# THE FAILURE TO PREVENT MODERN SLAVERY: PROPOSING A NOVEL LEGAL APPROACH IN ATTRIBUTING CORPORATE CRIMINAL LIABILITY FOR TRANSNATIONAL HUMAN RIGHTS ABUSES

ANNABEL ANDERSON* AND HANNAH HARRIS†

*The intractable and pervasive nature of modern slavery in transnational corporate supply chains has necessitated a range of legal measures to combat this serious human rights issue. Australia's* Modern Slavery Act 2018 *(Cth) supplements the criminalisation of slavery and slavery-like practices under the* Criminal Code Act 1995 *(Cth). Unfortunately, these laws remain ineffective. The continuing challenge of modern slavery in transnational supply chains has been linked to the incompatibility of such laws with contemporary corporate structures and operations. Therefore, this article proposes the introduction of a failure to prevent modern slavery offence, modelled on the United Kingdom's failure to prevent bribery offence. This article positions such an offence as a viable mechanism to enhance Australia's existing modern slavery legal framework and overcome corporate impunity for modern slavery.*

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* Bachelor of Security Studies and Bachelor of Laws (Hons I), Macquarie University Law School.
† Senior Lecturer, Macquarie University Law School; Research Fellow, Financial Integrity Hub.

## I Introduction

### A *Background*

The scale and prevalence of modern slavery cannot be understated. 'Modern slavery' is an umbrella term used to describe several legal concepts including slavery, slavery-like practices, forced labour, debt bondage, forced marriage and human trafficking.[1] Each of these legal concepts involves serious exploitation arising from abuses of power, violence, manipulation, coercion or deception.[2]

[1] 'Modern Slavery', *Attorney-General's Department (Cth)* (Web Page) <https://www.ag.gov.au/crime/people-smuggling-and-human-trafficking/modern-slavery> ('Modern Slavery'); 'What Is Modern Slavery?', *UNSW Australian Human Rights Institute* (Web Page) <https://www.humanrights.unsw.edu.au/research/modern-slavery>, archived at <https://perma.cc/7ATY-LYJY>; Martijn Boersma and Justine Nolan, 'Modern Slavery and the Employment Relationship: Exploring the Continuum of Exploitation' (2022) 64(2) *Journal of Industrial Relations* 165, 165–6.

[2] See International Labour Organization, Walk Free and International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Report, September 2022) 13 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf>, archived at <https://perma.cc/LL5G-FHPB> ('*Global Estimates of Modern Slavery*').

The International Labor Organization conservatively estimates that 49.6 million people were victims of modern slavery in 2021.[3] On any given day in Australia in 2021, an estimated 41,000 people were living in conditions of modern slavery.[4] As the data reveals the shocking scale of this human rights disaster, the narrative of modern slavery as an aberration on the 'criminal fringes' of industry has been subverted.[5] Modern slavery is increasingly viewed as an inherent feature of our economic system.[6] For instance, of the 49.6 million people living in conditions of modern slavery, 27.6 million were trapped in forced labour, 86% of whom were exploited in the private economy.[7] The large transnational corporations constituting this economic system are becoming structurally implicated as enablers of widespread human rights abuses.[8]

In Australia, conduct associated with modern slavery is criminalised under the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').[9] Part 2.5 of the *Criminal Code* provides that corporations may be held responsible for such offences. Notwithstanding this, and despite the prevalence of modern slavery in transnational corporate operations,[10] there has been no action brought against a corporate defendant for modern slavery related offences in Australia.[11] This prosecutorial gap principally arises due to the conceptual and practical limitations

[3] Ibid 20.

[4] 'Global Slavery Index/Country Study: Australia', *Walk Free* (Web Page, 2023) <https://www.walkfree.org/global-slavery-index/country-studies/australia/>, archived at <https://perma.cc/X53Q-3LRC> ('Global Slavery Index').

[5] Stephen John New, 'Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility' (2015) 20(6) *Supply Chain Management* 697, 704. See also Boersma and Nolan (n 1) 166, 167–8.

[6] Jolyon Ford and Justine Nolan, 'Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy between Human Rights Due Diligence and the Social Audit' (2020) 26(1) *Australian Journal of Human Rights* 27, 27.

[7] *Global Estimates of Modern Slavery* (n 2) 21, 25.

[8] Ford and Nolan (n 6) 27.

[9] This includes slavery, slavery-like practices, servitude, forced labour, deceptive recruiting for labour or services, forced marriage, debt bondage and human trafficking: *Criminal Code 1995* (Cth) sch 1, divs 270–1 ('*Criminal Code*').

[10] *Global Estimates of Modern Slavery* (n 2) 93–4.

[11] Though *Darafsheh v Candoo Australia Pty Ltd* [2020] FCCA 2686 ('*Darafsheh*') involved a corporate respondent, this matter concerned alleged contraventions of the *Fair Work Act 2009* (Cth), rather than the *Criminal Code* (n 9), by a corporation: *Darafsheh* (n 11) [3]–[10] (Mercuri J). The corporate respondent itself was not committed to trial for modern slavery offences.

in applying traditional, direct models of corporate criminal liability in the context of transnational crimes.[12]

In recognition of the limitations of criminal law in addressing modern slavery, alternative regulatory approaches have emerged. The *Modern Slavery Act 2018* (Cth) ('*MSA*') has introduced a mandatory modern slavery reporting scheme.[13] However, early empirical research has highlighted widespread noncompliance with this scheme, calling into question the effectiveness of market-based enforcement approaches.[14]

The literature critiques traditional models of corporate criminal liability and market-based disclosure regimes for stifling meaningful anti-slavery progress in Australia.[15] An emerging proposal contemplated in the scholarship is the harmonisation of legal approaches to bribery and modern slavery to enhance and optimise modern slavery enforcement outcomes.[16]

Despite strong similarities between bribery and modern slavery, the legal approaches in combatting these crimes significantly diverge. The bribery framework is premised on hard law criminality relative to the softer disclosure-based frameworks for modern slavery.[17] It is suggested that disclosure-based legislative design is associated with weaker corporate policies on modern

[12] See, eg, Nicholas Lord and Rose Broad, 'Corporate Failures To Prevent Serious and Organised Crimes: Foregrounding the "Organisational" Component' (2017) 4(2) *European Review of Organised Crime* 27, 44–5; Stephanie Ware Barrientos, '"Labour Chains": Analysing the Role of Labour Contractors in Global Production Networks' (2013) 49(8) *Journal of Development Studies* 1058, 1063, 1067–9.

[13] *Modern Slavery Act 2018* (Cth) s 3 ('*MSA*').

[14] Hannah Harris and Justine Nolan, 'Outsourcing the Enforcement of Modern Slavery: Overcoming the Limitations of a Market-Based Disclosure Model' (2022) 64(2) *Journal of Industrial Relations* 223, 225 ('Outsourcing the Enforcement of Modern Slavery'); Amy Sinclair and Freya Dinshaw, *Paper Promises?: Evaluating the Early Impact of Australia's Modern Slavery Act* (Report) 2–7, 12–14 <https://www.hrlc.org.au/s/Paper-Promises_Australia-Modern-_Slavery-Act_7_FEB.pdf>, archived at <https://perma.cc/2DCB-347E>; Freya Dinshaw et al, *Broken Promises: Two Years of Corporate Reporting under Australia's Modern Slavery Act* (Report) 2–9, 14–15 <https://www.hrlc.org.au/reports-news-commentary/broken-promises>, archived at <https://perma.cc/GZ82-5AUA>.

[15] This is considered further below in Part II. See Dinshaw et al (n 14) 17; Harris and Nolan, 'Outsourcing the Enforcement of Modern Slavery' (n 14) 225.

[16] Hannah Harris and Justine Nolan, 'Learning from Experience: Comparing Legal Approaches to Foreign Bribery and Modern Slavery' (2021) 4(2) *Cardozo International and Comparative Law Review* 603, 649–51 ('Learning from Experience').

[17] See Harris and Nolan, 'Outsourcing the Enforcement of Modern Slavery' (n 14) 233–4, 236.

slavery.[18] Conversely, the 'harder' criminal sanctions associated with bribery have compelled stronger, private sector compliance outcomes.[19] Harmonising legal approaches to these crimes, by incorporating criminal sanction into the modern slavery framework, will arguably strengthen private sector compliance.

These authors build on this conceptual foundation and suggest the introduction of a failure to prevent modern slavery offence. This proposal promotes enhanced crossover between the legal approaches to bribery and modern slavery by importing a bribery criminalisation model into the modern slavery context. As will be demonstrated in this article, the failure to prevent model overcomes many of the difficulties presented by current corporate criminal liability approaches.[20]

This article, which responds to the Australian Law Reform Commission's call for further inquiry into a failure to prevent offence for transnational crimes involving human rights violations,[21] is structured as follows. Part II provides a systematic exposition of the laws criminalising modern slavery under the *Criminal Code* and the *MSA*. It also critiques these laws, highlighting that Australia's modern slavery legal framework is neither fit for purpose nor appropriately adapted to the contemporary corporate context. Part III undertakes a comparative analysis of bribery and modern slavery, justifying the harmonisation of legal approaches to these issues.

