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**Access to Remedy for Survivors of All Forms of
Slavery, Trafficking and Forced Labour**

Understanding Remedy Under the Australian Modern Slavery Act: From Conceptualisation to Provision of Remedy

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Abstract

Drawing on data from a multi-year collaborative research project, this article offers insight into how remedy is conceptualised by business in responding to the reporting requirements set out in the Australian Modern Slavery Act 2018 (Cth). The article considers three key questions regarding the provision of remedy. First, do companies facilitate remediation, or report facilitating remediation? Second, which types of remedy are being provided most frequently, at least on paper? And third, to what degree are key stakeholders consulted in the formulation of remedies? The research indicates that the MSA does not facilitate effective remediation.

Keywords: modern slavery, remedy, business, human rights

1 Introduction: A framework for understanding effective remedy

Access to an effective remedy is an essential component of human rights.¹ The third pillar of the United Nations' Guiding Principles on Business and Human Rights (UNGPs) provides that both States and business must offer access to effective remedy.² However, to date the mechanisms employed to provide remedies vary greatly in their effectiveness and in the Australian context, remediation has been identified as a key gap – both for government, in terms of compliance with international legal obligations,³ and for businesses.⁴ Concerns about the form, scope, adequacy, and availability of remedy remain central to the business and human rights (BHR) agenda. The provision of remedy to workers experiencing modern slavery or human rights abuses is a foundational aspect of a rights-based approach to addressing modern slavery. This article focuses on emerging practical responses to remedy and uses insights gained from a multi-year collaborative research project that examined the effectiveness of Australia's *Modern Slavery Act* 2018 (MSA) to understand how remedy is being perceived and operationalised by business.⁵

To foreground our analysis of the practice of remedy – that is how, when, and with what frequency business facilitates access to remedy under the MSA – we first step back and examine the principles that should guide the provision of remedy in BHR.

¹ Both international and regional standards note the responsibility on the state to provide access to effective remedies. The right to an effective remedy is present in Article 8 of the Universal Declaration of Human Rights and Article 2(3) of the International Covenant on Civil and Political Rights. Similarly, several regional instruments also guarantee the right to an effective remedy including Article 47 of the Charter of Fundamental Rights of the European Union, Article XVIII of the American Declaration of the Rights and Duties of Man and Article 9 of the Arab Charter on Human Rights.

² Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (New York and Geneva, United Nations, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

³ Frances Simmons, Jennifer Burn, and Fiona McLeod, "Modern Slavery and Material Justice: The case for Remedy and Reparation," *University of New South Wales Law Journal* 45, no. 1 (2022), 148-183.

⁴ Fiona McGaughey, "Behind the Scenes: Reporting Under Australia's Modern Slavery Act," *Australian Journal of Human Rights* 27, no. 1 (2021), 20-30.

⁵ Amy Sinclair and Freya Dinshaw, *Paper Promises: Evaluating the Early Impact of Australia's Modern Slavery Act* (Melbourne and Sydney: Human Rights Law Centre, 2022), <https://www.hrlc.org.au/reports-news-commentary/2022/2/3/paper-promises-evaluating-the-early-impact-of-australias-modern-slavery-act>; Freya Dinshaw et al, *Broken Promises: Two Years of Corporate Reporting under Australia's Modern Slavery Act* (Melbourne and Sydney: Human Rights Law Centre, 2022), <https://www.hrlc.org.au/reports-news-commentary/broken-promises>; Shelley Marshall et al, *Australia's Modern Slavery Act: Is it Fit for Purpose* (Sydney: Australian Human Rights Institute, 2023), <https://www.humanrights.unsw.edu.au/news/new-research-shows-companies-support-stronger-modern-slavery-laws>; "Testing the Effectiveness of Australia's Modern Slavery Act," Australian Human Rights Institute, accessed July 10 2023, <https://www.humanrights.unsw.edu.au/research/testing-effectiveness-Australia-modern-slavery-act>.

At a general level, remedy should “[s]eek to restore the affected person or persons to the situation they would be in had the adverse impact not occurred (where possible)”.⁶ The UN Working Group on Business and Human Rights (UN BHR Working Group) has acknowledged that “[r]ights holders affected by business-related human rights abuses should be able to seek, obtain, and enforce a ‘bouquet of remedies’ depending upon varied circumstances, including the nature of the abuses and the personal preferences of rights holders.”⁷ The provision of remediation should consider direct and indirect impacts of corporate activity on rights holders. More specifically, the UN BHR Working Group’s report highlights five different forms of remedy relevant to BHR: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁸ Each of these different forms of remedy may have a different purpose or interrelated purposes and may be employed singly or jointly.

However, the UNGPs do not simply refer to the provision of remedy, but rather, reference access to an *effective* remedy that entails both substantive and procedural aspects.⁹ The UNGPs outline eight criteria with which to assess the effectiveness of non-judicial grievance mechanisms in the context of discussing remedy. It suggests grievance mechanisms should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, promote continuous learning, and be based on engagement and dialogue.¹⁰ Meeting these criteria is considered best practice in devising remedial responses and it is reflected in the Australian Government’s *Guidance for Reporting Entities*.¹¹

This article begins by providing context for the MSA followed by offering some insights into how remedy is conceptualised by business in responding to the reporting requirements set out in the MSA considering three key questions regarding the provision of remedy. First, do companies facilitate remediation, or report facilitating remediation? Second, which types of remedy are being provided most frequently, at least on paper, including whether any ‘remedies’ companies report offering are, in fact, counterproductive or ineffective? Third, to what degree are stakeholders consulted in the formulation of remedies and what categories of stakeholders are consulted? Our research indicates that the MSA is generating limited engagement by business with respect to remedy, and based on the information available, it appears that the MSA does not facilitate effective remediation.

⁶ Organisation for Economic Co-operation and Development (OECD), *OECD Due Diligence Guidance for Responsible Business Conduct*, (Paris, OECD, 2018), <https://www.oecd.org/investment/ue-diligence-guidance-for-responsible-business-conduct.htm>.

⁷ UN General Assembly, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/72/162, (July 18, 2017), [38], <https://undocs.org/A/72/162>.

⁸ A/72/162, [42].

⁹ A/72/162, [14].

¹⁰ Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, Principle 31.

¹¹ Attorney-General’s Department, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*, (Canberra: Australian Government, 2023).

2 Methodology

Gathering evidence and overcoming challenges in defining and operationalising remedy is important because if each company has the latitude to define and implement its own version of remedy without reference to an agreed-upon standard, it is unlikely to lead to enhanced access to effective remedy for rights holders. This article leverages evidence gathered as part of a collaborative research project between nine academic and civil society organisations. Various research methodologies were employed to identify and evaluate corporate responses to the MSA, and accordingly the evidence presented is primarily concerned with corporate behaviour more so than other relevant and equally important parties. The methodologies employed throughout the course of the research project and incorporated in this article include: two separate rounds of qualitative analysis of statements submitted to the Modern Slavery Register, an anonymous survey distributed to businesses, and four focus groups conducted with business representatives, civil society and academia. Each of these methodologies are discussed in greater depth below.

