

TRANSNATIONAL SUPPLY CHAIN REGULATION: EXTRATERRITORIAL REGULATION AS CORPORATE LAW'S NEW FRONTIER

RYAN J TURNER*

Extraterritorial or quasi-extraterritorial regulation of business activities is becoming increasingly common in developed states. Most recently, the United Kingdom enacted legislation requiring certain commercial organisations that are incorporated, or carry on business, in the UK to disclose steps they have taken in relation to slavery and human trafficking in their supply chains and business. The Australian government ('the Commonwealth') has indicated that similar legislation could be enacted as part of its strategy to combat forced labour and human trafficking. This commentary reviews the Modern Slavery Act 2015 (UK) ('the Act') and other forms of extraterritorial and quasi-extraterritorial regulation of business in order to encourage and inform action by the Commonwealth to curb slavery and forced labour in the supply chains of businesses that carry on activities in Australia. This commentary demonstrates that the disclosure model of regulation in the Act is weak and should provide only the starting point for the regulation of business activities overseas. Instead or in supplementation of a disclosure model, the Commonwealth ought to adopt a strong regulatory model akin to the Illegal Logging Prohibition Act 2012 (Cth).

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* BA (Hons I), LLB (Hons I) (ANU), LLM Candidate (Cantab). The views expressed in this commentary are those of the author and are not (and may not reflect) those of his colleagues or any organisation with which he is associated. The author acknowledges and thanks Elouise Fowler, Rosalind Comyn and the peer reviewers for their comments on earlier versions of the commentary, and his mentors for the inspiration for this research. Any errors or omissions are, of course, the author's own.

I INTRODUCTION

More than ten years ago, Professor Paul Redmond observed that:

Corporate law does not repair ... weaknesses [in the regulation of the extraterritorial activities of transnational corporations overseas]. Its concerns are with financial accountability to investors, not accountability for human rights standards. Human rights concerns are for the most part extraneous to corporate regulation, culture and remedies.¹

Unacknowledged in Professor Redmond's observation is the *potential* for human rights accountability to be brought within corporate law's domain through an expanded concept of corporate law. The latent potential of corporate law has begun to stir and take form in practice in other jurisdictions in ways that indicate law reform possibilities that might be translated to our antipodean system in order to bring about changes in business practices and the philosophy of company law.² This commentary critically evaluates one such reform possibility: 'home' state regulation³ of the supply chains of corporations and other business entities based on the model of labour regulation in the United Kingdom and California.

Last year, the Parliament of the United Kingdom enacted the *Modern Slavery Act 2015* (UK) c 30 ('*Modern Slavery Act*' or 'the Act').⁴ Section 54(1) of the Act obligates certain commercial entities to disclose the steps that they have taken to identify the use of forced labour and human trafficking in their supply chains, or to disclose that they have taken no such steps. The Commonwealth has convened a 'Supply Chains Working Group' to assess regulatory options to

¹ Paul Redmond, 'Sanctioning Corporate Responsibility for Human Rights' (2002) 27 *Alternative Law Journal* 23, 23.

² The changing concept of 'corporate law' in foreign jurisdictions is also indicated in, for example, the doctrine of 'enlightened shareholder value' that has been codified in s 172 of the *Companies Act 2006* (UK) c 46, the enactment of 'benefit corporation' legislation in certain states of the United States, and the obligation on 'qualified business entities' under the *Companies Act 2013* (India) to 'dedicate 2% of [their] profits to [corporate social responsibility] endeavours in India': see Alison E McArdle, 'A Stick in the Global Carrot Patch: The Business of Corporate Social Responsibility in India's *Companies Act 2013*' (2015) 38 *Suffolk Transnational Law Review* 467, 467, citing Rama Lakshmi, 'India Mandates Increase in Charitable Giving by Corporations; Critics Fear Government Control', *Washington Post* (online), 11 September 2013 <<https://perma.cc/G28E-HCEB>>.

³ 'Home' state regulation refers to the regulation of a subject by the state in which an individual or entity is domiciled, incorporated or of which the subject holds nationality. The 'host' state is a separate state in which that individual or entity is present (that is, it is hosted). The description 'home state' may also refer, in broad and imprecise terms, to a state in which an entity or individual is carrying on activities or in which property owned by the entity is located that provides a jurisdictional basis on which to regulate that entity in a separate state (such as under the *Modern Slavery Act 2015* (UK) c 30 ('*Modern Slavery Act*' or 'the Act') or s 7 of the *Bribery Act 2010* (UK) c 23 ('*Bribery Act*'). In this way, home state regulation of transnational business expands the regulatory reach of the state beyond the regulation of acts and omissions occurring in its physical territory based on nationality or territorial jurisdiction in respect of the regulatory subject. See Rachel Chambers, 'Is Home State Litigation the Way to Fill the Lacuna in Corporate Legal Accountability for Human Rights Violations Perpetrated in Host States?' (2009) 4(2) *Journal of Comparative Law* 133.

⁴ The *Modern Slavery Act* received Royal Assent on 26 March 2015 and entered into force on 29 October 2015. The disclosure obligation, however, applies only from the financial year ending 31 March 2016 onwards: United Kingdom Home Office, *Transparency in Supply Chains etc: A Practical Guide* (Statutory Guidance, 29 October 2015) [6.2] ('*Practical Guide*').

address slavery and forced labour in supply chains and has indicated a willingness to enact similar legislation in Australia.⁵ This commentary may, therefore, encourage and inform the regulation of slavery and forced labour in transnational supply chains and, in this way, aid in the development of statutory human rights protections in Australia.⁶ In addition, the discussion of business regulation in this commentary is set against the backdrop of an ongoing inquiry into the elaboration of a treaty to regulate transnational business by a working group within the United Nations.⁷ For this reason, this commentary flags possible methods of quasi-extraterritorial regulation of business entities (such as public procurement guidelines based on corporate social responsibility standards) and questions the appropriate mix of international and domestic regulation of entities carrying on business in foreign states. In doing so, it highlights topics for further research.

This commentary is divided into two substantive parts. Part II explains and evaluates the legislative history, operation and weaknesses of the Act. Part III discusses home state regulation in Australia and the inaction of the international community in regulating transnational corporations. The significance of this discussion and analysis lies in its deconstruction and comparison of the disclosure obligation with other forms of regulation. The ensuing analysis identifies weaknesses in the Act and proposes alternative methods of regulation in order to strengthen the model of quasi-extraterritorial regulation in the Act. The implication is that the disclosure obligation in the Act ought to be one of a range of complementary measures adopted by the Commonwealth to regulate slavery and other wrongs in transnational supply chains.

II THE MODERN SLAVERY ACT 2015 (UK)

Section 54(1) of the Act provides that: ‘A commercial organisation within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organisation’. Section 54 is modelled on a similar provision in s 1714.43 of the *Civil Code of the State of California* (‘*Californian Civil*

⁵ Commonwealth, *Parliamentary Debates*, Senate, 28 October 2014, 7951–9 (Nigel Scullion).

⁶ This commentary does not set out arguments or factual evidence as to why slavery requires regulation; that case does not require iteration. Indeed, the intolerance of international law for slavery is of such long standing that freedom from slavery was ‘the first human right to be protected by international treaty’, being found in the *Berlin Treaty* of 1885: Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000) 431. See also Clayton and Tomlinson at ch 9; Fiona McLeod, ‘Human Trafficking and Modern Day Slavery — An Affront to Human Dignity’ (2014) 2 *Griffith Journal of Law & Human Dignity* 144.

⁷ See Human Rights Council, *Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument*, 31st sess, Agenda Item 3, UN Doc A/HRC/31/50 (5 February 2016).