Part IV proposes the introduction of a specific criminal offence successfully deployed in the context of bribery: a corporate offence of failing to prevent modern slavery. Finally, Part V assesses whether the proposed failure to prevent modern slavery offence is a viable mechanism to enhance Australia's modern slavery legal framework. Viability is assessed by reference to three factors: (i) the ability of this model to remedy the deficiencies in Australia's modern slavery legal framework; (ii) the offence's compatibility with Australia's criminal law

[18] Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 (Supplement 3) *Global Policy* 15, 23.

[19] Ibid 23.

[20] Penny Crofts, 'Three Recent Royal Commissions: The Failure To Prevent Harms and Attributions of Organisational Liability' (2020) 42(4) *Sydney Law Review* 395, 407–8 ('Three Recent Royal Commissions').

[21] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report No 136, April 2020) 491 [10.203] <https://www.alrc.gov.au/wp-content/uploads/2020/05/ALRC-CCR-Final-Report-websml.pdf>, archived at <https://perma.cc/AP5G-24DZ> ('*Corporate Criminal Responsibility*').

tradition; and (iii) the offence's compatibility with Australia's existing system of corporate regulation.

## II Australia's Modern Slavery Framework

It is first necessary to analyse the various mechanisms that comprise Australia's modern slavery legal framework. This analysis demonstrates the existing framework's inability to effectively address modern slavery in the contemporary corporate context.

### A *Modern Slavery and the* Criminal Code

Division 270 of the *Criminal Code* criminalises slavery, servitude, forced labour, deceptive recruiting for labour services, debt bondage, slavery-like offences and forced marriage. Division 271 criminalises human trafficking. The *Criminal Code* applies to corporations in the same way that it applies to individuals.[22] As with the majority of criminal offences, there are prerequisite physical and fault elements which must be established.[23] However, proving the physical and fault elements of an offence in respect of a corporate defendant (and in the context of transnational crimes) is incredibly difficult.[24]

### B *Corporate Criminal Liability under the* Criminal Code

#### 1 *Physical Element of an Offence under the* Criminal Code *s 12.2*

Section 12.2 of the *Criminal Code* provides that if the physical element of an offence is committed by an officer, agent or employee of a corporation acting with authority, that physical element is attributable to the corporation. It is pertinent to consider the meanings of 'officer', 'agent' and 'employee' for the purposes of attributing corporate criminal liability.

[22] *Criminal Code* (n 9) s 12.1(1). This is aligned with classic jurisprudential recognition that legal personality imbues both 'rights and duties, benefits and burdens', including duties to obey the criminal law: John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35(6) *Yale Law Journal* 655, 669.

[23] See generally Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2000) 1707–10.

[24] *Corporate Criminal Responsibility* (n 21) 159 [4.118], 229 [6.38], 317 [7.159].

*(a) Officer*

Corporate criminal liability may arise from the conduct of an officer,[25] meaning a director, an individual with the capacity to significantly affect the corporation's financial standing or an individual who makes decisions affecting the whole, or a substantial part of, the corporation's business.[26] Therefore, criminal conduct is attributable to a company when perpetrated by high-level senior executives.[27] However, these individuals are often several degrees and jurisdictions removed from the actual point in the supply chain where modern slavery occurs.[28] These individuals are likely oblivious to human rights abuses occurring in the lower tiers of corporate operations overseas and rarely facilitate modern slavery in an operational context.[29]

*(b) Agent*

Corporate criminal liability may arise from the conduct of a corporate agent.[30] A serious impediment in establishing this relationship is the use of foreign subsidiary companies. In practice, transnational corporations extensively utilise foreign subsidiary companies to manage overseas operations.[31] Foreign subsidiaries are often key enablers and perpetrators of human rights abuses.[32] However, the 'agent' relationship in Australia has been construed narrowly.[33] Even complete dominion over a subsidiary — or the total financial dependence of a subsidiary on its parent — does not alone constitute a relationship of

[25] *Criminal Code* (n 9) s 12.2.

[26] *Corporations Act 2001* (Cth) s 9 (definition of 'officer' paras (a)–(b)) ('*Corporations Act*'), cited in Radha Ivory and Anna John, 'Holding Companies Responsible?: The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations' (2017) 40(3) *University of New South Wales Law Journal* 1175, 1186–7.

[27] Ivory and John (n 26) 1187; *Corporations Act* (n 26) s 9 (definition of 'officer' paras (a)–(b)).

[28] Ivory and John (n 26) 1184.

[29] See also ibid.

[30] *Criminal Code* (n 9) s 12.2.

[31] Rolf H Weber and Rainer Baisch, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (2016) 27(5) *European Business Law Review* 669, 671. See also Layna Mosley, *Labor Rights and Multinational Production* (Cambridge University Press, 2011) 29–33.

[32] See Weber and Baisch (n 31) 669–71.

[33] Ivory and John (n 26) 1187. See also *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron (Reg)* (2005) 91 SASR 570, 593 [101]–[103] (Besanko J).

agency.[34] Thus, foreign subsidiaries have not often been considered agents for the purposes of attributing corporate criminal liability in Australia.

*(c) Employee*

Corporate criminal liability may arise from the conduct of employees.[35] A substantial impediment in establishing the employer–employee relationship, in the context of large transnational corporations, is the phenomenon of third-party labour arrangements. Transnational corporations often outsource labour to contractors.[36] Contractor agreements typically contain clauses expressly stipulating that the contractor is not an employee.[37] Contractors will then often delegate their work to another individual via subcontracting arrangements to which the original corporation is not a party and of which it has no oversight.[38] The outsourcing of labour, especially cross-jurisdictionally, is a critical dynamic facilitating exploitative labour practices.[39] However, this practice also insulates corporates from criminal liability because the contractor is not an employee whose conduct may be attributable to the corporation.

2 *Fault Element of an Offence under the* Criminal Code *s 12.3*

The fault element of an offence will be attributable to a corporation that 'expressly, tacitly or impliedly authorise[s] … the commission of the offence'.[40]

[34] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577 (Rogers AJA); *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 20–1 [70]–[72] (Merkel J); *Australian Competition and Consumer Commission v Yazaki Corporation [No 2]* (2015) 332 ALR 396, 466 [349]–[350], 468–9 [358]–[362] (Besanko J); *ACCC v Prysmian Cavi E Sistemi SRL [No 12]* (2016) ATPR ¶42-525, 43,081–2 [283]–[286] (Besanko J). See also *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd* [2015] FCA 1007, [140]–[157] (Beach J).

[35] *Criminal Code* (n 9) s 12.2.

[36] Justine Nolan and Nana Frishling, 'Australia's Modern Slavery Act: Towards Meaningful Compliance' (2019) 37(2) *Company and Securities Law Journal* 104, 110; Mosley (n 31) 27–8.

[37] This accords with established case law principles distinguishing contractors from employees: see, eg, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 398 ALR 404, 413–15 [34]–[40] (Kiefel CJ, Keane and Edelman JJ), 432–4 [113]–[119] (Gageler and Gleeson JJ); *ZG Operations Australia Pty Ltd v Jamsek* (2022) 398 ALR 603, 622 [85] (Gageler and Gleeson JJ).

[38] Genevieve LeBaron, 'Subcontracting Is Not Illegal, but Is It Unethical?: Business Ethics, Forced Labor, and Economic Success' (2014) 20(2) *Brown Journal of World Affairs* 237, 243–5.

[39] Barrientos (n 12) 1064–5.

[40] *Criminal Code* (n 9) s 12.3(1).

Establishing authorisation can be achieved in several ways, but it is practically very difficult to establish for any corporate crime.

The first method to establish authorisation is by proving the board of directors or a high managerial agent intentionally, knowingly or recklessly carried out the conduct or authorised the commission of the offence.[41] 'High managerial agent' means an employee, agent or officer of the corporation with duties of such responsibility that their conduct may be fairly assumed to represent the corporation's policy[42] or an individual 'closely and relevantly connected with the company' who makes decisions that impact a substantial part of the business.[43]

As in the case of attribution for the physical element of the offence discussed above, due to the decentralisation of authority in contemporary transnational supply chains, high managerial agents and directors are usually several jurisdictions removed from the actual perpetration of modern slavery.[44] They seldom engage in the positive act of authorising modern slavery in an operational context.[45] This authorisation is likely to be effected by lower-level decision-makers whose decisions are unlikely to have a substantial impact on the business and financial standing of the collective corporation.[46]

Second, the fault element may be established by arguing that a corporate culture existed within the corporation that 'directed, encouraged, tolerated or led to non-compliance' with the law or that the corporation 'failed to create and maintain a corporate culture that required compliance' with the law.[47] This is

[41] Ibid ss 12.3(2)(a)–(b).