2.1 Qualitative analysis of modern slavery statements

The first stage of the research project involved the development of baseline indicators to assess the statements submitted to the Australian Government's Modern Slavery Register.¹² As per pt 2 of the MSA, reporting entities (those earning 'at least \$100 million for the reporting period') must submit a statement reporting on key mandatory criteria (s 16) including any modern slavery risks, 'actions taken... to assess and address those risks', 'the effectiveness of such actions', and any consultation with entities the corporation 'owns and controls'.¹³

The research team developed a set of 66 indicators, covering:

- a. the ability of entities to map their supply chain;
- b. monitoring practices;
- c. remediation;
- d. audit practices;
- e. adoption and implementation of supply chain standards; and
- f. review of performance metrics and frameworks.

A trained team of assessors reviewed 110 modern slavery statements. Following a guide, assessors awarded a score for each indicator of 0, 0.5, or 1. These scores were reviewed by two further assessors for consistency and validation. The research team elected to review statements from four high-risk sectors: Garments from China (30 companies); Horticulture from Australia (30 companies); Seafood from Thailand (25 companies) and Gloves from Malaysia (24 companies). Eight companies were categorised under two sectors and scored separately for each.

¹² Australian Government Attorney-General's Department, "Modern Slavery Register," (accessed July 10, 2023), <https://modernslaveryregister.gov.au/>.

¹³ *Modern Slavery Act 2018* (Cth), Australia, pt 2.

For the second round, the research team reviewed the same modern slavery statements to provide a longitudinal analysis.¹⁴ The project team evaluated the existing indicators and made minor refinements. The results of these two rounds of analysis were published in two corresponding reports.¹⁵

2.2 Business survey

The findings of the qualitative analysis have been supported by an anonymous business survey which received 82 complete responses. The purpose of the survey was to gauge how reporting entities are responding to the MSA, how they conduct remediation, and how they engage suppliers and stakeholders. The survey asked a series of questions:

- Seven concerning background and demographic information on the participant's company.
- Eight concerning supply chain trust and transparency.
- Four concerning the capability of companies to address modern slavery.
- Twelve concerning company policy and compliance (including questions on reform of the MSA)
- Eight questions specifically examining remediation.

Much of the data derived from the survey is descriptive (i.e. direct percentages reflecting how corporate participants responded to discrete questions). However, detailed quantitative analysis building upon the responses to questions on remediation was also included. Seven key indicators were employed to measure what the authors term 'remediation practice effectiveness'. These indicators – listed in the report *Australia's Modern Slavery Act: Is it Fit for Purpose* – include:

1. The reported presence and form of mechanisms to ensure suppliers provide remediation to workers facing labour violations;
2. The reported presence of policies to handle supplier incidents regarding labour violations;
3. The degree to which survey participants believe those who face labour violations by their suppliers will be better off after the remediation process;
4. The reported resources (budget line, funding, insurance) of survey participants in place to seek restitution for affected workers at their supplier locations;
5. The degree to which survey participants believe staff within their organisation know what to do if incidents of modern slavery are reported;

¹⁴ 92 second round statements for reporting entities evaluated were available. The research team contacted the companies with missing statements, and three confirmed they had not submitted a second round statement. Thus, we included 95 companies in our dataset (92 available statements and the three confirmed unsubmitted statements scored nil).

¹⁵ Sinclair and Dinshaw, *Paper Promises*; Dinshaw et al, *Broken Promises*.

6. The degree to which survey participants believe staff within their organisation are well supported (through guidance, training, resources) to remedy situations of modern slavery; and
7. The reported external stakeholders involved in the co-design of the remediation process.

These indicators were subsequently analysed through a hierarchical linear regression model, measuring the impact that changes in one reported variable have on another (such as remediation practice effectiveness).

As the methods employed in this study are largely delimited to the perspectives of corporations reporting under the MSA – with the exception of two focus groups conducted with civil society organisations and academia – we do not purport that the following evidence is reflective of workers or their representatives.

2.3 Focus Groups

Finally, throughout the project period, the research team conducted four in-depth focus groups. Two of these sessions involved representatives from corporations and primarily focused on the topic of modern slavery remediation. Another session involved representatives from industry associations and broached the topics of reform and remediation. A final session involved civil society and representatives from unions and also addressed the two aforementioned topics. In total, there were 19 participants and all remain anonymous.

Interviews were conducted in a semi-structured format. Some questions were prepared, but conversation was largely guided by the responses of participants. Subsequently, the interviews were transcribed and qualitatively analysed to identify key themes pertaining to modern slavery reform and remediation. These findings were synthesised with the aforementioned business survey and have been published in a report.

3 Remedy in Practice: business response to Australia's *Modern Slavery Act*

3.1 Legislative context

Australia's MSA is a business reporting, or disclosure law which was introduced in 2018 to tackle modern slavery in Australian businesses and their supply chains. The MSA requires businesses and Commonwealth government entities with an annual turnover of \$100 million or more to publish an annual modern slavery statement.¹⁶ Statements must cover their structures, operations and supply chains and what they are doing to assess and address the risks of modern slavery in their operations and supply chains—and those of any entities they own or control (section 16).¹⁷ This high turnover threshold means that a wide range of medium-to-large-sized

¹⁶ *Modern Slavery Act 2018* (Cth), Australia, section 5(1)(a).

¹⁷ *Modern Slavery Act 2018* (Cth), section 16.

businesses fall outside the scope of the law,¹⁸ and it lacks penalties for non-compliance, another key critique of the legislation.¹⁹ Rather, public scrutiny of modern slavery statements is intended as a form of regulation,²⁰ and statements are available on a public, government repository.²¹ Of interest here with regard to remedy is section 16(1)(d) of the MSA which requires that reporting entities describe actions taken to assess and address modern slavery risks “including due diligence and remediation processes”.²² The Act provided for a three-year statutory review which was completed in May 2023 with a final report making numerous recommendations for improvements to the MSA.²³

3.2 Is remedy being provided?

We assessed if companies are facilitating remedy for modern slavery. To do so, we analysed references to remedy in the modern slavery statements submitted under Australia’s MSA, and the extent of information supplied. Our research indicates that references to remedy are being included in modern slavery statements, but the degree to which this is occurring appears to be more superficial than substantive.²⁴ References to remedy are frequent but are often nominal and fail to elaborate in detail what such remedies entail. Although section 16(1)(d) of the MSA requires that modern slavery statements *describe* the actions taken to “assess and address” risks of modern slavery, including “remediation processes”,²⁵ the definitional and enforcement limitations of the law mean there is little to prevent reporting companies from simply reporting they have established remedial processes, without substantiating such claims or providing details of the types of remedy available and the process by which a victim might make

¹⁸ Ramona Vijeyarasa, “A Missed Opportunity: How Australia Failed to Make its Modern Slavery Act a Good Practice Global Example,” *Adelaide Law Review* 40, no. 3 (2019): 857-866.