Code’), enacted by the *California Transparency in Supply Chains Act of 2010*.⁸ But, as the British Home Secretary explained in her third reading speech, s 54(1) has a broader reach and ‘goes further than any other similar legislation in the world’.⁹

The disclosure obligation in the Act supplements the disclosure obligations for listed corporations in s 414C(7) of the *Companies Act 2006* (UK) c 46. Section 414C(7) requires listed companies to prepare a strategic report setting out information about environmental matters, employee matters and ‘social, community and human rights issues’ insofar as such matters are ‘necessary for an understanding of the development, performance or position of the company’s business’.¹⁰

A The Political Genesis of the Supply Chain Disclosure Obligation

The supply chain disclosure obligation was not included in the Modern Slavery Bill 2014–15 (UK) (‘the Bill’) when it was first introduced by the British Home Secretary on 10 June 2014. Indeed, in a fact sheet issued by the Home Office the Minister for Modern Slavery and Organised Crime, Karen Bradley MP, stated that such an obligation was unnecessary due to *European Union Directive 2014/95/EU*, which is required to be implemented in member states by 6 December 2016.¹¹ Section 54 came about, instead, as an amendment that the Home Secretary made on 4 November 2014 following criticism of the

⁸ Cal Civ Code § 1714.43 (West 2012); *California Transparency in Supply Chains Act of 2010*, ch 556 Cal Stat § 2641 (West 2012). On 27 July 2015, Carolyn B Maloney (D-NY) introduced the following Bill into the United States House of Representatives: Business Supply Chain Transparency on Trafficking and Slavery Bill of 2015, HR 3226, 114th Congress (2015). The Bill is a federal equivalent of the Californian legislation and requires the Securities Exchange Commission (‘SEC’) to promulgate regulations requiring ‘covered issuer[s]’ to make certain disclosures regarding modern slavery. Disclosure to the SEC under the proposed federal regulation differs from disclosure to the *public* under the Californian and British legislation. Although the difference appears semantic, it suggests a focus on investors rather than consumers and may affect the effectiveness of the regulation in altering consumer behaviour.

⁹ United Kingdom, *Parliamentary Debates*, House of Commons, 4 November 2014, vol 587, col 789 (Theresa May).

¹⁰ Listed corporations in Australia have a similar, albeit narrower, disclosure obligation which requires a listed company to disclose its compliance with the *ASX Corporate Governance Principles*: Australian Securities Exchange, *Listing Rules* (as at 6 May 2016) r 4.10.3. Recommendation 7.4 of the *ASX Corporate Governance Principles* requires each listed company to ‘disclose whether it has any material exposure to economic, environmental and social sustainability risks’: Australian Corporate Governance Council, *Corporate Governance Principles and Recommendations* (Australian Securities Exchange, 3rd ed, 2014) 30.

¹¹ Michael Pollitt, ‘This Isn’t the Time to Go Wobbly on Slavery’, *Foreign Policy* (online), 12 September 2014 <<https://perma.cc/869A-DFKL>>. *European Union Directive 2014/95/EU*, which amended *European Union Directive 2013/34/EU*, requires member states to legislate obligations for ‘large undertakings’ to disclose information ‘to the extent necessary for an understanding of the undertaking’s development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters’: *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups* [2014] OJ L 330/1, art 19(a).

limited scope of the Bill from civil society and on the recommendation of the Joint Committee on the Draft Modern Slavery Bill.¹²

Two private members' Bills, introduced by Labour's Fiona Mactaggart MP and Michael Connarty MP, preceded the *Modern Slavery Act 2015* (UK).¹³ The Bills mimicked the language of the *Californian Civil Code* and were similar to s 54 of the Act. Without the support of the Liberal Democrat–Conservative coalition government, however, the private members' Bills proceeded no further than a first reading in the House of Commons. The similarities between the text of s 54 and the unsuccessful private members' Bills highlight the political nature of corporate law reform and the poor prospects of legislation that does not have support within the governing political party (and, particularly, the ministry). Although the Act was repeatedly criticised by the then Shadow Home Secretary as 'not go[ing] far enough',¹⁴ there was a sufficient consensus across the political spectrum about the importance of regulating commercial organisations that carry on activities in the United Kingdom in this way. Indeed, the bipartisan support for the *Modern Slavery Act* indicates that corporate law reform is not the exclusive domain of leftist or centre-left political parties. Rather, the spirit of corporate law reform can, as in this instance, take form in conservative or centre-right political parties.

B To Whom Does the Disclosure Obligation Apply?

The disclosure obligation in s 54(1) attaches to entities that satisfy four criteria.¹⁵ This involves an assessment of the type, geographical location, activities and turnover of the entity.

Section 54(1) applies to 'commercial organisations' which are defined as being, first, either bodies corporate (wherever incorporated) or partnerships (wherever formed) that, second, 'carr[y] on a business, or part of a business' in the United Kingdom.¹⁶ The definition of 'commercial organisation' is similar to the definition of a 'relevant commercial organisation' for the purpose of s 7 of

¹² Sally Lipscombe and Oonagh Gay, 'Modern Slavery Bill 2014–15: Bill 8 of 2014–15' (Research Paper No 14/37, Parliamentary Library, United Kingdom House of Commons, 2014) 20–3. See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 582, col 638 (Kerry McCarthy); Joint Committee on the Draft Modern Slavery Bill, *Report — Draft Modern Slavery Bill*, House of Lords Paper No 166 and House of Commons Paper No 1019, Session 2013–14 (2014) ch 5.

¹³ The Eradication of Slavery (UK Company Supply Chains) Bill 2010–12 (UK) was introduced by Fiona Mactaggart on 28 February 2012 and the Transparency in UK Company Supply Chains (Eradication of Slavery) Bill 2012–13 (UK) was introduced by Michael Connarty on 9 July 2012.

¹⁴ United Kingdom, *Parliamentary Debates*, House of Commons, 4 November 2014, vol 587, col 791–2 (Yvette Cooper). See also Yvette Cooper, 'Speech to the Labour Party Annual Conference' (Speech delivered at Labour's Annual Conference, Manchester, 24 September 2014) <<https://perma.cc/9P3D-KCH5>>: 'The Government's Modern Slavery Bill doesn't go nearly far enough. There can be no half measures. A Labour government will demand action from major companies throughout their international supply chains. It's time to stamp out this evil trade.'

¹⁵ *Modern Slavery Act* ss 54(2), (12).

¹⁶ Cf the meaning of 'doing business in California' under the *Californian Civil Code*, which requires either that the corporation is domiciled in California, or that revenue, the value of property, or compensation paid, in California exceeds certain thresholds: *California Revenue and Taxation Code*, Cal Rev Code § 23101(b) (West 2012).

the *Bribery Act 2010* (UK) c 23 ('the *Bribery Act*').¹⁷ The regulatory nexus between the subject and the state under both s 54(1) of the Act and s 7 of the *Bribery Act* is based on the 'carry[ing] on [of] a business, or part of a business' within the territorial jurisdiction of the state.¹⁸ Neither of these provisions predicate jurisdiction on the state being the domicile of the corporation,¹⁹ in contrast to the nationality jurisdiction model that founds the extraterritorial operation of ss 1, 2 and 6 of the *Bribery Act*.²⁰ The focus of the Act on the activities of business entities rather than their domicile reflects the artificiality of an entity's domicile as a basis for regulation, and extends the reach of the legislation to business entities incorporated in foreign jurisdictions (such as offshore jurisdictions and other European Union member states) but which carry on business in the United Kingdom.

Third, the entity must supply goods or services, although there is no requirement in the Act that the goods and services be supplied in the United Kingdom.²¹ By contrast, the *Californian Civil Code* imposes a disclosure obligation only on 'retail seller[s]' and 'manufacturer[s]'.²² In this respect, the Act is broader than the *Californian Civil Code* on which it is modelled.