[42] Ibid s 12.3(6) (definition of 'high managerial agent').

[43] *Australian Securities and Investments Commission v Managed Investments Ltd [No 9]* (2016) 308 FLR 216, 328 [613] (Douglas J). See also *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, 172 (Denning LJ) ('*H L Bolton*'). This interpretation is slightly less prescriptive than the long standing common law 'directing mind and will' approach to criminal fault set out in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170–3 (Lord Reid), 179–81 (Lord Morris), 187 (Viscount Dilhorne), 190–1 (Lord Pearson), 199–200 (Lord Diplock) ('*Tesco*'). See also *H L Bolton* (n 43) 172 (Denning LJ); *DPP (UK) v Kent & Sussex Contractors Ltd* [1944] 1 KB 146, 155 (Viscount Caldecote CJ).

[44] Ivory and John (n 26) 1184.

[45] See ibid.

[46] See ibid 1192.

[47] *Criminal Code* (n 9) ss 12.3(2)(c)–(d), quoted in Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' (Research Paper No 17/14, Sydney Law School, The University of Sydney, February 2017) 9.

known as the corporate culture provision.[48] Where this is established, authorisation or permission exists for the purpose of attributing the fault element of an offence to a corporation.[49]

For example, the opacity of a company's multinational supply chain could be construed as evidence of a corporate culture leading to noncompliance with anti-slavery laws. However, it is difficult to glean the breadth and scope of application of the corporate culture provision as it has been subjected to limited judicial treatment.[50] It is unclear whether corporate culture is a social fact transcending an individual company such that it may be linked to a subsidiary operating in a different geographical or sociocultural context.[51] It is also unclear whether corporate culture must be construed narrowly so as to align with the doctrines of limited liability and separate legal personality. Without judicial guidance on these issues, imputing fault to a multinational corporation via the corporate culture provision remains uncertain.

The above analysis demonstrates that pt 2.5 of the *Criminal Code* imports a criminal liability model that is inflexible to the complex realities of contemporary corporations, which are proactively structured to externalise risk and insulate liability. A reconceptualisation of models of corporate criminal liability is clearly necessary.

### C *The* MSA

In 2018, Australia passed the *MSA*.[52] The *MSA* introduced a mandatory modern slavery reporting scheme.[53] Reporting entities, including entities based or

[48] *Criminal Code* (n 9) ss 12.3(2)(c)–(d); Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) *Law and Financial Markets Review* 57, 58 ('Corporate Liability').

[49] *Criminal Code* (n 9) ss 12.3(1)–(2).

[50] *Corporate Criminal Responsibility* (n 21) 245 [6.105]. Transcript of Proceedings, *Commonwealth v Potter* (Supreme Court of Tasmania, P-464, Blow CJ, 14 September 2015) 464–9 (Blow CJ) ('*Potter*') represents one of the only case law examples that provides critical insight into the application of the corporate culture provision: *Corporate Criminal Responsibility* (n 21) 245–6 [6.108]–[6.109]. See also 'Corporate Criminal Responsibility: The Case for Reform', *Australian Government: Australian Law Reform Commission* (Article, 31 December 2020) <https://www.alrc.gov.au/news/corporate-criminal-responsibility-the-case-for-reform/>, archived at <https://perma.cc/3GJR-PAKT>.

[51] See, eg, Blow CJ's notes on the difficulties in defining corporate culture in *Potter* (n 50) 466–8.

[52] *MSA* (n 13) s 2.

[53] This piece of legislation follows the United Kingdom ('UK') and Californian mandatory modern slavery reporting regimes: see *Civil Code of the State of California*, Cal Civ Code div 3

operating in Australia with a consolidated annual revenue exceeding $100 million, are required to produce a modern slavery statement reporting on modern slavery risks in their supply chain in accordance with the criteria set out in the *MSA*.[54] Reporting criteria include a description of the structure and operations of the reporting entity, the risks of modern slavery within this structure, actions taken to address such risks and remediation processes.[55]

The reporting criteria import elements of human rights due diligence ('HRDD') provided for in the United Nations *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* ('*UNGP*').[56] However, actively undertaking HRDD and preventing and addressing modern slavery in corporate operations is not a technical requirement under the *MSA*. The legislation merely requires the reporting of modern slavery risks.[57] Critique of the *MSA* as a regulatory approach is strong and insistent, and many dimensions of this critique have now been articulated in the *Report of the Statutory Review of the* Modern Slavery Act 2018 *(Cth): The First Three Years* ('*MSA Review*') recently handed down by Professor John McMillan AO.[58] The elements of this critique are explored below.

§ 1714.43 (Deering 2023); *Modern Slavery Act 2015* (UK) s 54 ('*MSAUK*'). Canada has recently adopted a similar piece of legislation and New Zealand is currently developing similar legislation: *Fighting against Forced Labour and Child Labour in Supply Chains Act*, SC 2023, c 9, ss 6, 11; Ministry of Business, Innovation & Employment, New Zealand Government, *Consultation on Legislation To Address Modern Slavery and Worker Exploitation* (Report, September 2022) 7–8 <https://www.mbie.govt.nz/assets/consultation-on-legislation-to-address-modern-slavery-and-worker-exploitation-summary-of-feedback.pdf>.

54 *MSA* (n 13) ss 5, 16.

55 Ibid ss 16(1)(b)–(d).

56 Nolan and Frishling (n 36) 114, citing Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex ('*Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*') principle 15(b) ('*UNGP*').

57 *MSA* (n 13) s 3.

58 John McMillan, *Report of the Statutory Review of the* Modern Slavery Act 2018 *(Cth): The First Three Years* (Report, 2023) 7–8 <https://www.ag.gov.au//crime/publications/report-statutory-review-modern-slavery-act-2018-cth>, archived at <https://perma.cc/A326-CJD3> ('*MSA Review*').

### 1 *Deficiencies of a Disclosure-Based Modern Slavery Framework*

#### *(a) Misplaced Faith in Consumer Purchasing Power*

The *MSA* is predicated on the assumption that consumers, once equipped with a modern slavery statement, will be sufficiently qualified to interpret and compare these documents and motivated to drive changes to corporate behaviour.[59] This market-outsourced enforcement approach positions consumers as powerful stakeholders in slavery prevention.[60] However, research suggests that the role of consumers in eradicating modern slavery is inflated.[61] Even if all consumers were capable of comparing and contrasting modern slavery statements across all corporations from which they purchased, many consumers are not in a position to access ethically-sourced goods and services. There are many socioeconomic barriers that present a real constraint on purchasing power. This reality underscores the unrealistic nature of 'market mechanisms' and the suggestion that consumers can act as unconstrained agents of ethical corporate practices.[62] In reality, the hypothesis that consumers can be relied upon to use their purchasing power to pressure corporations to deliver substantive anti-slavery commitments is completely misplaced.[63]

#### *(b) Social Auditing versus HRDD*

Disclosure-based legislative schemes, such as the *MSA*, have compounded the use of social auditing in substitution for comprehensive HRDD.[64] Social

[59] Ford and Nolan (n 6) 28.

[60] Harris and Nolan, 'Outsourcing the Enforcement of Modern Slavery' (n 14) 225.

[61] See, eg, Michael J Carrington, Benjamin A Neville and Gregory J Whitwell, 'Why Ethical Consumers Don't Walk Their Talk: Towards a Framework for Understanding the Gap between Ethical Purchase Intentions and Actual Buying Behaviour of Ethically Minded Consumers' (2010) 97(1) *Journal of Business Ethics* 139, 154; Lord and Broad (n 12) 44.

[62] Lord and Broad (n 12) 44.

[63] Michael Carrington, Andreas Chatzidakis and Deirdre Shaw, 'Consuming Worker Exploitation?: Accounts and Justifications for Consumer (In)action to Modern Slavery' (2021) 35(3) *Work, Employment and Society* 432, 434.

[64] Ford and Nolan (n 6) 28–9. Supplier auditing has emerged as the second most prominent method to identify human rights risks in corporate operations: at 33. Contrastingly, there are significantly less companies undertaking comprehensive HRDD: see, eg, Robert McCorquodale et al, 'Human Rights Due Diligence in Law and Practice: Good Practice and Challenges for Business Enterprises' (2017) 2(2) *Business and Human Rights Journal* 195, 205.

auditing is a process designed to detect and measure exploitative labour conditions.[65] It is typically outsourced to third-party auditing firms that report on the ethics of various stakeholders within a corporate supply chain.[66] Ford and Nolan argue that social auditing is an 'inherently superficial' process.[67] It neglects the monitoring and review of lower tiers in the supply chain that are often the most vulnerable to exploitation.[68] Social auditing is typically undertaken every few years.[69] Thus, the results reflect only a 'snapshot' of time and are vulnerable to fraud.[70] For instance, payslips are often forged prior to inspections to convey the impression that employees are paid a living wage.[71] This necessarily means that the information reported under modern slavery disclosure schemes is low quality and neglects the underlying causes of modern slavery.[72]

### *(c) A Tiger without Teeth*[73]

The *MSA*'s compliance mechanism relies solely on a transparency framework,[74] based on the idea that reputational damage will be a sufficient deterrent for

[65] Ford and Nolan (n 6) 28. See generally Samuel O Idowu, 'Social Audit in the Supply Chains Sector' in Mia Mahmudur Rahim and Samuel O Idowu (eds), *Social Audit Regulation: Development, Challenges and Opportunities* (Springer, 2015) 187, 195.

