that COVID-19 appeared to raise awareness of employee wellbeing, with a particular focus on hygiene, health and flexible working. Concomitantly though, COVID-19 and government responses resulted in widespread job losses in certain industries such as aviation. Much of the statements' content with regard to employees and workers in supply chains is not evidently related to specific types of modern slavery, such as bonded or forced labour. However, it is well established that various types of labour exploitation can 'tip over' into modern slavery and that abuse of workers can escalate over time or change in its severity from day to day.⁶¹ Hsin, Marshall, Nolan and others have posited that labour exploitation and modern slavery exist on a continuum.⁶² Therefore, taking a broad approach is appropriate as long as specific high risk activities are also scrutinised in more detail.

In terms of specific COVID-19 related risks, some of the risks identified in the statements, such as procurement of PPE, have been widely reported on elsewhere. For example, the Special Rapporteur's report on the impact of COVID-19 on modern slavery notes several alleged labour rights violations in the rubber glove manufacturing sector in Malaysia regarding non-compliance with social distancing, occupational safety and health, excessive overtime with no pay, forced labour, as well as inadequate living conditions.⁶³ He notes that the South African Government reported that in a factory producing medical masks, workers were prevented from leaving the premises and forced to work to meet the increased demand. The Special Rapporteur also raises concerns that COVID-19 adversely affected the ability to ensure due diligence in supply chains with some Governments purchasing PPE produced by companies that are allegedly associated with forced labour.⁶⁴

Similarly, some statements identified risks in the garment industry supply chain and it has been reported elsewhere that millions of garment workers faced destitution due to cancelled orders during the pandemic.⁶⁵ A commendable feature of a few of the statements is some of the specificity that is provided with regard to the modern slavery risks. Providing specific details on

⁶¹ Lisa K.E. Hsin, "Modern slavery in law: towards continuums of exploitation" *Australian Journal of Human Rights* 26 no. 1 (2020) 165-175.

⁶² Hsin, n 65; Justine Nolan and Martijn Boersma, *Addressing Modern Slavery*. (UNSW Press 2019); Shelley Marshall, *Living Wage: Regulatory Solutions to Informal and Precarious Work in Global Supply Chains* (Oxford University Press 2019).

⁶³ Report of the Special Rapporteur (n 1), 12.

⁶⁴ Ibid.

⁶⁵ Business and Human Rights Resource Centre, 'Millions of garment workers face destitution as fashion brands cancel orders', <https://www.business-humanrights.org/en/blog/millions-of-garment-workers-face-destitution-as-fashion-brands-cancel-orders/>.

emerging risks in this rapidly changing time could be of significant benefit in building the knowledge-base regarding manifestations of modern slavery so that other businesses, governments and civil society can act accordingly. For example, an identified COVID-19 related risk is unilateral cancellations and suspensions of orders from overseas suppliers which, with economies in lockdown and few alternative employment possibilities, leaves workers at risk of exploitation and modern slavery.⁶⁶ Knowledge of such cancellations would provide valuable information to international aid agencies, civil society, governments and others about where labour inspections, humanitarian support and other measures may be required.

Overall, reporting entities undoubtedly 'put their best foot forward' in their modern slavery statements, while more critical analysis of their modern slavery related responses to COVID-19 may be publicly available elsewhere. For example, Inditex's (Group Zara Australia Pty Limited) statement addressed COVID-19 risks and was part of the sample discussed here. They reported on their proactive stance and collaboration with regard to the global garment industry. This can be supplemented with Business and Human Rights Resource Centre's *COVID-19 Apparel Action Tracker* which provides further analysis of Inditex's performance during the pandemic.⁶⁷ It presents a good 'scorecard' overall but raises concerns with regard to extended payment times and Inditex's pandemic policy on price reductions. The Business and Human Rights Resource Centre also reports on historical allegations against Inditex of worker abuse in China, not referenced in the modern slavery statement.⁶⁸

Conclusion

The COVID-19 pandemic increased modern slavery risks around the world, including in the operations and supply chains of Australian businesses. In response to COVID-19, the Government agency responsible for supporting the implementation of the MSA extended the deadlines for reporting and noted that entities may be unable to undertake planned activities to address modern slavery risks, may have limited capacity to prepare statements, and their normal supply chains may have been altered. To assess how reporting entities responded to this, I analysed a sample of statements from the public register.

Overall, the statements acknowledged that COVID-19 had increased risks through rapidly altered supply chain profiles, urgent demand for items such as PPE, and yet reports of reduced capacity to fully execute planned modern slavery risk assessment, training, and audit activities. Several entities reported implementing COVID-19 related risk assessments or

⁶⁶ Hinrich Voss, "Implications of the COVID-19 pandemic for human rights and modern slavery vulnerabilities in global value chains" *Transnational Corporations* 27 no.2 (2020) 113 - 126, 114.

⁶⁷ Business and Human Rights Resource Centre, 'Inditex', <https://www.business-humanrights.org/en/companies/inditex/?issue=332>.

⁶⁸ Business and Human Rights Resource Centre, 'Reality behind brands CSR hypocrisy: an investigative report on China suppliers of Zara, H&M and Gap', <https://www.business-humanrights.org/en/latest-news/reality-behind-brands-csr-hypocrisy-an-investigative-report-on-china-suppliers-of-zara-hm-and-gap/>.

otherwise indicated that they would return to the question of COVID-19 risks in next year's statement. These statements will likely provide a more comprehensive engagement with the topic, but given the reporting rather than due diligence nature of the MSA, whether workers have experienced forms of modern slavery may not always be known, or if known, not revealed.