Fourth, the entity must have a 'total turnover' greater than the threshold amount prescribed by the Secretary of State in the *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) (currently £36 million).²³ This threshold is lower than that in the *Californian Civil Code*, which is US\$100 million in 'annual worldwide gross receipts',²⁴ and Mactaggart and Connarty's private members' Bills, which stipulated a threshold of £100 million.²⁵ Importantly, the 'total turnover' under the regulations includes the turnover of the disclosing entity and 'any of its subsidiary undertakings'.²⁶ The inclusion of subsidiary undertakings in the calculation of the turnover threshold, compared with a calculation on an entity-by-entity basis, expands the reach of the legislation to account, in a limited way, for the reality of enterprise structures.

The subject of the disclosure obligation is, however, technically narrow. The legislation takes as its focus, and is constrained to, individual entities rather than the group or enterprise of which that entity forms a part. This constraint is of little consequence if a disclosing entity's subsidiaries form part of its supply

¹⁷ *Bribery Act* s 7(5). See the equivalent in Australia and in the United States: *Criminal Code Act 1995* (Cth) sch s 70.2(1) ('*Criminal Code*'); *Foreign Corrupt Practices Act of 1977*, 15 USCA § 78dd-1 (1998).

¹⁸ *Bribery Act* s 7(5); *Modern Slavery Act* s 54(12).

¹⁹ *Bribery Act* s 7(5); *Modern Slavery Act* s 54(12).

²⁰ *Bribery Act* s 12(4).

²¹ *Modern Slavery Act* s 54(2)(a).

²² Cal Civ Code § 1714.43(a)(1) (West 2012).

²³ *Modern Slavery Act* ss 54(2)(b), (3); *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) SI 2015/1833 reg 2.

²⁴ Cal Civ Code § 1714.43(a)(1) (West 2012).

²⁵ Although, in her first reading speech Mactaggart appears to have referred to a threshold of £500 million: United Kingdom, *Parliamentary Debates*, House of Commons, 28 February 2012, vol 541, col 172 (Fiona Mactaggart).

²⁶ *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) SI 2015/1833 reg 3(1). 'Subsidiary undertakings' is defined in the regulations as having the same meaning as in s 1162 of the *Companies Act 2006* (UK) c 46, which is based on the control exercised by a parent company over subsidiaries and sub-subsidiaries: at reg 1(2)(b).

chain; but outside of this limited circumstance of vertical integration the implications are significant as the disclosure obligation may be circumvented or its effect limited through careful business structuring. In order to account for the realities and complexity of group structures, the disclosure obligation ought to be extended to the enterprise as a whole such that each entity that is owned or controlled by the entity satisfying the statutory definition must give disclosure in respect of its supply chain. In practical terms, this could be achieved based on the use of a similar control- and ownership-based definition to that of ‘subsidiary undertakings’ in the *Companies Act 2006* (UK) c 46.²⁷ The failure to extend the disclosure obligation across a group or enterprise in this way is a significant flaw in the Act. Indeed, the government appeared to acknowledge this flaw in its ‘practical guidance’, writing that:

If a parent company is seen to be ignoring the behaviour of its non-UK subsidiaries, this may still reflect badly on the parent company. As such, seeking to cover non-UK subsidiaries in a parent company statement, or asking those non-UK subsidiaries to produce a statement themselves (if they are not legally required to do so already), would represent good practice and would demonstrate that the company is committed to preventing modern slavery. This is highly recommended, especially in cases where the non-UK subsidiary is in a high-risk industry or location.²⁸

C What Must Commercial Organisations Disclose?

The slavery and human trafficking statement (‘the Statement’) required by s 54(1) of the Act must set out:

the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place — (i) in any of its supply chains, and (ii) in any part of its own business, or ... that the organisation has taken no such steps.²⁹

‘Slavery and human trafficking’ is defined as conduct that constitutes an offence or which would constitute an offence if it were to have occurred in the United Kingdom under certain anti-slavery legislation.³⁰ It includes the offences of slavery, forced or compulsory labour, human trafficking and third party involvement in such acts. If the disclosing entity has a website, it must then publish the Statement on its website and include a link to the Statement on its home page.³¹

The entities *in relation to which* the disclosure obligation applies (that is, the subject of the disclosure) are far broader than the entities to which the disclosure obligation applies (that is, the regulatory subject). This is due to the inclusion of the disclosing entities’ ‘supply chains’ in s 54(4)(a)(i) of the Act. The Act then, in ss 54(5)(a)–(e), lists certain information in respect of the supply chain that ‘may’ be included in the Statement. In this way, the disclosure obligation may

²⁷ *Companies Act 2006* (UK) c 46 s 1162.

²⁸ *Practical Guide*, above n 4, [3.13].

²⁹ *Modern Slavery Act* s 54(4).

³⁰ *Ibid* s 54(12) (definition of ‘slavery and human trafficking’).

³¹ *Ibid* s 54(7).

have an extraterritorial effect as it may (depending on the particular commercial organisation) operate in relation to extraterritorial activities.

However, the scope of the disclosure obligation is unclear due to the absence from the Act of a definition of ‘supply chain’. By this omission the legislative drafters have left open the question of how far into the supply chain the legislation reaches. That is, the question of whether commercial organisations are required to make disclosures only in relation to the first tier of their supply chains, with whom they have a direct contractual relationship, or the lower tiers in their supply chain based on outsourcing, subcontracting or separate supply contracts and with whom the commercial organisation does not have a direct contractual relationship. The intention of the Parliament is not clear from the legislative materials, but a broad reading of the statutory reference to ‘supply chain’ is indicated by both a comparison with the *Californian Civil Code* and the ordinary meaning of the expression. The reference to ‘supply chain’ in the Act may be contrasted with the reference to ‘direct supply chain for tangible goods offered for sale’ in s 1714.43(a)(1) of the *Californian Civil Code*. This expression in the *Californian Civil Code* is similarly undefined and has not been judicially considered. However, it is instructive insofar as the different statutory language points toward a separate meaning. That is to say, the omission of the adjective ‘direct’ in the Act suggests that, by comparison with the *Californian Civil Code*, s 54(1) is intended to have a broader reach. Indeed, a narrow interpretation of the obligation — and, to an extent, the use of the adjective ‘direct’ in the *Californian Civil Code* — is inconsistent with the ordinary meaning of the expression ‘supply chain’.³²

D A Penalty for Non-Compliance?

The disclosure obligation in s 54 is enforceable by the Secretary of State.³³ However, outside of the reputational and market consequences of non-compliance with s 54, there is no penalty for non-compliance with the disclosure obligation. Remedies against a disclosing entity whose supply chain includes slavery or forced labour lie only on the basis of representations made in the Statement. The absence of a penalty regime contrasts with the penalties payable under anti-corruption legislation, which Galit Sarfaty describes as having ‘spurred’ compliance, monitoring and control over supply chains.³⁴ As a result, the ‘synergy between punishment and persuasion’ that Ian Ayres and John Braithwaite identify as the hallmark of ‘successful regulation’ is entirely absent from the Act.³⁵ This soft regulatory approach reflects the broader reluctance of states to impose strict social responsibility standards on business entities backed by sanctions and which ultimately undercuts the effectiveness of transnational supply chain regulation.

³² The Oxford English Dictionary defines ‘supply chain’ as (inter alia) ‘the chain of processes involved in the production and distribution of a commodity’: *Oxford English Dictionary* (online) (Oxford University Press, 2016) <<https://perma.cc/XR5H-U9ZF>>.

³³ *Modern Slavery Act* s 54(11).

³⁴ Galit A Sarfaty, ‘Shining Light on Global Supply Chains’ (2015) 56 *Harvard International Law Journal* 419, 427.

³⁵ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 25.