[66] Clean Clothes Campaign, *Looking for a Quick Fix: How Weak Social Auditing Is Keeping Workers in Sweatshops* (Report, 2005) 12 <https://cleanclothes.org/file-repository/resources-publications-05-quick-fix.pdf>, archived at <https://perma.cc/6WMX-BUUK> ('*Looking for a Quick Fix*').

[67] Ford and Nolan (n 6) 34.

[68] Ibid 35.

[69] Ibid 34.

[70] Ibid.

[71] *Looking for a Quick Fix* (n 66) 24–7. See also Ford and Nolan (n 6) 34; Human Rights Watch, *'Obsessed with Audit Tools, Missing the Goal': Why Social Audits Can't Fix Labor Rights Abuses in Global Supply Chains* (Report, November 2022) 15–16 <https://www.hrw.org/sites/default/files/media_2022/11/Social_audits_brochure_1122_WEBSPREADS_0.pdf>, archived at <https://perma.cc/C4HF-3N43>.

[72] Ford and Nolan (n 6) 34.

[73] Margaret Cusenza and Vivienne Brand, '"A Tiger Without Teeth"?: The Forthcoming Review of the Modern Slavery Act 2018 (Cth) and the Place of "Traditional" Penalties' (2021) 38(3) *Company and Securities Law Journal* 152, 154, citing Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2017, 9145 (Graham Perrett).

[74] The Supplementary Explanatory Memorandum of the *MSA* (n 13) indicated an open dialogue with stakeholders would more effectively foster compliance, compared to traditional penalties: Supplementary Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) [9] ('Supplementary Memorandum'). This is strongly aligned with Australia's responsive co-regulation logic:

noncompliance.[75] Hypothetically, if a reporting entity fails to comply with reporting requirements, the Minister for Home Affairs may request in writing that the reporting entity provide an explanation or undertake remedial action.[76] If noncompliance persists, the Minister may publish a notice on the register, identifying the reporting entity as noncompliant.[77] To date, no such notices have been published in Australia despite evidence that 66% of companies failed to address all mandatory reporting criteria in their statements in the second reporting period (2020–21).[78]

In Australia, 77% of reporting entities failed to address the mandatory reporting criteria in their statements produced in the first reporting period (2019–20),[79] and only 33% of Australian companies demonstrated any form of effective action to address risks of modern slavery in their supply chain in the most recent reporting period (2020–21).[80] A lack of traditional penalty provisions is a key contributor to this noncompliance.[81] The above analysis has positioned Australia's current modern slavery legal framework as obviously and emphatically deficient, establishing the need for improvement.

## III Harmonising Legal Approaches to Bribery and Modern Slavery

Acknowledging the significant deficiencies in Australia's modern slavery framework, this article makes a case for harmonising legal approaches to

see John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475, 475–9; Senate Economics References Committee, Parliament of Australia, *The Performance of the Australian Securities and Investments Commission* (Report, June 2014) 28–32 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/~/media/Committees/Senate/committee/economics_ctte/ASIC/Final_Report/report.pdf>, archived at <https://perma.cc/2X72-4QUC> ('*ASIC Performance Review*'); Vicky Comino, 'Towards Better Corporate Regulation in Australia' (2011) 26(1) *Australian Journal of Corporate Law* 6, 6–8, 12–17.

75 Supplementary Memorandum (n 74) [10].

76 *MSA* (n 13) ss 16A(1)(a)–(b).

77 Ibid s 16A(4).

78 Dinshaw et al (n 14) 2.

79 See Sinclair and Dinshaw (n 14) 4; ibid.

80 Dinshaw et al (n 14) 3.

81 See ibid 24; Home Office (UK), *Independent Review of the Modern Slavery Act* (Final Report CP 100, May 2019) 14–15 [15]–[17], 39 [1.4] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf>, archived at <https://perma.cc/M7E7-YJHH>.

bribery and modern slavery.[82] This argument in favour of harmonisation informs the subsequent original proposal in Part IV to introduce a failure to prevent modern slavery offence, modelled on the United Kingdom's ('UK') failure to prevent bribery offence.[83]

### A *Similarities between Bribery and Modern Slavery*

The similarities between bribery and modern slavery offer strong justifications for the like treatment of these offences.[84] Bribery is a widespread phenomenon in international business[85] in the same way modern slavery is an intractable feature of the private economy.[86] Bribery and modern slavery are transnational crimes which flourish in diffuse, opaque and cross-jurisdictional supply chains.[87] Just as modern slavery manifests itself in an invisible workforce,

[82] Drawing on the work of Harris and Nolan, 'Outsourcing the Enforcement of Modern Slavery' (n 14) 239–41. See generally Anita Ramasastry, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility To Respect?* (Cambridge University Press, 2013) 162.

[83] This proposal is original in the Australian context. Introducing a failure to prevent modern slavery offence has been contemplated in the UK, though research in this area remains elusive: see, eg, Irene Pietropaoli et al, *A UK Failure To Prevent Mechanism for Corporate Human Rights Harms* (Report) 5–6, 62–4 <https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf>, archived at <https://perma.cc/5UPY-D9CW>; Campbell, 'Corporate Liability' (n 48) 61–2. In addition, it is pertinent to note that the *MSA Review* (n 58) considered the industry suggestion that the *MSA* (n 13) should impose a duty on corporations to prevent modern slavery, accompanied by an obligation to have due diligence systems in place, similar to the duty recently introduced into the *Sex Discrimination Act 1984* (Cth): *MSA Review* (n 58) 72, discussing *Sex Discrimination Act 1984* (Cth) s 47C. This proposal was not taken further in the *MSA Review* (n 58) and Professor McMillan AO accepted submissions that a duty to prevent modern slavery would rest on a different 'platform' of enforcement: at 72. This article proposes such a platform.

[84] See especially Harris and Nolan, 'Learning from Experience' (n 16) 604–8.

[85] 'Foreign Bribery Rages across the Globe', *Transparency International* (Web Page), 13 October 2020) <https://www.transparency.org/en/news/foreign-bribery-rages-across-the-globe>, archived at <https://perma.cc/4EGP-68TZ>.

[86] Ford and Nolan (n 6) 27.

[87] Harris and Nolan, 'Learning from Experience' (n 16) 604–6.

bribery is similarly hidden and discreet,[88] presenting significant (and similar) detection and enforcement challenges.[89]

There is an inextricable causal connection between bribery and modern slavery, further supporting the convergence of legal approaches to these issues.[90] Bribery undermines organisational integrity,[91] and the existence of bribery in supply chains has been found to circumvent sustainability standards by facilitating opportunities for human rights abuses.[92] Bribery is also an enabler of human trafficking and exploitative labour practices.[93] Thus, eliminating bribery from international business is a valuable method to reduce opportunities for, and the actual occurrence of, modern slavery.

[88] OECD, *The Detection of Foreign Bribery* (Report, 2017) 9 <https://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery-ENG.pdf>, archived at <https://perma.cc/9SC5-JRXX>.

[89] Harris and Nolan, 'Learning from Experience' (n 16) 604–6.

[90] Ibid 606–8; Morten Andersen, 'Why Corruption Matters in Human Rights' (2018) 10(1) *Journal of Human Rights Practice* 179, 180.

[91] See Catherine Boardman and Vicki Klum, 'Building Organisational Integrity' in Peter Larmour and Nick Wolanin (eds), *Corruption and Anti-Corruption* (Australian National University E Press, 2013) 82, 83.

[92] Bruno S Silvestre, Fernando Luiz E Viana and Marcelo de Sousa Monteiro, 'Supply Chain Corruption Practices Circumventing Sustainability Standards: Wolves in Sheep's Clothing' (2020) 40(12) *International Journal of Operations and Production Management* 1873, 1875, 1891; Bruno S Silvestre, 'Sustainable Supply Chain Management in Emerging Economies: Environmental Turbulence, Institutional Voids and Sustainability Trajectories' (2015) 167 (September) *International Journal of Production Economics* 156, 162.