¹⁹ Justine Nolan and Nana Frishling, “Australia’s Modern Slavery Act: Towards Meaningful Compliance,” *Company and Securities Law Journal* 37, no. 2 (2019): 104-126; Ingrid Landau, “Human Rights Due Diligence and the Risk of Cosmetic Compliance,” *Melbourne Journal of International Law* 20, no 1. (2019): 221-248.

²⁰ See, e.g., Paul Redmond, “Regulating Through Reporting: An Anticipatory Assessment of The Australian Modern Slavery Acts,” *Australian Journal of Human Rights* 26, no. 1 (2020): 5-26; Christine Parker and Vibeke Lehmann Nielsen, “Compliance: 14 Questions,” in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos (Acton: ANU Press, 2017), 217-232.

²¹ “Modern Slavery Register,” Australian Government Attorney-General’s Department, accessed July 10, 2023, <https://modernslaveryregister.gov.au/>.

²² *Modern Slavery Act 2018* (Cth), section 16(1)(d).

²³ John McMillan, *Report of the Statutory Review of the Modern Slavery Act 2018 (Cth): The First Three Years*, (Canberra: Commonwealth of Australia, 2023), <https://www.ag.gov.au/crime/publications/report-statutory-review-modern-slavery-act-2018-cth>.

²⁴ Sinclair and Dinshaw, *Paper Promises*, 2.

²⁵ *Modern Slavery Act 2018* (Cth), section 16(1)(d).

a claim for remedy.²⁶ Along similar lines, supply chain scholarship demonstrates that firms report “proposed” remediation practices;²⁷ yet, little evidence exists pertaining to what has been accomplished successfully in terms of actual remediation practices.²⁸

We note from the outset, that business in Australia is not alone in struggling to provide remedy, and that some barriers to remediating modern slavery are beyond the scope of HRDD. Evidence from other countries confirms that, as our research shows, a primary barrier to remedy is the failure to detect modern slavery.²⁹ This is exacerbated by contractual, geographical, and psychological distance between lead firms and the victim/survivors.³⁰ Grievance handling is beset by difficulties such as insufficient communication about the existence of a grievance mechanism to potentially affected rightsholders and workers. There is a significant “distinction between a mechanism being publicised and being known,” in the sense of workers having confidence about using it³¹ And also, even where workers know about the existence of a remedial mechanism, and have the technological means of accessing it (i.e. access to an email account or a mobile phone), many other barriers to use exist such as mistrust of impersonal and remote.³² There is often, also, a failure to engage rights holders or work with existing collective labour relations structures, instead creating new company-based complaints systems that do not complement or engage with local processes and actors.³³ Furthermore, combatting modern slavery is at times beyond the scope of company remedial action. For example, Crane et al argue that ‘business models’ or economic systems are behind a great deal of modern slavery.³⁴ These

²⁶ Marcia Narine, “Disclosing Disclosure’s Defects: Addressing Corporate Responsibility for Human Rights Impacts,” *Columbia Law Review* 47, no. 1 (2015): 84-150; Christine Parker and Vibeke Lehmann Nielsen, “Compliance: 14 Questions,” in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos (Acton: ANU Press, 2017), 217-232; Gabriela Quijano and Carlos Lopez, “Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?,” *Business and Human Rights Journal* 6, no.2 (2021): 241-254.

²⁷ Mark Stevenson and Rosanna Cole, “Modern Slavery in Supply Chains: A Secondary Data Analysis of Detection, Remediation and Disclosure,” *Supply Chain Management: An International Journal* 12, no. 3 (2018): 81-99.

²⁸ Amy V. Benstead, Lisa C. Hendry and Mark Stevenson, “Detecting and Remediating Modern Slavery in Supply Chains: A Targeted Audit Approach,” *Production Planning & Control* 32, no. 13 (2020): 1136-1157.

²⁹ Amy V. Benstead, Lisa C. Hendry and Mark Stevenson, “Detecting and Remediating Modern Slavery in Supply Chains: A Targeted Audit Approach,” *Production Planning & Control* 32, no. 13 (2020): 1136-1157.

³⁰ Danya Simpson et al, “The Role of Psychological Distance in Organizational Responses to Modern Slavery Risk in Supply Chains,” *Journal of Operations Management* 67, no. 8 (2021): 989-1016.

³¹ Caroline Rees, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned* (Cambridge: Harvard Kennedy School: Corporate Social Responsibility Initiative, 2011), <https://media.business-humanrights.org/media/documents/files/media/documents/ruggie/grievance-mechanism-pilots-report-harvard-csri-jun-2011.pdf>.

³² The ETI’s vulnerable workers toolkit provides more information as well as practical guidance and tools: Ethical Trade Initiative, *Addressing Worker Vulnerability in Agricultural and Food Supply Chains* (London: Ethical Trade Initiative, 2016), https://www.ethicaltrade.org/sites/default/files/shared_resources/vulnerable_workers_toolkit.pdf.

³³ Tim Connor, Annie Delaney and Sarah Rennie, *Non-judicial Mechanisms in Global Footwear and Apparel Supply Chains: Lessons from Workers in Indonesia* (Melbourne: Corporate Accountability Research, 2016), <http://corporateaccountabilityresearch.net/njm-project-publications/#njr-reports>.

³⁴ Andrew Crane et al, “Confronting the Business Models of Modern Slavery,” *Journal of Management Inquiry* 31, no. 3 (2022): 264-285.

business models require more substantial action than remediation to as to prevent ongoing incidences of modern slavery.³⁵

Our longitudinal modern slavery statement analysis revealed that while companies stated they had remedial processes in place, they failed to provide additional detail.³⁶ The relevant indicator used to measure the presence of such processes considered whether the reporting entity disclosed incomplete, informal or inappropriate processes, or whether they provided a robust and detailed outline of their procedures. As foreshadowed, there was a clear disparity between nominal references and deeper consideration of remedial responses in modern slavery statements. A majority of companies in both the first and second rounds of modern slavery reporting under the MSA³⁷ disclosed their prospective responses to modern slavery identified in their operations or supply chains.³⁸ However, further elaboration was lacking with only 24% of statements in round 1 and 26% of statements in round 2 providing details of the nature of such a response.³⁹ This lack of detail may be indicative of a gap between what is being reported and what is being practiced, or it may alternatively suggest the underdevelopment of remedial practices.