Fiona Mactaggart MP had explained in respect of her earlier private member's Bill that '[i]n enabling public information to be provided, the Bill aims to use the power of the purchaser to prevent slavery and exploitation'.³⁶ The former Federal Court judge and president of the Australian Human Rights Commission, Catherine Branson QC, has similarly suggested that '[t]ransparency is a powerful antidote to corruption' and recommended that additional disclosure measures be imposed on corporations.³⁷ Yet, a market-based mechanism is a weak regulatory tool.³⁸ This is particularly because it incorrectly presupposes the existence of perfect market conditions in which consumers are fully informed about the use of forced labour and slavery in supply chains.³⁹ But it is also because purchasing behaviour is not wholly rational and because other product characteristics (such as price and quality) may outweigh individual consumers' concerns about the use of forced labour or slavery in a supply chain. Empirical evidence about the effect of ethical concerns on consumer behaviour is lacking.⁴⁰ That is to say, even if consumers were fully informed about product supply chains, it is not known how consumers would act on such information in their purchasing decisions.⁴¹ Indeed, in the third reading debate, Frank Field MP raised, but did not answer, the 'question of how we educate a new consumer movement, so that consumers enforce the Bill by refusing to touch goods and services made by slaves'.⁴²

Civil society and participants in corporate value chains could play a key role in monitoring and highlighting unethical conduct. In particular, the procurement practices and decisions of wholesalers and retailers could limit the ability of consumers to purchase tainted goods and services. The power of wholesalers and retailers to remove a good from their physical or electronic sale platforms due to practices in the producer's supply chain may prove more successful than the purchasing power of consumers in altering supply chain behaviour. Yet, outsourcing regulation to private actors — whether wholesalers and retailers or consumers — remains a weak regulatory tool in the absence of an effective incentive structure for ethical action.

The enforcement regime in the Act also imposes an unnecessary regulatory burden on the administrative branch of government. Melissa Lane notes that corporate accountability is hindered by laws that place the onus or burden on regulatory authorities to investigate and then prosecute corporate wrongdoing and enforce regulatory standards in the face of sophisticated and better-resourced legal teams.⁴³ The logical inference is, therefore, that corporate regulation ought to include both public monitoring and enforcement and the creation of incentive

³⁶ United Kingdom, *Parliamentary Debates*, House of Commons, 28 February 2012, vol 541, col 174 (Fiona Mactaggart).

³⁷ Catherine Branson, 'Business and Human Rights: The New Global Consensus?' (2014) 16 *Flinders Law Journal* 187, 199–200.

³⁸ Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2nd ed, 2012) 119–21.

³⁹ *Ibid* 18.

⁴⁰ David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, 2005) 48.

⁴¹ Baldwin, Cave and Lodge, above n 38, 120.

⁴² United Kingdom, *Parliamentary Debates*, House of Commons, 4 November 2014, vol 587, col 795 (Frank Field).

⁴³ Melissa Lane, 'The Moral Dimension of Corporate Accountability' in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge, 2005) 229, 233.

structures within the law for self-regulation in accordance with Ayres and Braithwaite's formula. Excepting the market consequences of non-compliance with the disclosure obligation or disclosure that the commercial organisation has taken no steps to monitor its supply chain, there is no penalty or sanction to deter a breach of the disclosure obligation or the tolerance of slavery and forced labour in supply chains. In these circumstances, there is no incentive for corporations to self-regulate or adopt a pro-monitoring and pro-disclosure culture internally and in their interactions with suppliers. Instead, regulators must incur the time and financial cost of monitoring and enforcing compliance under s 54(11). Even then, the disclosing entity may simply disclose that it has taken no steps in relation to the monitoring of slavery in its supply chain.

The greatest risk in giving disclosure or monitoring a corporate supply chain arises from the possibility that one might create a factum supporting a cause of action by suppliers, consumers or shareholders. Such a cause of action may take two broad forms. First, the making of inaccurate or incorrect disclosures may breach general law or statutory prohibitions on misrepresentation or stock exchange listing rules.⁴⁴ Second, intervening in or monitoring a supply chain erodes the protection of arm's-length contracting, and in this way, may ground liability in tort based on breach of a duty of care, conspiracy or (depending on the jurisdiction) statutory liability.⁴⁵ Slavery in Côte d'Ivoire has, for example, formed the basis of a long-running class action in California against Nestlé USA, Inc.⁴⁶ Separate class actions in Californian courts against Costco Wholesale Corporation and Nestlé similarly publicised claims of slavery in transnational supply chains, although the class actions were unsuccessful and did not result in adverse legal consequences.⁴⁷ The class actions included claims of unfair competition, breach of consumer law and false advertising based on the corporations' failure to disclose slavery in their supply chains. Indeed, the complaint against Costco sets out in full the disclosure made by Costco in purported satisfaction of its obligation under the *Californian Civil Code*⁴⁸ and inferred from this and other representations by Costco that the company had a positive duty to disclose the use of forced labour or slavery in its product supply chain.

⁴⁴ In Australia, the making of a misleading or deceptive statement would carry the risk of the Australian Competition and Consumer Commission ('ACCC') seeking a pecuniary penalty order for contravention of s 18 of the *Australian Consumer Law*. It may also provide the basis for shareholder or stakeholder actions. Such a hypothetical is similar to the private action in *Kasky v Nike Inc*, 45 P 3d 243 (Cal, 2002).

⁴⁵ See Ryan J Turner, 'Revisiting the Direct Liability of Parent Entities Following *Chandler v Cape Plc*' (2015) 33 *Company & Securities Law Journal* 45, 57; Andrew Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary' (2012) 71 *Cambridge Law Journal* 478, 480–1; Christian Witting and James Rankin, 'Tortious Liability of Corporate Groups: From Control to Coordination' (2014) 22 *Tort Law Review* 91. Such a contention, however, suffers from the logical flaw that it would create a perverse incentive for corporations not to regulate their supply chains by contract or otherwise, for fear of generating the factum for a cause of action in tort. One might theorise that the law is unlikely, as a matter of policy, to encourage such wilful blindness.

⁴⁶ *Doe v Nestlé USA Inc*, 738 F 3d 1051 (9th Cir, 2013).

⁴⁷ *Sud v Costco Wholesale Corporation* (ND Cal, No 15-cv-03783-JSW, 15 January 2016); *Barber v Nestlé USA Inc* (CD Cal, No SACV15-01364-CJC(AGR), 9 December 2015).

⁴⁸ This, in itself, indicates the importance of care by corporations in making representations regarding slavery, forced labour and human rights compliance.

Models of private regulation displace the obligation of monitoring and enforcement from the public to the private sphere. The Costco and Nestlé class actions, for example, followed scrutiny by mainstream media outlets and non-government organisations, with the costs and burden of enforcement borne by the class action plaintiffs. The weakness of a private regulatory model is apparent; regulation is contingent on the existence and effectiveness of private sector actors such as investigative journalists, non-government organisations and private individuals. The private sector may not, however, have an incentive to proactively monitor, or standing to enforce through litigation, the human rights compliance of corporations. Moreover, monitoring and enforcement by private sector actors is necessarily selective and may be hindered by resourcing limitations greater than those of the public sectors of developed states. In these circumstances, the risk of private regulatory action is unlikely to incentivise corporations to weed out slavery and forced labour in their supply chains.

III TRANSNATIONAL CORPORATE REGULATION

A *International Inaction on Supply Chain Regulation*

Home state regulation is ‘a promising avenue to regulate human rights practices within global supply chains’.⁴⁹ ‘Promising’ not because of any claim about the utility of domestic law as a regulatory tool in comparison with international law, however, but ‘promising’ on pragmatic grounds, cognisant of the international community’s intransigence and inaction in regulating transnational corporate groups and supply chains. Although organs of the United Nations have worked toward binding regulation of transnational corporations over many years, the international community has not been able to agree a binding treaty to either impose obligations directly on business entities or on states to regulate business entities.⁵⁰ In the absence of binding regulation, international institutions and professional associations have repeatedly promulgated voluntary codes of conduct.⁵¹ The consequent regulatory gap in international law is partially set off through domestic legal mechanisms that form an ‘expanding web of liability’,⁵² albeit ineffectively and in an ad hoc fashion. A short discursus on international regulation of business activities demonstrates the pragmatic necessity and possibilities of home state regulation.

