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ABSTRACT

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

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It is widely understood and acknowledged that COVID-19 increases risks to already vulnerable workers, including 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.<sup>1</sup> As the Special Procedures, like all UN human rights mechanisms, are State-centric, there is limited engagement with the question of *business* responsibilities in light of COVID-19. Paragraph 100 of the report does provide that States should 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.<sup>2</sup>

Business reporting and due diligence laws on modern slavery, or broader human rights and environmental risks, are becoming more prevalent across jurisdictions.<sup>3</sup> In 2020, businesses and Australian Commonwealth government entities with an annual turnover of \$100 million or more are expected to publish their first statements under *Australia's Modern Slavery Act 2018 (Cth)* (MSA). COVID-19 not only impacts on the risk of modern slavery 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.<sup>4</sup> The information sheet notes that as a result of COVID-19, entities may be unable to undertake planned activities to address

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<sup>1</sup> 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.

<sup>2</sup> *Ibid*, para 100.

<sup>3</sup> Fiona McGaughey, 'Australia's proposed Modern Slavery Act for business reporting - part of an international trend in business and human rights' (2018) 36(3) *Australian Resources and Energy Law Journal* 29.

<sup>4</sup> Australian Border Force, 'Modern Slavery Act Information Sheet: Coronavirus'. Available at: <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-covid-19.pdf>

modern slavery risks, may have limited capacity to prepare statements, and their normal supply chains may have been altered.<sup>5</sup> 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. It remains to be seen whether the extended deadline and acknowledgment that COVID-19 may have impacted reporting entities' capacity will 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.<sup>6</sup> Rather, we see a form of transnational non-state regulation wherein regulatory arrangements are carried out by corporate actors and civil society, in collaboration or separately.<sup>7</sup>

To facilitate oversight by civil society and others, the Australian MSA differs from that of the United Kingdom and other comparable laws, such as the French Duty of Vigilance Law,<sup>8</sup> in that Australia is the first jurisdiction with a Government repository for MSA statements. The repository is now open for reporting entities to submit their statements and statements will begin to be made available for public scrutiny later this year.<sup>9</sup> Some Australian companies already reporting under the UK MSA had begun to prepare a statement intended to meet the requirements of both Acts.<sup>10</sup> The first examples of Australia's MSA statements are being published on company websites and there are some early indications of engagement with the challenges of COVID-19 regarding modern slavery.

For example, mining and metals company South 32's 2020 Modern Slavery Statement includes a section on COVID-19.<sup>11</sup> This lists proactive steps taken by South 32 with regard to COVID-19 risk assessment, as well as delays to planned work on modern slavery as a result of COVID-19. It is reported that the heightened risks of modern slavery on vulnerable workers was recognised and in particular, tailored human rights due diligence was carried out in response to high demand for

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<sup>5</sup> Ibid, 1.

<sup>6</sup> See, eg. Justine Nolan and Nana Frishling, 'Australia's Modern Slavery Act: Towards Meaningful Compliance' (2019) 37 *C&SLG* 104.

<sup>7</sup> Natasha Tusikov, 'Transnational non-state regulatory regimes', in Drahos, P. (Ed.). (2017). *Regulatory theory: Foundations and applications* 339-354.

<sup>8</sup> *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.

<sup>9</sup> <https://modernslaveryregister.gov.au/>.

<sup>10</sup> See, eg. Wesfarmers, '2019 Modern Slavery Act for Wesfarmers'. Available at: <https://sustainability.wesfarmers.com.au/media/3118/wesfarmers-modern-slavery-statement-2019.pdf>.

<sup>11</sup> South 32, '2020 Modern Slavery Statement'. Available at: [https://www.south32.net/docs/default-source/sustainability-reporting/fy20-sustainability-reporting/2020-modern-slavery-statement.pdf?sfvrsn=b81e4476\\_4](https://www.south32.net/docs/default-source/sustainability-reporting/fy20-sustainability-reporting/2020-modern-slavery-statement.pdf?sfvrsn=b81e4476_4).

personal protective equipment (PPE) and medical supplies, to identify risks and drive responsible decision-making for rapid sourcing of these items. It is also reported that commercial teams 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. 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 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.<sup>12</sup> The report lists these tasks as being in progress and it will be interesting to review the 2021 Modern Slavery Statement to assess progress. In terms of delays, it is reported that two independent supplier audits were postponed due to travel restrictions and social distancing controls, some human rights and modern slavery training was postponed and planned initiatives to support the human rights working group of the Sustainable Shipping Initiative were also postponed. With regard to training, given the rapid transition to online meetings and education during COVID-19, there is insufficient information or whether online training could have been a feasible alternative.

However, a commendable feature of the South 32 statement is some of the specificity (e.g. PPE, shipping) that is provided with regard to the modern slavery risks. Other reporting entities have acknowledged the risk of 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.<sup>13</sup> Providing specific details on 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.<sup>14</sup> Knowledge of such cancellations would provide valuable information to international aid agencies, civil society, governments and others

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<sup>12</sup> Australian Government, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*. <<https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>>.

<sup>13</sup> See, eg, KPMG, 'KPMG Australia's Modern Slavery Statement 2020'. Available at: <https://assets.kpmg/content/dam/kpmg/au/pdf/2020/kpmg-australia-modern-slavery-statement-fy20.pdf>.

<sup>14</sup> Hinrich Voss, 'Implications of the COVID-19 pandemic for human rights and modern slavery vulnerabilities in global value chains' (2020) 27(2) *Transnational Corporations* 113, 114.

about where labour inspections, humanitarian support and other measures may be required. However, it remains to be seen whether reporting entities disclose such COVID-19 related impacts.

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,<sup>15</sup> and a representative sample will be selected for the analysis on the basis of SIC (Standard Industry Code) Division. Within this sub-set, comparative analysis will be carried out on any available statements from the 23 companies we have identified as already reporting under the UK MSA and French Duty of Vigilance Law and expected to report under the Australian MSA as our previous studies have established base-line data for these entities. A secondary and supporting data source is relevant extracts from a broader qualitative dataset from interviews with Australian reporting entities, which I am currently conducting. Both datasets will be subjected to qualitative analysis using NVivo software to thematically code the data.

This analysis will be used to identify trends in reporting, to identify whether reporting entities appeared to grapple with COVID-19 related-risks, or, whether COVID-19 challenges risk being used as something of a 'get out of jail free card'. It will document what specific, increased risks exist according to the statements and draw on global datasets for triangulation.<sup>16</sup> The research is intended to be of an applied nature, developing recommendations to inform government policy and business best practice and can be incorporated into a submission to the Australian Government's three-year review of the MSA.

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<sup>15</sup> Australian Government, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*. Available at: <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>.

<sup>16</sup> Including the Global Slavery Index, US State Department Trafficking in Persons Report and other contemporary online sources such as those provided by the Business and Human Rights Resource Centre.