In addition, we measured the presence of references to grievance mechanisms and hotlines in reporting entities' operations or supply chains. Our business survey asked respondents to rate the degree to which their corporation utilises grievance mechanisms. 23% 'always used', 28% 'frequently used', 24% 'moderately used', 13% 'rarely used', and 12% 'never used'. Additionally, our hierarchical linear regression model found that among companies identifying more effective remediation practices, grievance mechanisms were the fourth most influential risk management variable.⁴⁰ This high level of self-reported usage of grievance mechanisms is reflected by our first round of statements analysis. An overwhelming majority of companies (82% in both rounds of review) outlined that they had such mechanisms in place.⁴¹ However, in

³⁵ Mohammad J. Uddin et al, "Exploitation in Bangladeshi Ready-made Garments Supply Chain: A Case of Irresponsible Capitalism?," *International Journal of Logistics Management* 34, no. 1 (2023): 164-188.

³⁶ In Round 1 of our statement analysis, 60% of companies mentioned remediation processes. In Round 2 of our statement analysis, 67% of companies mentioned remediation processes.

³⁷ As per section 4 of the *Modern Slavery Act 2018* (Cth), a "reporting period, of an entity, means a financial year, or another annual accounting period applicable to the entity, which starts after the commencement of this section". For Round 1 of analysis, this included statements of Australian companies from 1 July 2019 to 30 June 2020, and statements of foreign companies from 1 April 2019 to 31 March 2020. For Round 2 of analysis, this included statements of Australian companies from 1 July 2020 to 30 June 2021, and statements of foreign companies from 1 April 2020 to 31 March 2021.

³⁸ In Round 1 of our statement analysis, 60% of companies mentioned remediation processes. In Round 2 of our statement analysis, 67% of companies mentioned remediation processes.

³⁹ Sinclair and Dinshaw, *Paper Promises*; Dinshaw et al, *Broken Promises*.

⁴⁰ Marshall et al, *Fit for Purpose*, 23.

⁴¹ Dinshaw et al, *Broken Promises*, 19.

round 2, only 40% of companies provided details about the mechanism,⁴² and 17% specified how it was available to vulnerable workers.⁴³

Many of the grievance mechanisms referenced in statements appear to deal with a broad range of complaints, including, for example, fraud or corruption, rather than being adapted to receiving complaints regarding modern slavery.⁴⁴ As reporting an incident of modern slavery is very different in nature to reports of general corporate misconduct⁴⁵ due to the vulnerability of workers, barriers such as language, fear of reprisal, lack of access to technology,⁴⁶ and lack of privacy, the use of general grievance mechanisms may be less effective in identifying modern slavery. These findings stand in stark contrast to the UNGPs' criteria on non-judicial grievance mechanisms.⁴⁷ Given that a minority of companies provide detail about their grievance mechanisms,⁴⁸ this indicates a lack of transparency regarding their operation and does not provide any degree of predictability. Moreover, the very low percentage of statements detailing availability of remedy to vulnerable workers starkly contradicts the UNGP's guidance on grievance mechanisms being accessible and equitable.⁴⁹

Furthermore, our business survey found a relatively low capacity of business to provide remedy. For example, only approximately half of the survey participants agreed that "their company had an effective approach to providing remedy to victim-survivors of modern slavery in their operations or with direct suppliers" (56%).⁵⁰ Again, this aligns with the percentage of modern slavery statements that made at least a passing reference to established processes for remediating modern slavery (61% in round 1 of our statements analysis).⁵¹ However, it is noticeably higher than those statements that supplied detail as to how these processes operate

⁴² Dinshaw et al, *Broken Promises*.

⁴³ Dinshaw et al, *Broken Promises*, 19.

⁴⁴ Sinclair and Dinshaw, *Paper Promises*, 63.

⁴⁵ See for example: Mark Stevenson, "Hidden in Plain Sight: The Bystander Effect and the Mobilisation of Modern Slavery Whistleblowing," *Supply Chain Management* 27, no. 1 (2022): 128-139; Stephen John New, "Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility," *Supply Chain Management* 20, no. 6 (2015): 697-707; Carly Lightowlers, Rose Broad and David Gadd, "Temporal Measures of Modern Slavery Victimisation," *Criminology and Criminal Justice* (2022): 1-19.

⁴⁶ See for example: Lisa R. Taylor and Elena Shih, "Worker Feedback Technologies and Combatting Modern Slavery in Global Supply Chains: Examining the Effectiveness of Remediation-oriented and Due-diligence-oriented Technologies in Identifying and Addressing Forced Labour and Human Trafficking," *Journal of the British Academy* 7, no. 1 (2019): 131-165.

⁴⁷ Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, Principle 31.

⁴⁸ Dinshaw et al, *Broken Promises*.

⁴⁹ Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, Principle 31(b) and 31(d); Katherine McDonnell, "Epistemic Injustice and Remedy: Can BHR Ever Really 'Centre' Rights Holders?" *Australian Journal of Human Rights*, (2023) available online DOI: [10.1080/1323238X.2023.2221175](https://doi.org/10.1080/1323238X.2023.2221175).

⁵⁰ Marshall et al, *Fit for Purpose*, 17.

⁵¹ Sinclair and Dinshaw, *Paper Promises*, 58.

(less than a quarter).⁵² This disparity may be because the respondents to our survey were from companies that have high compliance with the MSA, and thus are more likely to have well developed remedial practices compared with the average reporting entity. Alternatively, it may indicate a broader mismatch between what is practiced, on the one hand, and what is reported on the other. Participants from our focus groups revealed that – particularly for suppliers – such a low capacity can arise from being ‘spread too thin’; entities not having the resources necessary to comply with the requirements of the MSA.

A further substantial problem with these remedial processes is that, alongside the apparent lack of capacity to offer remedy, there is an accompanying low detection of modern slavery. Our research demonstrated that companies are indeed failing to acknowledge or identify the presence of modern slavery within their operations or supply chains. Our business survey and particularly our modern slavery statements analysis indicate that most companies are failing to identify modern slavery associated with their business. Only 39% of survey respondents and 14% of round 2 modern slavery statements referenced that they had identified instances of modern slavery in their supply chains or operations.⁵³ This low identification rate means that companies are not identifying a need for remedy, and thus perhaps not establishing effective processes to supply remedy. Consequentially, a core aspect of the “bouquet of remedies” – that the remedy provided is reflective of the varied circumstances of the abuse and the rights-holder – is not capable of being satisfied. If companies are failing to identify the abuses that give rise to the need for remedy, let alone the contextual particularities of the abuse or rights-holder, they lack the requisite information to ensure that the remedy is effective in such a context.

Overall, the disparity between “paper promises” and substantive commitments to remedial processes and grievance mechanisms reflects the limitations of the disclosure-centric approach of the MSA.⁵⁴ It points to the ease with which entities can state that they are working to remedy modern slavery without verification or disclosure of the specificities of such approaches. Again, this ambiguity runs contrary to the guidance supplied by the UNGPs. If, under the MSA, companies can state that they have remedial processes in operation without further substantiation or evidence, then the UNGP’s guidance to collect and disclose data on the practical use of remedial mechanisms becomes even more unrealistic. Since the law was introduced, there have been consistent critiques about the design of the MSA;⁵⁵ more specifically, the 2023 independent review of the law noted widespread views that “there is no hard evidence that the *Modern Slavery Act* in its early years had yet caused meaningful change for people living in conditions of modern slavery.”⁵⁶ The review went on to state that while “there are occasional scattered

⁵² Sinclair and Dinshaw, *Paper Promises*, 63.