Article 1 of the United Nations *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (‘the Norms’) sought to impose obligations under international

⁴⁹ Sarfaty, above n 34, 427.

⁵⁰ David Kinley and Rachel Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6 *Human Rights Law Review* 447, 454–7.

⁵¹ For a summary of international business regulation and voluntary codes in Australia, see Alex Newton, ‘Any Volunteers? Challenges and Opportunities for Corporations Implementing the Responsibility to Respect Human Rights’ (2013) 28 *Australian Journal of Corporate Law* 72, 78–9.

⁵² Robert C Thompson, Anita Ramasastry and Mark B Taylor, ‘Translating *Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes’ (2009) 40 *George Washington International Law Review* 841.

law directly on ‘transnational corporations and other business enterprises’.⁵³ According to the associated commentary, the *Norms* imposed on

[t]ransnational corporations and other business enterprises ... the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.⁵⁴

The obligation in art 1 extended to the subject’s ‘spheres of activity and influence’ (an undefined and far-reaching expression). Article 15 of the *Norms* imposed an obligation on transnational corporations and other business enterprises to incorporate the *Norms* into their supply chains.⁵⁵ Yet, in the face of sustained criticism, the *Norms* stagnated; they were never adopted by the United Nations (other than by the United Nations Sub-Commission on the Promotion and Protection of Human Rights) and were declared by the Office of the High Commissioner for Human Rights to have ‘no legal standing’.⁵⁶ Instead, the United Nations Commission on Human Rights recommended the appointment of a special representative to investigate the responsibilities of corporations, ultimately leading to the adoption of the voluntarist *Guiding Principles on Business and Human Rights* (‘the *Guiding Principles*’). The *Guiding Principles* recommend (among other things) supply chain monitoring and due diligence by companies and, for states, the provision of effective judicial and non-judicial remedies for wrongdoing by companies domiciled in their jurisdiction.⁵⁷ Yet, the voluntary nature of the *Guiding Principles* undercuts their effectiveness and

⁵³ Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003, adopted 13 August 2003) art 1. ‘Other business enterprise’ is defined in art 21 as ‘any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity’.

⁵⁴ Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003) art 1(b).

⁵⁵ Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003, adopted 13 August 2003) art 15. The reach of art 15 is broad, referring to ‘contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement’ with a company.

⁵⁶ Commission on Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with regard to Human Rights*, 56th mtg, UN Doc E/CN.4/Dec/2004/116 (20 April 2004). See generally Kinley and Chambers, above n 50.

⁵⁷ John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex, principles 2, 13, 17, 25 (‘*Guiding Principles*’). This was endorsed, without a vote, by the United Nations Human Rights Council: Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, 17th sess, UN Doc A/HRC/17/L.17/Rev.1 (15 June 2011).

normative power, inviting speculation as to whether the international community is committed to regulating business.

The voluntary character of the *Guiding Principles* is mirrored in a range of other voluntarist instruments such as the *OECD Guidelines for Multinational Enterprises* ('the *OECD Guidelines*'). The commentary on the general principles in the *OECD Guidelines* states that '[i]n the context of its supply chain, if the enterprise identifies a risk of causing an adverse impact, then it should take the necessary steps to cease or prevent that impact'.⁵⁸ However, the *OECD Guidelines* also

recognise that there are practical limitations on the ability of enterprises to effect change in the behaviour of their suppliers. These are related to product characteristics, the number of suppliers, the structure and complexity of the supply chain, the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain.⁵⁹

Although the *OECD Guidelines* have no legal force, the Australian National Contact Point ('ANCP') for the *OECD Guidelines* may investigate the implementation of the *OECD Guidelines* in specific instances in response to a complaint.⁶⁰ However, the ANCP has not provided an effective forum for the resolution of disputes or the airing of complaints about the activities of Australian corporations in foreign jurisdictions.⁶¹

In spite of the proliferation of voluntarist codes, it is the author's contention that binding international regulation ought to remain the focus of efforts to meld

⁵⁸ Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) 24 [18] ('*OECD Guidelines*'). See also Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, 2011) 52–3.

⁵⁹ *OECD Guidelines*, above n 58, 24 [21]. For similar comments in Ruggie, see *Guiding Principles*, UN Doc A/HRC/17/31, [18]. Cognisance of the 'practical limitations' of supply chain monitoring does not necessarily point toward the diminishing of an obligation to do so. Sarfaty describes, at length, the potentially vast scale of supply chains: Sarfaty, above n 34, 431–3. Moreover, supply chains are not static and the suppliers or the product or service supplied may change as business needs shift. As a result, the obligation to monitor is a constant one, requiring continual superintendence. That is not to say, however, that the burden of supply chain monitoring is not undue. Normatively, if one is to take the benefit of a contract or business arrangement, it is not unfairly burdensome for the law to ask that one does so with their conscience alive to how that benefit was generated.

⁶⁰ Australian National Contact Point, *Procedural Guidance* (10 May 2015) <<https://perma.cc/D8UV-ETKA>>. See also the statements made by the ANCP in response to specific instance complaints.

⁶¹ See the complaint reports listed on the ANCP website: Australian National Contact Point, *Publications* <<https://perma.cc/3U65-BS7F>>. For an assessment of the function of NCPs in other jurisdictions, see Claire Methven O'Brien et al, 'National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool' (2016) 1(1) *Business and Human Rights Journal* 117; Jan Wouters and Cedric Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction' (2009) 40 *George Washington International Law Review* 939, 973–4.

corporate social responsibility into business practices. According to Joseph Stiglitz:

Eventually, we should be working toward the creation of international legal frameworks and international courts — as necessary for the smooth functioning of the global economy as federal courts and national laws are for national economies.⁶²

This claim has two components. First, the claim that regulation ought to be binding rather than voluntary and, second, the claim that international regulation rather than domestic regulation is optimal. International regulation may occur either directly or indirectly. The former involves directly regulating business entities under international law with international obligations enforceable in an international forum. The latter entails imposing obligations on states to regulate business entities that carry on business or are domiciled in their jurisdiction. Indirect regulation takes form as coordinated domestic regulation backed by international law obligations on states to enact such measures. Depending on the method of international regulation adopted and the enforcement mechanisms to render such regulation effective, international regulation offers consistency across jurisdictions and the possibility of making up the regulatory shortfall in states with weaker governance and regulatory structures.

The realisation of Stiglitz's objective, however, appears remote. In 2014 the United Nations Human Rights Council ('UNHRC') resolved, by a narrow majority, to establish an intergovernmental working group ('the Working Group') to inquire into 'a legally binding instrument on transnational corporations and other business enterprises'.⁶³ The pattern of voting on the Resolution reflects a North–South divide that leads Anna Grear and Burns Weston to be rightly sceptical of the prospects of achieving a binding global instrument on business regulation.⁶⁴ The 'geopolitical and geo-economic' tension implicated in the Working Group was noted by the Law Society of England and Wales, which stated that:

Opposition by the [United States], [United Kingdom] and European Union States was intense. Not only did they vote against the resolution, they stated that they would refuse to participate in the Intergovernmental Working Group.⁶⁵

Indeed, participation in the first meeting of the Working Group reflected this global North–South divide, with the United States, Canada, Japan, Australia and

⁶² Joseph E Stiglitz, *Making Globalization Work: The Next Steps to Global Justice* (Penguin Books, 2007) 207.

⁶³ Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, 26th sess, UN Doc A/HRC/26/L.22/Rev.1 (25 June 2014).

⁶⁴ Anna Grear and Burns H Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel* Lawscape' (2015) 15 *Human Rights Law Review* 21, 40, 42. Cf Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1(1) *Business and Human Rights Journal* 41, 42–3.