[93] Research has highlighted how the payment of bribes to government officials facilitates human trafficking, labour exploitation and debt bondage in migrant recruitment corridors: see, eg, The Freedom Fund and Verité, *An Exploratory Study on the Role of Corruption in International Labor Migration* (Report, January 2016) 1 <https://www.verite.org/wp-content/uploads/2016/11/Verite-Report-Intl-Labour-Recruitment.pdf>, archived at <https://perma.cc/PJF2-AJE4>, citing Verité, *Corruption & Labor Trafficking in Global Supply Chains* (White Paper, December 2013) 2, 3 <https://www.verite.org/wp-content/uploads/2016/11/WhitePaperCorruptionLaborTrafficking.pdf>, archived at <https://perma.cc/JSK3-LHA8>. See United Nations Global Initiative to Fight Human Trafficking, '020 Workshop: Corruption and Human Trafficking' (Background Paper, Vienna Forum to Fight Human Trafficking, 13–15 February 2008) 3 <https://www.unodc.org/documents/human-trafficking/2008/BP020CorruptionandHumanTrafficking.pdf>, archived at <https://perma.cc/YAT2-AW64>.

### B *Harmonising Legal Approaches to Bribery and Modern Slavery*

#### 1 *Home-State Anti-Bribery and Modern Slavery Legislation*

In almost every jurisdiction, bribery is subject to a stringent criminal law regime, defined by robust enforcement and strict penalties for noncompliance.[94] There is a comprehensive international legal framework, including the Organisation for Economic Co-Operation and Development's ('OECD') *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ('*OECD Bribery Convention*'), which requires states parties to criminalise bribery through domestic law.[95] The *OECD Bribery Convention* is designed to achieve 'functional equivalence' in domestic anti-bribery legislation and was followed by the *United Nations Convention against Corruption* ('*Convention against Corruption*').[96] As a state party to the *Convention against Corruption*, Australia has adopted a criminalisation framework to address bribery.[97] Penalties for corporate violations of anti-bribery provisions are substantial.[98] Unfortunately, despite this hard law framework, enforcement against corporations for bribery offences in Australia are rare;[99] this is similar to Australia's disappointingly low levels of modern slavery law enforcement.[100] Comparative international perspectives are also instructive of the distinct legal treatment of bribery and modern slavery.

[94] See 'Foreign Bribery Offences and Penalties', *Attorney-General's Department (Cth)* (Web Page) <https://www.ag.gov.au/crime/foreign-bribery/foreign-bribery-offences-and-penalties>.

[95] OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, opened for signature 17 December 1997, [1999] ATS 21 (entered into force 15 February 1999) arts 1–3 ('*OECD Bribery Convention*').

[96] OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, DAFFE/IME/BR(97)17/REV1 (adopted 21 November 1997) [2]; *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) arts 1, 5 ('*Convention against Corruption*'); Harris and Nolan, 'Learning from Experience' (n 16) 610–11.

[97] *Criminal Code* (n 9) ss 70.2, 141.1; 'Global Leadership in Combating Corruption', *Attorney-General's Department (Cth)* (Web Page) <https://www.ag.gov.au/integrity/anti-corruption/global-leadership-combating-corruption>.

[98] Totalling the greater of 100,000 penalty units and, depending on whether or not the court can determine the value of the benefit obtained from the act of bribery, either 10% of a corporation's annual turnover or three times the value of that benefit: *Criminal Code* (n 9) s 70.2(5).

[99] Harris and Nolan, 'Learning from Experience' (n 16) 634.

[100] Sinclair and Dinshaw (n 14) 2.

The *Bribery Act 2010* (UK) ('*BAUK*') criminalises bribery.[101] Furthermore, it introduced a new offence: the failure of a commercial organisation to prevent the commission of bribery in connection with its business.[102] The *BAUK* imposes unlimited fines for noncompliance with that new offence and individuals may face imprisonment for up to 10 years.[103] Serious Fraud Office ('SFO') investigations regularly result in fines of millions of pounds.[104] Between 2016 and 2021, the SFO contributed approximately £1.4 billion to the Treasury through fines, disgorgement and confiscation.[105]

In contrast, the *Modern Slavery Act 2015* (UK) ('*MSAUK*') implements a disclosure-based regime which aims to reduce the prevalence of modern slavery.[106] There are no penalties imposed for noncompliance with disclosure obligations. The regime has increased the identification of modern slavery victims.[107] However, it remains unknown whether the regime has necessitated a decrease in modern slavery as originally envisaged.[108]

### 2 *Divergence between Bribery and Modern Slavery Legal Approaches*

There are notable divergences in the legal treatment of modern slavery and bribery. First, criminal law approaches to bribery are common cross-

[101] *Bribery Act 2010* (UK) s 12 ('*BAUK*'). This is pursuant to art 1 of the *OECD Bribery Convention* (n 95): United Kingdom, *Parliamentary Debates*, House of Lords, 3 March 2010, vol 506, col 948 (Jack Straw).

[102] *BAUK* (n 101) s 7.

[103] Ibid ss 11(1), (3).

[104] These fines include those handed down at trial and those stipulated in deferred prosecution agreements: see, eg, 'SFP Enters into Deferred Prosecution Agreement with Airline Services Limited', *Serious Fraud Office* (News Release, 30 October 2020) <https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/>, archived at <https://perma.cc/525Y-P578>; 'Glencore to Pay £280 Million for "Highly Corrosive" and "Endemic" Corruption', *Serious Fraud Office* (News Release, 3 November 2022) <https://www.sfo.gov.uk/2022/11/03/glencore-energy-uk-ltd-will-pay-280965092-95-million-over-400-million-usd-after-an-sfo-investigation-revealed-it-paid-us-29-million-in-bribes-to-gain-preferential-access-to-oil-in-africa/>, archived at <https://perma.cc/26RS-HZEP>.

[105] 'SFO Enters into £103m DPA with Amec Foster Wheeler Energy Limited', *Serious Fraud Office* (News Release, 2 July 2021) <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/>, archived at <https://perma.cc/E8LM-UQKY>.

[106] *MSAUK* (n 53) s 54; Sir Amyas Morse, *Reducing Modern Slavery* (House of Commons Paper No 630, Session 2017–19) 25 [1.13].

[107] Morse (n 106) 8 [8], 13 [22].

[108] Ibid 9 [10].

jurisdictionally.[109] Contrastingly, modern slavery is addressed through disclosure-based approaches.[110] Second, there are significant penalties associated with noncompliance with anti-bribery legislation.[111] Noncompliance with modern slavery disclosure schemes does not attract monetary penalties.[112] Rather, the supposed penalty for noncompliance is reputational damage.[113] Finally, there is an overarching international legal framework to achieve consistency in domestic anti-bribery law.[114] There is no equivalent modern slavery treaty to provide definitive guidance on domestic legislative design.[115]

Despite stringent criminalisation, the successful enforcement of anti-bribery law remains imperfect.[116] Much like the challenges with anti-modern slavery enforcement, difficulties of detection and measurement in a complex transnational environment involving powerful corporate stakeholders has prevented effective anti-bribery enforcement action.[117] As such, it is important to clarify that this article does not suggest that hard law criminalisation alone will guarantee stronger criminal prevention and positive enforcement outcomes. There is considerably more to regulating the issue of modern slavery than criminalisation, and disclosure-based regimes certainly comprise an important component within the broader modern slavery framework.[118]

Rather, this article contends that legislative design plays a powerful role in shaping private governance behaviours and that it is valuable to consider

[109] Harris and Nolan, 'Outsourcing the Enforcement of Modern Slavery' (n 14) 228.

[110] Ibid 227, 233.

[111] Ibid 236. See, eg, *Criminal Code* (n 9) ss 70.2(4)–(5).

[112] Harris and Nolan, 'Outsourcing the Enforcement of Modern Slavery' (n 14) 233.

[113] Supplementary Memorandum (n 74) [10].

[114] See above nn 94–6 and accompanying text.

[115] However, there are several discrete international conventions that capture various facets of modern slavery: see, eg, International Labour Organization, *Convention Concerning Forced or Compulsory Labour*, International Labour Conference, 14th sess (adopted 28 June 1930) art 1 ('*Forced Labour Convention*'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 32–6 ('*CRC*').

[116] Harris and Nolan, 'Learning from Experience' (n 16) 634. See also OECD, *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End* (Report, 2018) 19 [6.1] <https://www.oecd.org/corruption/Foreign-Bribery-Enforcement-What-Happens-to-the-Public-Officials-on-the-Receiving-End.pdf>, archived at <https://perma.cc/8DWS-ZWF2>; E Grobler and SJ Joubert, 'Corruption in the Public Sector: The Elusive Crime' (2004) 17(1) *Acta Criminologica* 90, 93.

[117] Harris and Nolan, 'Learning from Experience' (n 16) 604–5.

[118] Questions on the utility of criminalisation in enhancing modern slavery enforcement outcomes will be discussed further below in Part V.

different and alternative legal approaches which may fill gaps within Australia's current modern slavery legal framework. The next section relevantly examines the impact of anti-bribery legal approaches on corporate behaviour, compared to the impact of modern slavery legal approaches.

### 3 *Legislative Design and Private Governance Behaviours*

LeBaron and Rühmkorf analysed the distinctive legal approaches under the *BAUK* and *MSAUK* to assess the impact of legislative design on corporate behaviour.[119] Twenty-five corporations were studied to compare their bribery and modern slavery policies.[120] Several key trends emerged.