⁵³ Marshall et al, *Fit for Purpose*, 13.

⁵⁴ Dinshaw et al, *Broken Promises*, 17.

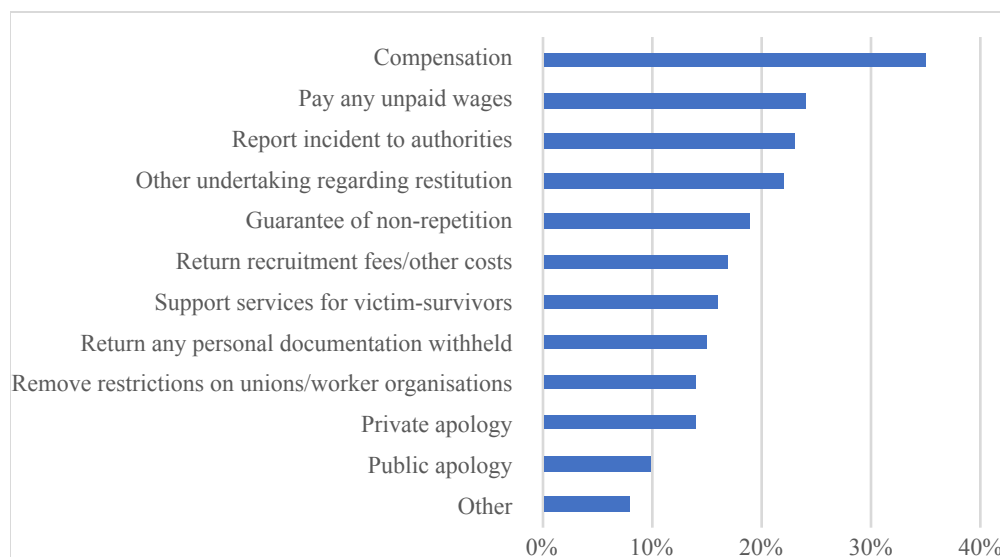
⁵⁵ Ramona Vijayarasa, “A Missed Opportunity: How Australia Failed to Make its Modern Slavery Act a Good Practice Global Example,” *Adelaide Law Review* 40, no. 3 (2019): 857-866; Fiona McGaughey, Hinrich Voss, Holly Cullen and Matthew Davis, “Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom” *Business and Human Rights Journal* 7, no.2 (2022): 249-270.

⁵⁶ McMillan, *Report of the Statutory Review*, 8.

instances of modern slavery incidents and victims being identified...[there is] no strong storyline that the drivers of modern slavery are being turned around.”⁵⁷

3.3 What remedies are being provided on paper?

We next examine the types of remedy that are provided, in the rare occasions that companies have reported taking remedial action. As noted above, the UN BHR Working Group highlighted five different forms of remedy applicable in BHR including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Furthermore, the usage of these remedies should be predicated on the nature of the harm suffered and the context of the rights-holder. This is particularly true as grievance mechanisms are often situated within international corporate structures with complex and opaque supply chains. As OECD Due Diligence Guidance explains,⁵⁸ corporations must be proactive in identifying whether they caused, contributed or are linked to a harm. Correspondingly, the actions of corporations vary from stopping the cause of harm, to leveraging influence, to mitigating future harm. While in our statements analysis, the companies we analysed referenced a variety of forms of remedy, responses to our survey of businesses were heavily weighted toward compensation. Participants were supplied a non-exhaustive list of remedies and prompted to indicate whether they utilised them in their supply chains.⁵⁹ The results provide insight into the remedies considered as most relevant by business.



⁵⁷ McMillan, *Report of the Statutory Review*, 8.

⁵⁸ Organisation for Economic Co-operation and Development (OECD), *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (Paris: OECD, 2018), <https://www.oecd.org/industry/inv/mne/responsible-supply-chains-textile-garment-sector.htm>.

⁵⁹ Marshall et al, *Fit for Purpose*, 16.

Our evidence shows that most companies conceptualise remedy as a monetary exercise, with compensation and payment of unpaid wages being the most common remedies.⁶⁰ However, restitution and compensation account for just two of the remedy options in the ‘bouquet’. As the harm incurred by a rights-holder may be multivariate in nature, its effect may not exclusively involve financial factors.⁶¹ Firstly, these remedies do not ensure that the practices that gave rise to their occurrence are discontinued. According to our survey, guarantees of non-repetition are over 15% less frequently employed than compensation, yet they are just as essential.⁶² Additionally, this narrow view of remedy precludes consideration of other forms of harm outside of financial remediation. Remedies that fall under the rehabilitation or satisfaction categories of the UN BHR Working Group report, like support services or apologies,⁶³ are comparatively under-utilised. This was supported by the focus group participants, as many referenced direct compensation as a critical component of remediation.⁶⁴

Despite companies primarily conceptualising of remedy in monetary terms, in our statements analysis, only 7% of total statements in round 2 referred to compensation.⁶⁵ This is reflective of both the lack of detail supplied regarding remedy in the majority of modern slavery statements, and the predominance of compensation as the default remedy when any detail is supplied. Remedies that engage more preventative aspects – like removal of restrictions and support services – rank much lower.⁶⁶ Therefore, it is evident that companies prioritise one type of remedy within a broader range. The OECD Due Diligence Guidance states that preventative remedies should sit alongside compensatory responses.⁶⁷ However, it is important to acknowledge that the degree to which any of the above remedies are engaged is already low, with the most widely used remedy reportedly used by only 35% of survey respondents.⁶⁸

Our analysis suggests that companies may engage in activities that they perceive to be remedial in nature but may in fact be counterproductive to providing access to remedy for victims. Notably, our data identified that the approach to remedy of many companies was not grounded in seeking to achieve restoration for victim-survivors, but rather in a formulation of

⁶⁰ Marshall et al, *Fit for Purpose*, 16.

⁶¹ For example, see Electronics Watch, *Monitoring Methodology Guidance 1.0* (Amsterdam: Electronics Watch, 2020), https://electronicswatch.org/electronics-watch-monitoring-methodology-guidance-1-0_2577562.pdf.

⁶² See, e.g., the Proactive Compliance Deed between the Commonwealth and 7-Eleven Stores Pty Ltd, 6 December 2016, cl. 5 which included a range of preventative measures in response to widespread underpayment of wages, as discussed in Laurie Berg and Bassina Farbenblum, “Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program,” *Melbourne University Law Review* 41, no. 3 (2018): 1035-1084.

⁶³ A/72/162, [39].

⁶⁴ Marshall et al, *Fit for Purpose*, 16.

⁶⁵ Dinshaw et al, *Broken Promises*, 19.