⁶⁵ Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, *Written Statement Submitted by Law Society of England and Wales, a Non-Governmental Organization in Special Consultative Status*, 1st sess, UN Doc A/HRC/WG.16/1/NGO/6 (2 July 2015) 13.

several member states of the European Union (including the United Kingdom and Germany) absent.⁶⁶

The Working Group's report of its first meeting warrants both optimism and pessimism for the prospects of international business regulation (albeit not in equal measures).⁶⁷ On the one hand, the report records a great many options for the regulation of transnational business entities and the remedying of human rights violations, either by states acting unilaterally or the international community acting collectively. On the other hand, the diversity of issues and concerns within the scope of the Working Group's deliberations and the geopolitical backdrop to the Working Group are likely to make agreement on the need for, role and content of a binding instrument difficult. As John Ruggie has noted, the treaty 'encompasses too many complex areas of national and international law for a single treaty instrument to resolve across the full range of internationally recognized human rights'.⁶⁸ Moreover, the UNHRC Resolution and the scope of the Working Group's inquiry contain a number of weaknesses. For example, delegates and participants at the first meeting of the Working Group disagreed about whether a treaty ought to regulate the conduct of all business⁶⁹ or (as the Resolution currently provides) only transnational corporations and 'other business enterprises', being 'business enterprises that have a transnational character in their operational activities' but not 'local businesses registered in terms of relevant domestic law'.⁷⁰

The poor prospects of international regulation and the consequent regulatory gap in the international legal sphere reveal the importance of strengthening national and regional regulation of business entities. That is, regulation by states, supranational institutions with (limited) legislative powers (such as the European Union) or by treaty within regional institutions (such as the African Union and the Association of Southeast Asian Nations). National and regional regulation

⁶⁶ The following 59 states attended some or all of the first meeting of the Working Group: Algeria, Argentine, Austria, Bangladesh, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran, Iraq, Italy, Kenya, Korea, Kuwait, Latvia, Libya, Lichtenstein, Luxembourg, Malaysia, Mexico, Moldova, Morocco, Myanmar, Nicaragua, Namibia, Netherlands, Pakistan, Peru, Philippines, Qatar, Russia, Singapore, South Africa, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukraine, Uruguay, Venezuela and Vietnam. See Human Rights Council, *Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument*, 31st sess, Agenda Item 3, UN Doc A/HRC/31/50 (5 February 2016) 4 [6].

⁶⁷ For an account of the first meeting, see Carlos Lopez and Ben Shea, 'Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session' (2016) 1(1) *Business and Human Rights Journal* 111.

⁶⁸ John Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors* (9 September 2014) Institute for Human Rights and Business <<https://perma.cc/QA5E-BERR>>.

⁶⁹ Human Rights Council, *Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument*, 31st sess, Agenda Item 3, UN Doc A/HRC/31/50 (5 February 2016) 7 [25], 16 [81].

⁷⁰ Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, 26th sess, Agenda Item 3, UN Doc A/HRC/26/L.22/Rev.1 (25 June 2014) 1 n 1.

may aggravate the peaks and troughs in the international regulatory landscape, but in the absence of a widely adopted multilateral treaty, national and regional regulation has an important role. Regulation by regional institutions, in particular, allows states with a common interest in establishing or lifting minimum regulatory standards to lessen or mitigate any perceived negative effect on the attractiveness of a state (*vis-à-vis* other states) to foreign investors that may follow from unilateral state action. Indeed, already states have entered into regional investment treaties that impose obligations under international law directly on investors that may be enforced through either investor–state arbitration or, under two treaties, proceedings before an international court.⁷¹

B *The Prospects of Home State Regulation in Australia*

Home state regulation of transnational corporations or their supply chains has been slow to develop in Australia and in some respects has stalled. Since the failed attempt to impose standards on transnational corporations through the Corporate Code of Conduct Bill 2000 (Cth) there have been few law reform proposals to strengthen the protection of human rights or compliance with foreign laws. The *Illegal Logging Prohibition Act 2012* (Cth) (*‘ILP Act’*) is the notable exception. Indeed, this commentary contends that the model of downstream enforcement adopted by the *ILP Act* flags a possible model for the regulation of supply chains more broadly. Part B therefore proceeds in two stages. First, it describes the Corporate Code of Conduct Bill 2000 (Cth) that was proposed (but not legislated) in Australia, which indicates both possible methods of corporate law reform and the political context of such reform. Second, it reviews the *ILP Act* and the model of downstream enforcement that it has adopted in order to strengthen compliance by timber loggers and exporters with foreign state laws.

Although this commentary favours a formal regulatory approach to slavery, Onora O’Neill is optimistic about the potential of transnational corporations to be ‘agents of justice’ in the absence of formal regulation.⁷² Already, there are corporations voluntarily managing or monitoring the practices of their supply chains by including corporate social responsibility clauses in supply contracts. Such provisions may confer on the contracting party a right to terminate the supply contract or grant an indemnity against loss or payment of liquidated damages where a supplier is in breach of the social, environmental or human rights standards contained in the contract or the corporation’s supplier guidelines. Corporations have also introduced supply chain monitoring and auditing practices and, as David Kinley notes, transactions (particularly if the

⁷¹ *Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference*, opened for signature 1–5 June 1981 (entered into force 23 September 1986) art 9; *Unified Agreement for the Investment of Arab Capital in Arab States*, opened for signature 26 November 1980 (entered into force 7 September 1981) art 14(1); *Amendment to the Unified Agreement for the Investment of Arab Capital in Arab States* [OECD trans], opened for signature January 2013 (entered into force 24 April 2016) art 13(1). An English translation of the *Amendment to the Unified Agreement for the Investment of Arab Capital in Arab States* was provided by the Organisation for Economic Co-operation and Development and is on file with the author.

⁷² Onora O’Neill, ‘Agents of Justice’ in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge, 2005) 37, 49–50.

target assets or entities are located in developing states) may include corporate social responsibility or human rights-oriented due diligence.⁷³ Such practices, however, appear rare (indeed, there is no record of corporate social responsibility clauses being the subject of a court judgment). In these circumstances — and notwithstanding business entities' informal (private) regulation of their supply chains — formal (public) regulation is necessary in order to strengthen the accountability of business entities for the practices of suppliers in their value chains.

1 *The Corporate Code of Conduct Bill 2000 (Cth)*

The Corporate Code of Conduct Bill 2000 (Cth) was introduced into the Senate by Australian Democrats Senator Vicki Bourne. The reach of the Bill into corporate group structures was broad — indeed, broader than the reach of its counterparts in the United Kingdom, the Corporate Responsibility Bill 2002 (UK) and the Corporate Responsibility Bill 2003 (UK). The Bill sought to regulate the activities of corporations registered in Australia, subsidiaries and holding companies of such corporations and subsidiaries of holding companies of such corporations, provided the corporation 'employs or engages the services of 100 or more persons' outside of Australia.⁷⁴ The Bill imposed environmental, labour, human rights, tax compliance and consumer protection standards on such corporations,⁷⁵ backed by a civil enforcement regime in Australian courts.⁷⁶ In these ways, the Bill endeavoured to protect stakeholders in foreign jurisdictions from lesser standards of corporate conduct and regulatory compliance. The Bill was framed as a response to specific acts of corporate misconduct, most notably the pollution of the Ok Tedi River in Papua New Guinea by a subsidiary of BHP Billiton Ltd and a cyanide spill at the Esmerelda mine in Romania caused by a joint venture company partly owned by an Australian corporation.⁷⁷ It also went some way to addressing the regulatory arbitrage that transnational corporate groups and supply chains are able to capitalise on.

The Bill was considered by the parliamentary Joint Statutory Committee on Corporations and Securities,⁷⁸ but it was never scheduled for a vote and lapsed with the dissolution of the Parliament. The Liberal members of the Joint Committee rejected the Bill as 'impracticable and unwarranted',⁷⁹ writing that 'there [was] no evidence of systemic failure regarding Australian corporate behaviour'.⁸⁰ The Labor members considered that, although the purpose of the

⁷³ David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press, 2009) 186. See generally Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36 *Michigan Journal of International Law* 425.