First, the language used to communicate bribery and modern slavery governance standards significantly differed.[121] All study participants used strict language regarding bribery (eg 'zero tolerance').[122] This should be compared to the more aspirational language — '*we will work to … respect human rights* or '*we do not support forced labour*' — used in relation to modern slavery.[123]

This language discrepancy is apparent in BHP's minimum requirements for suppliers policy, reviewed for the purpose of this article.[124] Prospective suppliers '*must comply*' with applicable anti-corruption laws and must not make or allow facilitation payments when undertaking work for or on behalf of BHP.[125] Conversely, the supplier need only '*affirm*' that it does not allow forced, bonded or involuntary labour.[126] There is no requirement for ongoing due diligence of supplier practices in relation to modern slavery. The former language imbues BHP's anti-bribery requirements for suppliers with legal status whereas the latter language positions BHP's modern slavery requirements as merely aspirational.

[119] LeBaron and Rühmkorf (n 18) 20–6; *BAUK* (n 101); *MSAUK* (n 53).

[120] Ibid 22.

[121] Ibid 24–5.

[122] Ibid 24.

[123] Ibid 24–5 (emphasis added).

[124] BHP, *Minimum Requirements for Suppliers* (Policy Document, 17 May 2022) 1–2 <https://www.bhp.com/-/media/documents/suppliers/200304_minimum-requirements-for-suppliers.pdf>, archived at <https://perma.cc/5EE5-2EYA> ('*Minimum Requirements*'). Note that this example is not drawn from LeBaron and Rühmkorf's (n 18) study. It has been selected by the authors to lend further support to LeBaron and Rühmkorf's research in the Australian context.

[125] BHP, *Minimum Requirements* (n 124) 1 (emphasis added).

[126] Ibid 2 (emphasis added).

Second, all participants in LeBaron and Rühmkorf's study published a bribery policy, with most incorporating due diligence assessments therein.[127] By comparison, modern slavery policies were inconsistent across the cohort.[128] Returning to BHP, this organisation disclosed an anti-bribery policy as a distinct section within its code of conduct.[129] Bribery is positioned as a governance issue and key operational risk, associated with criminal penalties.[130] Modern slavery, however, is not referenced at any point in BHP's code though there are scattered references to forced labour in the broader 'respecting human rights' section.[131]

The conclusions gleaned from LeBaron and Rühmkorf's inquiry, supported by additional analysis of BHP, are as follows. The stringency, form and degree of home-state regulation have significant consequences in directing company policies, practices and behaviour in respect of transnational issues.[132] The coherent body of international law and 'harder' approaches to bribery under the *BAUK* have directed corporations to utilise their bargaining power and incorporate stringent anti-bribery policies, practices and standards in corporate operations.[133]

In contrast, the institutional design of the *MSAUK* has undermined the effectiveness of this legislative instrument in steering meaningful corporate approaches to prevent and address modern slavery.[134] This analysis offers a compelling case for the harmonisation of legal approaches to bribery and modern slavery by, in particular, strengthening the modern slavery framework through more stringent criminalisation to reflect the well-established approach to bribery.

[127] LeBaron and Rühmkorf (n 18) 24.

[128] Ibid.

[129] BHP, *Code of Conduct: The Guide to Bringing* Our Charter *Values to Life* (Policy Document, 2018) 29 <https://www.bhp.com/-/media/documents/ourapproach/codeofconduct/code-of-conduct---english.pdf>, archived at <https://perma.cc/RSK5-U8BF>.

[130] Ibid.

[131] Ibid 19–20.

[132] LeBaron and Rühmkorf (n 18) 23.

[133] Ibid 20–1; *BAUK* (n 101).

[134] LeBaron and Rühmkorf (n 18) 26; *MSAUK* (n 53).

## IV The Failure To Prevent Modern Slavery

This article has proposed that harmonising approaches to bribery and modern slavery, by hardening the legal treatment of modern slavery through criminal sanction, is likely to incentivise more meaningful responses from the private sector in preventing and addressing modern slavery. It is now time to demonstrate how such harmonisation may be achieved.

It is contended that the failure to prevent model available in the context of bribery can and should be extended to modern slavery.[135]

### A *The Failure To Prevent as an Organisational Model of Corporate Criminal Liability*

The failure to prevent model of corporate criminal liability consists of a standalone offence, under which a corporation may be convicted on the basis that it failed to prevent the commission of a specific offence by another legal or natural person operating within its business or supply chain ('associate').[136] The failure to prevent offence is accompanied by a full defence.[137] This offers a corporate defendant an opportunity to demonstrate that it had in place procedures to prevent the commission of the underlying offence.[138]

The failure to prevent model does not, in and of itself, require a corporation to implement and comply with any particular policies or procedures or take burdensome steps to prevent and address criminal misconduct.[139] However, corporations are incentivised to take proactive responsibility for the conduct of their associates and to foster a corporate culture of compliance such that the corporation is protected by the defence.[140]

Thus, the failure to prevent model reconceptualises criminal justice, requiring that corporations are held responsible where they knowingly commit crimes *and* where they are reckless, indifferent or ignorant as to the common risks associated with their business activities. Imposing criminal liability for

135 *BAUK* (n 101) s 7.

136 Ibid ss 7(1), 8.

137 Ibid s 7(2).

138 Ibid. In this way, the corporation is essentially arguing that the commission of the underlying offence was an isolated incident not attributable to the corporation and so criminal liability is thus extinguished.

139 Campbell, 'Corporate Liability' (n 48) 59.

140 Ibid.

failing to prevent certain crimes signals the heightened expectations on corporate entities in the 21st century, acknowledging the significant harms emerging from corporate activities.[141]

### B *Comparative Perspectives: The UK and the Failure To Prevent Offence*

#### 1 *Failing To Prevent Bribery in the UK*

To demonstrate the application of the failure to prevent model, this article considers the UK's failure to prevent bribery offence.[142] A corporation is guilty of the offence of failing to prevent bribery if an associate, meaning a legal or natural person located in any jurisdiction and who performs services for or on behalf of the corporation, bribes another person.[143] Importantly, the associate does not need to have a direct or formal relationship with the corporation, and the capacity in which the associate performs services for the corporation is irrelevant.[144]

[141] See United Nations Human Rights Office of the High Commissioner, *The Corporate Responsibility To Respect Human Rights: An Interpretive Guide*, UN Doc HR/PUB/12/02 (2012) 10–14; OECD, *G20/OECD Principles of Corporate Governance* (2015) 3–4 <https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf>, archived at <https://perma.cc/U6Y8-PY43>; Carolin F Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 4(10) *German Law Journal* 1065, 1067.

[142] Established through the passage of s 7 of the *BAUK* (n 101). The authors acknowledge that the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (Cth) ('Combatting Foreign Bribery Bill') was recently put before the Australian Parliament and, if passed, will introduce a failure to prevent bribery offence in the Australian context which is closely modelled on the analogous UK provision: at cl 8. This article focuses on the UK failure to prevent bribery offence given that the proposed Australian failure to prevent bribery offence is the subject of ongoing parliamentary debate: see generally 'Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7055#:~:text=Amends%20the%3A%20Criminal%20Code%20Act,with%20the%20concept%20of%20'improperly>, archived at <https://perma.cc/3C4G-LWSP>. However, the introduction of the 'Combatting Foreign Bribery Bill' (n 142) usefully demonstrates the Australian Parliament's appetite for engaging alternative models of corporate criminal liability to address transnational crimes. Such appetite enhances the potential for legislating a similar model of accountability in the context of modern slavery.

[143] And that bribe was paid with the intention of benefiting the corporation: *BAUK* (n 101) s 7(1).

[144] Ibid ss 8(1)–(4); Ministry of Justice (UK), *The Bribery Act 2010: Guidance about Procedures Which Relevant Organisations Can Put into Place To Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010)* (Guidance, 2011) 16 [37]

### 2 *The Adequate Procedures Defence*

It is a full defence for the corporation to prove that it had in place adequate procedures designed to prevent the associate from bribing another person.[145] There has only been one contested case involving a charge for failing to prevent bribery.[146] Therefore, there is limited judicial articulation on what constitutes 'adequate procedures'.[147]

The UK Ministry of Justice has produced a guidance note, *The Bribery Act 2010: Guidance about Procedures Which Relevant Organisations Can Put into Place To Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010)* ('*BAUK Guidance*'), about the meaning and scope of 'adequate procedures'.[148] The term 'procedures' is described as encapsulating both an organisation's bribery prevention policies *and* the procedures which implement such policies.[149] Thus, the existence of an anti-bribery policy alone is insufficient to constitute 'adequate procedures'.[150] Rather, a corporation must

<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>, archived at <https://perma.cc/WB6Q-JAD8> ('*BAUK Guidance*').

145 *BAUK* (n 101) s 7(2).