⁶⁶ Marshall et al, *Fit for Purpose*, 16.

⁶⁷ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*.

⁶⁸ Marshall et al, *Fit for Purpose*, 16.

remedy predicated upon purchaser-supplier relationships.⁶⁹ This means that rather than attempting to provide remedy to the individuals directly harmed and prevent recurrence, business is adopting a risk minimisation approach that predicates risk to business above risk to victim-survivors and instituting ineffective practices. For example, a number of statements assessed disclosed that their initial response to identified instances of modern slavery is to terminate the supplier relationship.⁷⁰ This is not a remedy. As we noted in the accompanying report: “terminating relationships risks leaving workers in exploitative conditions”.⁷¹ This fault was identified by focus group participants also. Notably, specific participants highlighted that the provision of remediation needs to be “victim or people-centric”, and in the “best interests of the person impacted”.⁷² Thus, without a clear understanding of the purpose underlying the provision of remediation, companies risk enacting ineffective or counter-productive remedies.

3.4 Consultation in the design of remedies

The design and implementation of prospective remedies should not be conducted without considering the needs and factors that impact rights-holders in the operations and supply chains of companies. A robust understanding of such needs is achieved through comprehensive stakeholder consultation; an approach emphasised by both the *Guidance to the MSA* and the UNGPs.⁷³ It is clear that stakeholder engagement is imperative in the provision of remedy, as it is through collaboration and consultation with parties familiar with worker conditions that an appropriate remedy can be identified to suit particular contexts.⁷⁴ The UNGPs emphasise that the process of identifying “any actual or potential adverse human rights impacts” should invariably “involve meaningful consultation with potentially affected groups or other relevant stakeholders”.⁷⁵ It is due to many companies failing to properly execute stakeholder engagement that so few cases of modern slavery are identified, and correspondingly, remedy is not properly conducted.⁷⁶ Scholarship provides evidence that when companies are more contractually oriented towards handling modern slavery incidents, they are subsequently less proactive in engaging various stakeholder groups—which in turn leads to a less active discovery process (e.g.

⁶⁹ Sinclair and Dinshaw, *Paper Promises*.

⁷⁰ Sinclair and Dinshaw, *Paper Promises*, 58.

⁷¹ Sinclair and Dinshaw, *Paper Promises*, 58.

⁷² Marshall et al, *Fit for Purpose*, 16.

⁷³ Attorney-General’s Department, *Guidance for Reporting Entities*; Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*.

⁷⁴ Justine Nolan et al, *Good Practice Toolkit: Strengthening Modern Slavery Responses* (Sydney: Australian Human Rights Institute, 2023), 18, <https://www.humanrights.unsw.edu.au/news/strengthening-modern-slavery-responses-good-practice-toolkit>.

⁷⁵ Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, Principle 18.

⁷⁶ Marshall et al, *Fit for Purpose*, 13.

regarding human rights violations) alongside suppliers who are fearful to report incidents given the contractual punishments looming over their heads.⁷⁷

This failure to engage rights-holders or their representatives stands in contrast to UNGP 31 – that remedy should be “based on engagement and dialogue”.⁷⁸ One of the key findings from our survey was that when companies engaged key stakeholders, they correspondingly also reported more effective remediation practices.⁷⁹ Furthermore, research has indicated that stakeholder involvement is crucial for developing remediation practices geared towards workers abused at supplier locations,⁸⁰ proposing community-focused engagement practices to help generate effective targeted solutions. Therefore, stakeholder consultation is imperative to ensure that the remedy is effective and rights-holders’ input is essential in ensuring remedy is reflective of contextual factors.

Beyond simply engaging in the practice of consultation itself, it must also be strategic and involve a range of parties proximate to the interests of the workers. Notably, participants in our focus groups on remediation emphasised that in order to effectively conduct stakeholder engagement, a plurality of stakeholders must be involved.⁸¹ Our survey asked businesses to indicate which stakeholders they consulted in the design of their remediation process. The results are as follows:⁸²



⁷⁷ Danya Simpson et al, “The Role of Psychological Distance in Organizational Responses to Modern Slavery Risk in Supply Chains,” *Journal of Operations Management* 67, no. 8 (2021): 989-1016.

⁷⁸ Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, Principle 31(h).

⁷⁹ Marshall et al, *Fit for Purpose*, 22.

⁸⁰ Stefan Gold, Alexander Trautrimms and Zoe Trodd “Modern Slavery Challenges to Supply Chain Management,” *Supply Chain Management: An International Journal* 20, no. 5 (2015): 585-494.

⁸¹ Marshall et al, *Fit for Purpose*, 22.

⁸² Marshall et al, *Fit for Purpose*, 15.

Participants reported most commonly engaging with “consulting and professional services groups” but less frequently engaging with groups more proximate to workers (like unions).⁸³ Evidently, engagement with workers’ rights groups is an outlier to this trend, but the remainder of the top five include legal advisors, consultants, certification bodies and auditors. Mere consultation is not enough to ensure that remedies are effective and beneficial to workers. Rather, stakeholders considered for consultation need to be close to potentially affected workers to act as effective advocates for their needs. Our research findings indicate that reporting entities under the MSA are more concerned with engaging stakeholders with greater expertise on matters of interest to the company (liability; certification), rather than those best positioned to advocate for workers. Correspondingly, the design of remedies is informed by interests distinct from those of at-risk workers and victim-survivors.

4 Connecting policy and practice under the MSA

Considering the UNGPs and the UN BHR Working Group’s guidance on access to effective remedy and emerging practice, we suggest four critical elements that businesses should consider in the design and implementation of remedial mechanisms under the MSA.

First, effective remedy should be available in a *multiplicity of forms*, which may encompass judicial and/or non-judicial mechanisms and may require institutional support from both the State and business. UNGP 1 obliges the State to take “appropriate steps to prevent, investigate, punish, and redress” corporate human rights issues within their jurisdiction and UNGP 25, reminds states to “take appropriate steps to ensure” that those affected by corporate human rights issues within their jurisdiction have access to an effective remedy.⁸⁴ UNGP 22 notes that for business, remedy should be provided only for adverse impacts which the business ‘caused’ or to which it “contributed” as opposed to those with which the business is directly linked.⁸⁵ Similarly, the OECD Due Diligence Guidance mirrors the language of the UNGPs and notes that where business has caused or contributed to adverse impacts, a range of remedies should be considered.⁸⁶ These include “apologies, restitution or rehabilitation (e.g., reinstatement of dismissed workers, recognition of the trade union for the purpose of collective bargaining), financial or non-financial compensation (for example, establishing compensation funds for victims, or for future outreach and educational programmes), punitive sanctions (for example, the dismissals of staff responsible for wrongdoing), taking measures to prevent future adverse impacts.”⁸⁷

⁸³ Marshall et al, *Fit for Purpose*, 15.

⁸⁴ Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, Principle 25.

⁸⁵ Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, Principle 22.