⁷⁴ Corporate Code of Conduct Bill 2000 (Cth) cl 4. See also at cl 5. See generally Adam McBeth, 'A Look at Corporate Code of Conduct Legislation' (2004) 33 *Common Law World Review* 222.

⁷⁵ Corporate Code of Conduct Bill 2000 (Cth) cls 7 (environmental), 8–9 (labour), 10 (human rights), 11 (tax), 12–13 (consumer protection).

⁷⁶ *Ibid* cls 16–17.

⁷⁷ Commonwealth, *Parliamentary Debates*, Senate, 6 September 2000, 17 457 (Vicki Bourne).

⁷⁸ Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Code of Conduct Bill 2000* (2001).

⁷⁹ *Ibid* 39 [4.5].

⁸⁰ *Ibid* 45 [4.44].

Bill was appropriate, its method of operation was not; the Labor members considered that a softer, self-regulatory approach was necessary.⁸¹ Only the lone Australian Democrats member on the Committee, Senator Andrew Murray, recommended the enactment of the Bill, but with several amendments.⁸²

Although the Commonwealth did not enact the Corporate Code of Conduct Bill 2000 (Cth), it has enacted legislation that has extraterritorial effect. This has predominantly been in relation to matters of international criminal law and includes laws in relation to child sex tourism or sex-related offences by Australians,⁸³ people smuggling,⁸⁴ foreign bribery⁸⁵ and international sanctions.⁸⁶ However, to the extent that the Commonwealth regulates the overseas activities of corporations, such regulation has predominantly come about as a reaction to, or reflection of, legislative developments in other states. Statutory regulation of foreign bribery in the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*'), for example, followed from the *Foreign Corrupt Practices Act of 1977* in the United States.⁸⁷ Similarly, the *ILP Act*, discussed immediately below, mirrored similar regulation by the European Union and the United States.⁸⁸ The implication is that the Commonwealth has not been proactive, but reactive, in bringing about corporate law reform or strengthening the regulation of transnational corporations incorporated, or carrying on business, in Australia.

2 *The Illegal Logging Prohibition Act 2012 (Cth)*

The *ILP Act* is a model of transnational supply chain regulation in the timber industry already in force in Australia. Although the *ILP Act* was not designed as a human rights protection law per se, it provides a regulatory scheme in which human rights claims that may have a human rights protective effect are able to be packaged as statutory wrongs. The legislation criminalises a range of activities in relation to illegally logged timber and regulated timber products. This includes: the importation of 'thing[s] ... made from, or [that include], illegally logged timber';⁸⁹ the importation of illegally logged timber that is also a 'regulated

⁸¹ Ibid (Comments by Labor Members on the Corporate Code of Conduct Bill 2000).

⁸² Ibid (Australian Democrats Minority Report on the Corporate Code of Conduct Bill 2000 by Senator Andrew Murray) [89].

⁸³ *Criminal Code* div 272. The regulatory nexus between the Commonwealth and an offender under s 272.6 is based on citizenship or residency (for natural persons) or the place of incorporation or principal place of business (for bodies corporate).

⁸⁴ Ibid div 73. The regulatory nexus between the Commonwealth and an offender under s 73.4 is based on either citizenship or residency (s 73.4(a)) or conduct occurs within Australia (s 73.4(b)).

⁸⁵ Ibid div 70. The regulatory nexus between the Commonwealth and an offender under s 70.5 is based on either the conduct occurring in Australia or on board an Australian aircraft or ship (s 70.5(1)(a)) or citizenship or nationality (for natural persons) or the place of incorporation (for bodies corporate) (s 70.5(1)(b)).

⁸⁶ *Autonomous Sanctions Regulations 2011* (Cth) reg 12(2); *Autonomous Sanctions Act 2011* (Cth) ss 11 (regarding the extraterritorial effect of the laws), 16 (the offence of contravening a sanction).

⁸⁷ *Foreign Corrupt Practices Act of 1977*, 15 USCA § 78dd-1 (1998).

⁸⁸ See *Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market* [2010] OJ L 295/23; *Lacey Act of 1900*, 16 USC §§ 3371–8.

⁸⁹ *Illegal Logging Prohibition Act 2012* (Cth) s 8 ('*ILP Act*').

timber product’;⁹⁰ the importation of a ‘regulated timber product’ without complying with the due diligence requirements set out in the *Illegal Logging Prohibition Regulations 2012* (Cth);⁹¹ and the processing of illegally logged raw logs that are not imported into Australia, both generally and without having complied with the due diligence requirements in the regulations.⁹² The second reading speech envisages that importers and processors will utilise verification and certification schemes in order to ensure that imported timber is not illegally logged.⁹³

Timber is ‘illegally logged’ if it has been harvested in breach of the laws in the place where the timber was harvested.⁹⁴ The use of the ‘laws in force in the place ... where the timber was harvested’ as a central element of offences under the *ILP Act* creates a wide-ranging liability. This is because ‘laws’ has no subject-matter limitation and may, therefore, include (for example) environmental, planning, employment, workplace health and safety and human rights laws that are in force in the state where the timber was logged. The Explanatory Memorandum enumerates four examples of illegal logging, including when: ‘[t]imber is stolen’; ‘[t]imber is harvested without the required approvals or in breach of a harvesting licence or law’; ‘[t]imber is bought, sold, exported or imported and processed in breach of law’; or ‘[t]imber is harvested or trade is authorised through corrupt practices’.⁹⁵ The examples are broad, ranging from criminal conduct to regulatory non-compliance, use generalised language (such as ‘breach of law’) and do not evince a basis on which to limit the expression ‘illegally logged’. Thus, while the *ILP Act* has not yet been adjudicated on by a court, the legislative materials and language of the statute point toward a broad obligation, although the particular illegality may be relevant to sentencing.

The maximum penalties for the criminal offences in the *ILP Act* vary from a fine of 300 penalty units to either or both 5 years’ imprisonment and 500 penalty units.⁹⁶ Certain other contraventions of the *ILP Act* or the regulations are also punishable by civil penalties under a separate civil penalty enforcement procedure.⁹⁷ Timber products may also be forfeited if a person is convicted of importing illegally logged timber.⁹⁸

The Explanatory Memorandum to the Illegal Logging Prohibition Bill 2012 (Cth) recognised that:

It is generally acknowledged that, as the forestry laws in developing countries are sufficiently robust to stop illegal logging if they were adequately enforced, it is

⁹⁰ Ibid s 9(1)(c).

⁹¹ Ibid s 12.

⁹² Ibid ss 15, 17.

⁹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13 570–1 (Mike Kelly).

⁹⁴ *ILP Act* s 7 (definition of ‘illegally logged’).

⁹⁵ Revised Explanatory Memorandum, Illegal Logging Prohibition Bill 2012 (Cth) 40.

⁹⁶ Although the *ILP Act* declares the penalty for these offences, it does not state who has responsibility for enforcement of these measures (distinct from enforcement of the civil penalty provisions).

⁹⁷ *ILP Act* s 60(1). See the provisions declared to be civil penalty provisions in the *Illegal Logging Prohibition Regulations 2012* (Cth).

⁹⁸ *ILP Act* s 10(1).

not the legal framework that is the problem. A lack of capacity of governments to enforce those laws or to monitor compliance with the regulatory regimes applying to forestry has subsequently led to consumer countries taking action to address the illegal logging problem.⁹⁹

The *ILP Act* thus goes some way to remedying the regulatory gap that arises in states with weak or corrupt governance or ineffective regulatory or enforcement agencies that limit access to domestic remedies for victims of corporate wrongdoing.