146 This case was Transcript of Proceedings, *R v Skansen Interiors Ltd* (Southwark Crown Court, T20170224, Taylor J, 21 February 2018) ('*Skansen*'): Alex Swan, 'UK: Anti-Corruption & Bribery Comparative Guide', *Mondaq* (Article, 24 May 2023) [3.4] <https://www.mondaq.com/uk/criminal-law/1215712/anti-corruption--bribery-comparative-guide>, archived at <https://perma.cc/4559-KJCT>. It should be noted that there have been five prosecutions under s 7 of the *BAUK* (n 101): Swan (n 146) [3.4]. However, in four of these cases, the charges were not contested, with the corporate defendants entering guilty pleas and choosing not to mount a defence of adequate procedures: at [3.4]–[3.5]. Therefore, there is not a significant amount of judicial commentary on s 7 of the *BAUK* (n 101) to be gleaned.

147 In *Skansen* (n 146), Skansen was found guilty of failing to prevent bribery: at 50 (Taylor J). As this was a jury trial, there remains an absence of judicial commentary confirming the exact nature of the adequate procedures defence. However, several general principles emerged from this ruling. First, bespoke policies are important to demonstrate the presence of adequate procedures: see at 47–8. Second, the adequate procedures defence may be argued more successfully where a corporation has clear reporting lines to escalate corruption concerns: see at 45–6. Third, evidence of training and communication with employees on bribery risks must be demonstrated to successfully claim the adequate procedures defence: at 42.

148 *BAUK Guidance* (n 144) 6–7 [1]–[8].

149 Ibid 21 [1.1].

150 This is contrary to the assertions of certain critics of the failure to prevent model who contend that it promotes mere paper compliance: see, eg, Mark Lewis, 'Criminalising Corporate Failures To Prevent Foreign Bribery by Non-Controlled Associates: A Net Cast Too Wide' (2020) 44(2) *Criminal Law Journal* 80, 89 ('Criminalising Corporate Failures').

demonstrate how these procedures are implemented to achieve a meaningful, anti-bribery compliance culture.[151]

The *BAUK Guidance* provides a non-exhaustive list of bribery prevention procedures which may be embraced by corporations. These include due diligence of existing or prospective associates, whistleblowing procedures, discipline processes and sanctions, anti-bribery training programs and financial controls, such as adequate bookkeeping and independent auditing.[152] Importantly, the *BAUK Guidance* provides that a commercial organisation's anti-bribery procedures should be proportionate to the internal and external bribery risks it faces and the nature, complexity and scale of the commercial organisation's activities.[153]

The *BAUK Guidance* draws inspiration from the *OECD Bribery Convention* and associated guidance.[154] This demonstrates an integration of international law concepts into domestic legal systems to provide guidance to corporations where there is limited judicial direction domestically.[155] Drawing on international standards and norms is a component of the recommended hardening of Australia's modern slavery legal framework, which is discussed further below when introducing the proposed failure to prevent modern slavery offence.

### C *Proposed Failure To Prevent Modern Slavery Offence*

This section now considers the extension of the failure to prevent model to modern slavery and assesses the preferred scope of such an offence. It then presents a draft provision and considers its application.

#### 1 *Determining the Scope of a Failure To Prevent Modern Slavery Offence*

As a starting position, the UK Joint Committee on Human Rights ('JCHR') considers it appropriate to apply the failure to prevent model of corporate criminal

[151] *BAUK Guidance* (n 144) 6 [4].

[152] Ibid 22 [1.7].

[153] Ibid 21 [1.3].

[154] Cecily Rose, 'The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention' (2012) 61(2) *International and Comparative Law Quarterly* 485, 496, citing OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (Guidance, 18 February 2010) <https://www.oecd.org/daf/anti-bribery/44884389.pdf>, archived at <https://perma.cc/XK5Y-E8RR>.

[155] Rose (n 154) 487, 495–8.

liability to business and human rights.[156] It has been proposed by scholars that the term 'human rights' should be defined to include all internationally recognised human rights.[157] Such a definition would include the right to freedom from slavery and forced labour as contained in art 8 of the *International Covenant on Civil and Political Rights*.[158]

The Human Rights Council Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights has produced a third revised draft of the *Legally Binding Instrument* ('*Legally Binding Instrument*') which proposes that liability should arise where corporations fail to prevent other legal persons, with whom they share a business relationship, from causing or contributing to human rights abuses,[159] also broadly defined to encapsulate all internationally recognised human rights violations.[160] In the Australian context, the Australian Law Reform Commission has suggested that the failure to prevent model may be appropriate in respect of certain human rights abuses[161] though it has not yet proposed a specific statutory offence. The position of the JCHR and the *Legally Binding Instrument* demonstrates a strong commitment to human rights protection. However, a statutory offence criminalising corporate failures to prevent violations of every internationally recognised human right would be so expansive in scope it would likely be impossible to enforce.[162]

156 Joint Committee on Human Rights (UK), *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability* (House of Lords Paper No 153, House of Commons Paper No 443, Session 2016–17) 59–60 [193]–[194].

157 Pietropaoli et al (n 83) 28.

158 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 8 ('*ICCPR*').

159 Human Rights Council, *Text of the Third Revised Draft Legally Binding Instrument with Textual Proposals Submitted by States during the Seventh and Eighth Sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/52/41/Add.1 (23 January 2023) 35 art 8.6 ('*Legally Binding Instrument*').

160 Ibid 9–10 art 1.2.

161 *Corporate Criminal Responsibility* (n 21) 447 [10.8]–[10.9].

162 For example, the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('*UDHR*') outlines 30 basic human rights and freedoms in addition to the numerous human rights established in the nine core international human rights instruments: at arts 1–30. See generally *CRC* (n 115); *ICCPR* (n 158); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Economic,*

Moreover, an offence criminalising the corporate failure to prevent violations of every internationally recognised human right is neither clear nor sufficiently definite so as to accord with the principle of legal certainty.[163] This article therefore proposes a specific offence criminalising the corporate failure to prevent modern slavery. There are several reasons for this confined scope, all of which aim to increase the likelihood that the proposed offence will be accepted, implemented and enforceable in Australia.

Limiting the scope of the offence to modern slavery will streamline compliance and enforcement efforts. It allows the focusing of legal resources on one substantive offence type, rather than a group of disparate, often tangentially related human rights violations. Additionally, failure to prevent offences remain relatively novel and have yet to be applied in the context of human rights abuses. Therefore, it is appropriate to evaluate the practical strengths (and weaknesses) of the model in relation to a specific human rights violation before expanding the model to all human rights abuses.

Finally, the failure to prevent model is targeted towards corporate offenders. Modern slavery is a human rights violation directly related to corporate misconduct.[164] In contrast, the responsibility for the protection of many human rights is more readily attributable to states, for instance the responsibility to protect the right to education.[165] Therefore, a failure to prevent model for corporations is more fit for purpose in the context of modern slavery, compared to other human rights abuses which do not have the same corporate nexus.

Based on the above points, this article has developed a draft provision entitled, 'The Failure of a Commercial Organisation To Prevent Modern

*Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

163 Legal certainty is a fundamental pillar of the rule of law: Philip Sales, 'The Contribution of Legislative Drafting to the Rule of Law' (2018) 77(3) *Cambridge Law Journal* 630, 633.

164 Lord and Broad (n 12) 34–5.

165 See, eg, *ICESCR* (n 162) art 13.

Slavery', to be inserted into the *Criminal Code*.[166] This provision represents an integration of comparative and international legal approaches, uniquely adapted to the Australian legislative context.

The proposed failure to prevent modern slavery offence and accompanying defence is analogous to the UK's failure to prevent bribery offence, which has been successfully tried and tested for over 10 years.[167] The actual wording of the proposed failure to prevent modern slavery offence, including definitions, is also influenced by the *Legally Binding Instrument*, an emerging piece of international law aimed at regulating transnational corporate activity.[168] Independent, expert stakeholders have already deliberated over this language[169] and it is advantageous to integrate accepted international legal concepts into domestic law, as was done in the context of bribery, to promote consistency and a shared normative understanding of the targeted conduct. Finally, the recommended penalty provision aligns with Australia's penalty regime for bribery, ensuring legal consistency within the Australian context.[170]

### 2 *The Failure of a Commercial Organisation To Prevent Modern Slavery: A Draft Provision*

270.14 Failure of commercial organisations to prevent modern slavery

(1) A relevant commercial organisation ('R') is guilty of an offence against this section for its failure to prevent another legal or natural person (an 'associate') from causing or contributing to modern slavery.

(2) It is a defence for R to prove that it undertook comprehensive human rights due diligence to prevent its associate from causing or contributing to modern slavery.

(3) For the purposes of this section, an associate causes or contributes to modern slavery if, and only if, an associate is or would be guilty of an offence under Division 270 or Division 271 of the *Criminal Code Act 1995*

166 *Criminal Code* (n 9).

167 *BAUK* (n 101) s 7. See generally Celia Wells, 'Corporate Criminal Liability: A Ten Year Review' [2014] (12) *Criminal Law Review* 849.