⁸⁶ Karin Buhmann “Confronting Challenges to Substantive Remedy for Victims: Opportunities for OECD National Contact Points under a Due Diligence Regime Involving Civil Liability,” *Business and Human Rights Journal*, (2023): 1-24.

⁸⁷ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, Section 6.1(b).

For example, Coles, a leading supermarket, retailer and consumer services company, emphasises a broad approach to remedy that is consistent with the UNGPs. Their 2022 modern slavery statement provides a comprehensive overview of the remedies they utilise and their underlying purpose.⁸⁸ Notably, the company categorises their remedies as restorative or preventative. The former pertains to “the process of restoring individuals, or groups, that have been harmed to the situation they would have been in if the impact had not occurred”. The latter involves implementing steps “to secure the prevention of similar future harm”.⁸⁹ Additionally, these remedies are not constrained to monetary solutions. For example, the ‘Coles Ethical Sourcing – Child Labour Remediation Requirements’ specifies “viable alternative activity” and a safe location when child labour is identified.⁹⁰ Thus, there are notable examples of reporting entities employing a suite of remedies to address modern slavery; however, our data indicates these are outliers.

Second, *rights holders must be central* to the design and implementation of effective remedies. UNGP 31 notes that remedy should be “based on engagement and dialogue” and if this criterion is met, it is more likely that the remedy will also then be legitimate, accessible, and equitable given it will be driven by rights holders rather than imposed on them.⁹¹ Engaging with and ensuring the participation of rights holders in the process will facilitate greater input into the form and substance of the remediation offered and will also enable the safety and security of rights holders to be built into the remedy. Rights holders are an integral part of any process that aims to provide an effective remedy for corporate human rights abuses and “[h]uman rights are best advanced when the ‘experiences, perspectives, interests, and opinions [of the rights holders] deeply inform how remedy mechanisms are created and implemented’”.⁹² Their participation from the outset may help address some of the predominant barriers that rights holders have in accessing remedial mechanisms, including distance, language barriers, fear of job loss, and retribution. Consultation is distinct from participation, and providing access to effective remedy must incorporate the participation of rights holders in a substantive rather than a symbolic manner.⁹³

An example is the Cleaning Accountability Framework (CAF), which prioritises worker engagement in remediation in the cleaning industry.⁹⁴ It is a multi-stakeholder initiative to address labour standards non-compliance in the commercial real estate cleaning industry, which

⁸⁸ Coles Group, “Our Commitment to Human Rights: 2022 Modern Slavery Statement”, Modern Slavery Statements Register, accessed July 10, 2023, 43, <https://modernslaveryregister.gov.au/statements/10100/>.

⁸⁹ Coles Group, “2022 Modern Slavery Statement”, 43.

⁹⁰ Coles Group, “2022 Modern Slavery Statement”, 45.

⁹¹ Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, Principle 31.

⁹² A/72/162, [20] (see n. 7).

⁹³ Robert McCorquodale and Justine Nolan, “The Effectiveness of Human Rights Due Diligence for Preventing Business and Human Rights Abuses,” *Netherlands International Law Review* 68, no. 3 (2021): 455-478.

⁹⁴ “Cleaning Accountability Framework,” Cleaning Accountability Framework, accessed July 12, 2023, <https://www.cleaningaccountability.org.au/>.

has long suffered from underpayment, poor working conditions, and exploitation.⁹⁵ CAF brings together building owners, cleaning companies, the union representing cleaners – the United Workers Union, cleaners themselves, and other industry stakeholders. Worker engagement is a key aspect of CAF’s approach, as it seeks to involve cleaning workers in the process of identifying and rectifying labour violations.⁹⁶ This direct engagement with workers helps to uncover labour violations and ensures that workers have a voice. CAF works closely with the trade union to ensure that workers’ interests are represented in decision-making processes. Cleaners have played a vital role in this process.⁹⁷

Third, cross *collaboration* is key, and business should engage with rights holders, their representatives including unions, suppliers, and independent experts, including civil society in the design and implementation of remedy. Without this collaboration, remedy may produce low levels of trust, awareness, and usage.⁹⁸ Cross collaboration will likely facilitate greater transparency, which in turn feeds into increased perception of the legitimacy of the process. For example, Electronics Watch is an independent monitoring organisation that uses worker driven monitoring to address labour issues in the electronics sector and has played a key role in advancing understanding of what constitutes effective remediation.⁹⁹ In 2019, following three years of worker driven monitoring, Electronics Watch (along with its partner, Migrant Worker Rights Network (MWRN)) was successful in securing full compensation from Cal Comp, an electronics company, for excessive recruitment fees paid by 10,570 migrant workers.¹⁰⁰ Working with expert civil society groups, such as MWRN, a membership-based organisation for migrant workers, remediation and monitoring can be designed and implemented with collaborative insights from multiple stakeholders into daily working conditions.

Finally, an effective remedial process will incorporate *ongoing transparent monitoring* of its effectiveness that will promote continuous learning. Data on the practical operation and use of remedial mechanisms by rights holders (such as, for example, the number of claims filed, addressed and resolved at all levels of the supply chain in a grievance mechanism) should be

⁹⁵ Jon Davies and Natalia Ollus, “Labour Exploitation as Corporate Crime and Harm: Outsourcing Responsibility in Food Production and Cleaning Services Supply Chains,” *Crime, Law and Social Change* 72, (2019): 87-106; Natalia Ollus, “Forced Flexibility and Exploitation: Experiences of Migrant Workers in the Cleaning Industry,” *Nordic Journal of Working Life Studies* 6, no. 1 (2016): 25-45; Niels van Doorn, “Platform Labor: On the Gendered and Racialized Exploitation of Low-Income Service Work in the ‘On-Demand’ Economy,” *Information, Communication & Society* 20, no. 6 (2017): 898-914.

⁹⁶ “Modern Slavery in Cleaning Supply Chains,” Cleaning Accountability Framework, accessed July 12, 2023, <https://www.cleaningaccountability.org.au/modern-slavery/#MSS>.

⁹⁷ “Founding Partners,” Cleaning Accountability Framework, accessed July 12, 2023, <https://www.cleaningaccountability.org.au/partners/>.

⁹⁸ Mark Stevenson, “Hidden in Plain Sight: The Bystander Effect and the Mobilisation of Modern Slavery Whistleblowing,” *Supply Chain Management* 27, no. 1 (2022): 128-139; Fahian A. Huq, Mark Stevenson and Marta Zorzini, “Social Sustainability in Developing Country Suppliers: An Exploratory Study in the Ready Made Garments Industry of Bangladesh,” *International Journal of Operations & Production Management* 34, no. 5 (2014): 610-638; Bin Jiang, “Implementing Supplier Codes of Conduct in Global Supply Chains: Process Explanations from Theoretic and Empirical Perspectives,” *Journal of Business Ethics* 85, (2009): 77-92.