The *ILP Act* necessarily does not target the wrongdoer engaged in illegal logging in a foreign jurisdiction, over whom Australian courts may not have jurisdiction. Rather, the legislation strengthens foreign regulation of the timber industry by providing a mechanism for the prosecution of downstream activities ancillary to the illegal logging (that is, importation and processing). In this way, the legislation strengthens the deterrent against illegal logging and seeks to cut demand for illegally logged timber products. The corollary, in practical terms, is an incentive for companies that are at risk of liability under the *ILP Act* to negotiate appropriate warranties and indemnities in their contracts for supply in order to limit the exposure of the company and its officers and to obtain independent certification of the legality of the products. Thus, a wrongdoer engaged in illegal logging in a foreign jurisdiction may be subject to (civil) liability in contract if an importer or processor suffers loss in Australia. Contractual risk-allocation devices will not, however, protect the company or its officers from criminal liability.

Although the *ILP Act* has been criticised¹⁰⁰ and it is difficult to determine its practical effect on illegal logging, it is a strong regulatory model that ought to be replicated for other human right abuses and unlawful conduct. Illegal logging is not a wrong of an exceptional or gross character, particularly in comparison to slavery and other human rights abuses, and its broader applications are apparent. Both the legislation and the explanatory memorandum to the *ILP Act* highlight that a downstream regulatory scheme in developed states can indirectly strengthen compliance with the law in developing states. That is, developed states can reinforce the domestic law of foreign states through an incentive structure based on the sanctioning of the conduct of nationals (whether through civil or criminal penalties) that creates a market for unlawful goods and services. In this way, the downstream enforcement model goes some way to preventing unlawful transfers of value from states with weak enforcement structures to other states such as Australia by breaking down the market for goods and services that are created or provided unlawfully.

C A Modern Slavery Act for Australia

Slavery and forced labour are pressing human rights abuses requiring urgent, coordinated action to remove them from the supply chains of transnational corporations. The International Labour Organization estimates that the profits of forced labour are in the order of US\$150 billion per annum worldwide and that

⁹⁹ Revised Explanatory Memorandum, Illegal Logging Prohibition Bill 2012 (Cth) 40.

¹⁰⁰ See, eg, the questioning and commentary of Liberal Democrat Senator David Leyonhjelm: Evidence to Rural and Regional Affairs and Transport Legislation Committee, Parliament of Australia, Canberra, 20 November 2014, 154–62.

these profits are highest in Asia.¹⁰¹ The need for supply chain regulation has also been recognised within the corporate sector. Australian businessmen Andrew Forrest and Ray O'Rourke have commented that:

The overwhelming majority of companies have no desire to exploit people. The problem is that many do not know how to implement anti-slavery management systems. They are often reticent to look too closely at their supply chains for fear that if slavery is discovered, they will suffer reputational consequences.¹⁰²

Forrest and O'Rourke's suggestion of wilful blindness is a cause for concern. Slavery, servitude and forced labour are illegal under the *Criminal Code*.¹⁰³ Yet such practices persist in transnational supply chains in which business entities are able to capitalise on the labour practices of contractors and suppliers in foreign states with whom they have an arm's-length relationship. Indeed, companies seeking to maximise their profits may be attracted to jurisdictions with low wage and employment protections, in which labour practices straddle a thin line between lawful employment and slavery or forced labour and which may easily slide into illegality.¹⁰⁴ Entities that carry on business or contract with suppliers in such jurisdictions ought to be alive to the high risk that unlawful practices may infiltrate or infect their supply chains.

The Commonwealth Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade has previously reviewed precursors to the *Modern Slavery Act* and recommended that a review 'be conducted with a view to: introducing legislation to improve transparency in supply chains'.¹⁰⁵ Although the Liberal-National Government 'accept[ed] this recommendation in principle',¹⁰⁶ at the time of writing it has not yet acted to introduce similar legislation in Australia. '[L]abour exploitation in supply chains' is, however, one of the 'key areas for focus' in the Commonwealth's *National Action Plan to Combat Human Trafficking and Slavery 2015-19*.¹⁰⁷ This has included the convening of a Supply Chains Working Group with the purpose of recommending mechanisms to address exploitation in supply chains.¹⁰⁸ It is this review and the suggestion of regulatory action to address slavery that has motivated this commentary's analysis of the weaknesses of the *Modern Slavery Act*.

Supply chain disclosure is not the sole regulatory method available to the Commonwealth to improve labour practices in transnational supply chains. To the contrary, the Commonwealth ought to adopt complementary measures

¹⁰¹ International Labour Office, 'Profits and Poverty: The Economics of Forced Labour' (International Labour Organization, 2014) 13.

¹⁰² Andrew Forrest and Ray O'Rourke, 'The Modern Slavery Bill: A Step in the Right Direction', *The Huffington Post* (online), 6 April 2015 <<https://perma.cc/DN8V-82RC>>.

¹⁰³ *Criminal Code* div 270.

¹⁰⁴ Beth Stephens, 'The Amoral of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 52.

¹⁰⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Trading Lives: Modern Day Human Trafficking — Inquiry of the Human Rights Sub-Committee* (2013) 92 (Recommendation 7).

¹⁰⁶ Commonwealth, *Parliamentary Debates*, Senate, 28 October 2014, 7951-9 (Nigel Scullion).

¹⁰⁷ Commonwealth, *National Action Plan to Combat Human Trafficking and Slavery 2015-19* (2014) 2.

¹⁰⁸ See *ibid* 72.

that both incentivise compliance with supply chain best practice and penalise business entities with supply chains that include unlawful labour practices. Other important regulatory tools include public procurement guidelines requiring supply chain compliance and monitoring¹⁰⁹ and direct prohibitions and due diligence obligations akin to those in the *ILP Act*. Indeed, the latter reform could be achieved through minor amendments to the *Criminal Code* to extend the prohibition on slavery, servitude and forced labour to supply chains within Australia and overseas.

IV CONCLUDING OBSERVATIONS

The *Guiding Principles* and the *OECD Guidelines* identify corporate supply chain practices as a method by which to address human rights abuses and illegality. The disclosure obligation in the *Modern Slavery Act* is a form of soft regulation that can bring about behavioural change in corporate supply chains so as to address modern slavery. Notwithstanding the weaknesses in the Act identified in this commentary, the disclosure obligation in s 54(1) ought to provide the starting point for Commonwealth regulation of modern slavery in supply chains. Any Australian legislation must, however, account for the weaknesses and flaws in the Act identified in this commentary. In particular, it ought to remedy the limited information required to be disclosed; the absence of an obligation to report slavery or forced labour in the jurisdiction(s) in which it is occurring; and the weak enforcement structure and absence of pecuniary penalties for non-compliance or inadequate compliance. Supply chain disclosure is not, in and of itself, sufficient to curtail the use of forced labour and slavery in transnational supply chains; a change in internal corporate practices and supply chain relationships brought about through stronger regulatory action is required in order to render the law effective.

A supply chain disclosure obligation should not, however, be the sole regulatory measure enacted by the Commonwealth to root out and prevent modern slavery. Rather, it ought to be one part of a comprehensive strategy that culminates in the legislation of due diligence obligations and a prohibition on the importation of goods tainted by slavery and unlawful labour practices. In this respect the *ILP Act* has charted a clear path for the regulation of transnational supply chains, both in relation to modern slavery and broader human rights abuses.

¹⁰⁹ See John Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains' in Kate Macdonald and Shelley Marshall (eds), *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalising Justice* (Ashgate, 2010) 329; Katherine Zeisel, 'The Promotion of Human Rights by Selective Public Procurement under International Trade Law' in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Hart, 2006) 361. The Commonwealth Procurement Rules oblige procurement officers to 'use public resources in an efficient, effective, economical and *ethical* manner' (emphasis added): Department of Finance (Cth), 'Commonwealth Procurement Rules: Achieving Value for Money' (Commonwealth of Australia, July 2014) para 4.4(b). The Commonwealth treats this obligation as requiring procurement officers 'to be aware of a substantial risk of slavery, servitude or forced labour' in the supply chains of a supplier: Attorney-General's Department (Cth), *Human Trafficking — Information Sheet for Commonwealth Government Procurement Officers* <<https://perma.cc/J2VS-FBJA>>.