⁹⁹ “What We Do,” Electronics Watch, accessed July 12, 2023, https://electronicswatch.org/en/what-we-do_2548040.

¹⁰⁰ Justine Nolan et al, *Good Practice Toolkit*, 17.

collected and disclosed.¹⁰¹ Ongoing monitoring can drive continuous improvements in the workplace and facilitate increased transparency about the harms that have occurred, and the remedies implemented to address them. For example, Australian retail group, Woolworths utilises extensive risk assessment platforms (like ELEVATE's EiQ platform) and has been progressively incorporating more monitoring information to ensure a robust approach to identifying modern slavery and responding.¹⁰² In their 2022 modern slavery statement, Woolworths identified through an audit that supplier employees had "paid excessive recruitment fees to a labour agent", an indicator of forced labour. Subsequently, Woolworths reported that they "used [their] leverage to support [their] supplier to remediate the impact on workers and put systems in place to mitigate and prevent future harm".¹⁰³

5 Is the MSA facilitating remedy?

The MSA is a crucial piece of legislation to tackle modern slavery. However, it is just a first step and based on the available evidence, it appears that the MSA is not facilitating access to remedy, primarily due to the absence of an explicit requirement for Human Rights Due Diligence (HRDD). In our survey, 61% of participating businesses acknowledged that if they were legally obligated to carry out HRDD across their operations and supply chains, their company's response to modern slavery would likely improve.¹⁰⁴ This finding points to a significant gap in the MSA. If the Act had a provision to mandate HRDD, it could foster a more comprehensive and effective approach to tackling modern slavery, significantly enhancing businesses' remedial actions.¹⁰⁵

Moreover, focus group participants expressed frustration with the Act's overwhelming emphasis on reporting and disclosure. Some commented that time is spent on superficial compliance and modern slavery statement drafting, rather than on tackling extant issues. They identified this as a significant limitation, highlighting the absence of a robust enforcement mechanism or penalties for non-compliance.¹⁰⁶ This concern underscores that for the MSA to

¹⁰¹ Sinclair and Dinshaw, *Paper Promises*, 11.

¹⁰² Woolworths Group, "We are Woolworths Group: 2022 Modern Slavery Statement," Modern Slavery Statements Register, accessed July 12, 2023, 22, <https://modernslaveryregister.gov.au/statements/10009/>.

¹⁰³ Woolworths Group, "2022 Modern Slavery Statement," 22.

¹⁰⁴ Marshall et al, *Fit for Purpose*, 11.

¹⁰⁵ We do not mean to suggest that mandatory human rights due diligence laws introduced in European countries in recent years are adequately addressing remedy. For example, while the German Supply Chain Due Diligence Act provides strong guidance around the types of steps that companies can take to provide remedy, it precludes civil remedy. The competent authority under the legislation has not yet made decisions based on the two complaints made to it for labour rights breaches. In contrast, the French Due Vigilance law provides a right to civil complaints under tort law. Two cases have been lodged thus far that concern labour rights breaches, but decisions are pending. See Ingrid Landau and Shelley Marshall, "Does Remedy Remain Rare? The Potential of Mandatory Human Rights Due Diligence to Remediate Modern Slavery," in *Modern Slavery and the Governance of Global Value Chains*, eds. Hila Shamir and Tamar Barkay (Cambridge: Cambridge University Press, forthcoming). See also, European Union Agency for Fundamental Rights, *Business and Human Rights - Access to Remedy*, (Vienna: European Union Agency for Fundamental Rights, 2020), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf.

¹⁰⁶ Marshall et al, *Fit for Purpose*, 11.

effectively promote remedy, it needs to move beyond a mere reporting-centric focus and demand substantive action.

In our first round of statement analysis, only a minority of companies, one in four - reported undertaking HRDD on new suppliers during the selection stage.¹⁰⁷ Section 16(1)(d) of the MSA mandates companies to disclose any actions taken to assess and manage risks, including due diligence and remediation processes (but does not *require* these actions – only reporting on them).¹⁰⁸ However, we found a significant gap between this provision and actual practice. Even though 60% (in round one of reporting)¹⁰⁹ and 67% (in round two of reporting)¹¹⁰ of the companies in our sample complied with this disclosure requirement, our analysis suggested that company approaches to HRDD were largely cosmetic. This is a worrying trend as it implies a lack effectiveness in their due diligence procedures. Our statement analysis findings shed further light on a related issue: a notable discrepancy between the due diligence performed on suppliers and on companies' own operations. While a significant 84% of businesses claimed to conduct due diligence on their suppliers, only 64% said they performed the same due diligence within their own operations.¹¹¹ This gap suggests an uneven application of HRDD and further weakens the MSA's effectiveness in ensuring access to remedy.

The MSA, in its current form, requires entities to describe their due diligence systems but does not obligate them to implement and utilise such systems. This lack of requirement represents an elementary weakness in the Act. Based on research over the last three years in examining the effectiveness of the MSA and the 2023 independent review, it is evident that the MSA must require the implementation of HRDD not just reporting on it.¹¹² We suggest government and business each have a critical role to play in facilitating greater access to effective remedy. In terms of policy reform, we recommend that the MSA should be strengthened to impose a duty on companies to not only describe but also implement and employ an effective HRDD system. This should include explicit guidance from government specifying the minimum elements of an effective due diligence system that embodies international best practice.¹¹³ By enforcing the implementation of HRDD, the MSA could become more robust in its approach to identifying and addressing modern slavery and, in turn, would allow the MSA to play a more effective role in facilitating access to remedy, bringing it closer to its primary objective - the eradication of modern slavery.

For businesses, we believe it is imperative to understand the breadth of potential remedies and improve key supplier and stakeholder relationships in order to both identify and redress

¹⁰⁷ Dinshaw et al, *Broken Promises*, 2.

¹⁰⁸ *Modern Slavery Act 2018* (Cth), s 16(1)(d).

¹⁰⁹ Sinclair and Dinshaw, *Paper Promises*, 54.

¹¹⁰ Dinshaw et al, *Broken Promises*, 16.

¹¹¹ Sinclair and Dinshaw, *Paper Promises*, 56.

¹¹² McMillan, *Report of the Statutory Review*, 12.

¹¹³ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*.

modern slavery. Our data indicates that if “the problem cannot be seen, it cannot be fixed”¹¹⁴ and greater engagement with stakeholders such as unions and civil society who have the trust of workers is a necessary first step in building a more substantive approach to remediation. Businesses are currently under-investing in remediation processes and are largely unprepared for dealing with modern slavery.

It is evident that there is a gap between policy and practice in addressing remediation of modern slavery in the operations and supply chains of Australian companies. The limitations of the MSA which prioritises corporate reporting over action is impacting the provision of remedy under the law. Combined with low rates of identification and a narrow and superficial approach to understanding remedy means that effective remedy under the MSA remains an aspiration rather than the norm.

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¹¹⁴ Marshall et al, *Fit for Purpose*, 24.

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