168 *Legally Binding Instrument*, UN Doc A/HRC/52/41/Add.1 (n 159) 35 art 8.6.

169 Human Rights Council, *Report on the Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/52/41 (30 December 2022) 5 [15]–[16], 6 [18]–[20], annex ('*Eighth Session Report*').

170 *Criminal Code* (n 9) s 70.2(5).

(Cth) whether or not the associate has been prosecuted for such an offence.

(4) In this section:

***associate*** means:

(a) any legal or natural person who performs services for or on behalf of R;

(b) the capacity in which an associate performs services for or on behalf of R is not relevant;

(c) whether or not an associate performs services for or on behalf of R is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between an associate and R.

Note: This definition includes, but is not limited to, an employee, agent, subsidiary, supplier or subcontractor.

***relevant commercial organisation*** means:

(a) a body which is incorporated in Australia;

(b) any other body corporate (wherever incorporated) carrying on business in Australia, a State or a Territory within the meaning of section 21 of the *Corporations Act 2001* (Cth);

(c) a corporate Commonwealth entity, or a Commonwealth company, within the meaning of sections 89(1), 10(1) and 11 of the *Public Governance, Performance and Accountability Act 2013* (Cth);

(d) any other partnership, or other entity, whether incorporated or unincorporated, if:

(i) the entity is formed or incorporated within Australia; or

(ii) the central management or control of the entity is in Australia.[171]

[171] Partnership is the 'relation which exists between persons carrying on a business in common with a view of profit and includes an incorporated limited partnership': *Partnership Act 1892* (NSW) s 1(1). A partnership is a legal structure that is distinct from a corporation, though

> Penalty for body corporate
>
> (5) An offence against subsection (1) committed by R is punishable on conviction by a fine not more than the greatest of the following:
>
> (a) 100,000 penalty units;
>
> (b) if the court can determine the value of the benefit that R, and any body corporate related to the R, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—three times the value of that benefit;
>
> (c) if the court cannot determine the value of the benefit—10% of the annual turnover of R during the period of 12 months ending at the month in which the conduct constituting the offence occurred.

There are several important features of this draft provision which warrant further explanation. First, the provision is clearly and unambiguously drafted as a strict liability offence. According to s 270.14(1), the offence is not contingent on a fault element such as knowledge, recklessness or negligence as is typical with other criminal offences.[172] Rather, the corporate defendant will be found guilty of the offence if an associate is or would be guilty of an offence under divs 270 or 271 of the *Criminal Code* per s 270.14(3). Criminal liability arises irrespective of whether the associate has been convicted of an offence. Rather, the prosecutor must merely put forward evidence demonstrating a breach of either of these divisions.

Second, and as will be discussed further below, s 270.14(2) contains a full defence. The defence reverses the legal burden such that it rests on the defendant; this is explicit in the language that the defendant will be absolved from guilt to the extent it can demonstrate it undertook comprehensive HRDD to prevent its associate from causing or contributing to modern slavery.

Third, there is no definition of modern slavery provided and the underlying criminal offence triggering s 270.14 is not 'modern slavery'. Rather, modern slavery is understood by reference to the criminal offences contained in divs

both legal structures may operate businesses attracting modern slavery risks. It is for this reason that the proposed failure to prevent modern slavery provision includes partnerships within the meaning of 'relevant commercial organisation'. Partnerships are also included as a relevant commercial organisation in the UK's failure to prevent bribery offence: *BAUK* (n 101) s 7(5).

[172] See above nn 40–3 and accompanying text.

270–1 of the *Criminal Code*.[173] In this way, the proposed s 270.14 leverages the pre-existing modern slavery legal framework rather than establishing a completely new, underlying offence of modern slavery. This prevents the proliferation of additional legislative provisions, allowing focus to settle on the specific failure to prevent offence. Moreover, divs 270–1 have already been subject to judicial interpretation.[174] Thus, there is some certainty in the meaning and application of these provisions, whereas a new definition of modern slavery does not have the advantage of such legal precedent. Furthermore, these existing provisions will be reviewed and updated as part of the normal legislative review process.[175] By referencing these provisions in the proposed failure to prevent offence, any updates or improvements to the underlying offence will be immediately captured in the failure to prevent offence too.

Fourth, the proposed failure to prevent provision applies to 'relevant commercial organisations'. This is a broad definition, imbuing the provision with cross-jurisdictional effect. The provision is not merely concerned with conduct of Australian companies, occurring within Australia. 'Relevant commercial organisation' applies to entities incorporated in Australia, and entities incorporated elsewhere but where that entity has a place of business in Australia, and captures conduct occurring anywhere in the corporate supply chain.[176] This is useful to prevent companies from circumventing liability by incorporating in foreign jurisdictions. The extraterritorial reach of this provision also appropriately reflects the cross-jurisdictional nature of large corporate structures and

[173] See generally 'Slavery Today', *Anti-Slavery* (Web Page) <https://www.antislavery.org/slavery-today/>, archived at <https://perma.cc/FK69-BCY6>; 'Modern Slavery' (n 1); 'What Is Modern Slavery?' (n 1).

[174] See, eg, *R v Tang* (2008) 237 CLR 1, 15–21 [19]–[35], 23–6 [44]–[51] (Gleeson CJ, Gummow J agreeing at 27 [60], Heydon J agreeing at 64 [169], Crennan J agreeing at 64 [170], Kiefel J agreeing at 64 [171]), 55–66 [135]–[159] (Hayne J, Gummow J agreeing at 27 [60], Heydon J agreeing at 64 [169], Crennan J agreeing at 64 [170], Kiefel J agreeing at 64 [171]); *Ho v The Queen* (2011) 219 A Crim R 74, 78–9 [7]–[11], 96 [98] (Buchanan and Ashley JJA, Tate JA agreeing at 103 [144]); *R v Dobie* [2009] 1 Qd R 367, 378–83 [18]–[35] (Fraser JA, Cullinane J agreeing at 388 [53], Lyons J agreeing at 388 [54]).

[175] See Attorney-General's Department (Cth), *Targeted Review of Divisions 270 and 271 of the* Criminal Code Act 1995 *(Cth)* (Terms of Reference) <https://www.ag.gov.au/sites/default/files/2022-09/Targeted-review-of-divisions-270-and-271-of-the-criminal-code.PDF> ('*Targeted Review*').

[176] See *Corporations Act* (n 26) s 21.

anticipates the common corporate practice of conducting operations transnationally, often in jurisdictions lacking strong labour laws.[177]

Fifth, the provision does not define an associate by reference to the nature of the relationship between the associate and the corporate defendant. It should be recalled that under traditional criminal law models, liability must flow from an individual with a specific relationship vis-a-vis the corporation.[178] However, it has already been demonstrated that the nature of the relationship between parties is not an appropriate way to attribute liability in the context of transnational crimes. Rather, and as drafted above, an associate is defined by reference to the services it performs for or on behalf of the corporation, appropriately capturing actors across all tiers of corporate operations and jurisdictions.

Finally, the structure and form of the proposed penalty provision is modelled on the penalty provision for bribery.[179] This statutory penalty is significant so as to reflect the gravity of the crime of modern slavery, which involves objectively serious exploitation.[180] Such a penalty ensures that corporate offenders are 'adequately punished',[181] the offender and other corporations are deterred from committing similar offences[182] and the significant harms arising from the corporation's conduct are denounced.[183] This penalty provision does not restrict alternative claims, whether criminal or civil, pursued by individual victims of corporate exploitation.[184]

The penalty amount may be adjusted during sentencing pursuant to established principles.[185] It is common for discretionary discounts to be applied

[177] This is to be contrasted with the softer approach of the *MSA* (n 13) which delimits corporate reporting obligations on the basis of an annual revenue threshold: at s 5(1)(a).

[178] Typically an employee, officer or agent: *Criminal Code* (n 9) s 12.2.

[179] As set out in ibid s 70.2(5). It should be noted that 100,000 penalty units currently equates to a $18,492,000 fine: *Crimes Act 1914* (Cth) s 4AA(1) ('*Crimes Act*'). Whatever calculation produces a fine valued at 'not more than the greatest' of the penalty unit, the benefit derived from the unlawful conduct, or the body corporate's annual turnover, should be applied: *Criminal Code* (n 9) ss 5(a)–(c).

[180] See generally *R v Dodd* (1991) 57 A Crim R 349, 354 (The Court).

[181] *R v Scott* [2005] NSWCCA 152, [15] (Howie J, Barr J agreeing at [38], Grove J agreeing at [39]), citing *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a) ('*CSPA*').

[182] See generally *Weribone v The Queen* [2018] NSWCCA 172, [14] (White J), [53]–[54] (Wilson J, Bellew J agreeing at [17]).

[183] See generally *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).

[184] A guilty criminal verdict and award of a fine will not restrict victims from filing civil claims for compensation. This advances the restitutionary function of criminal law: see, eg, *Sentencing Act 1991* (Vic) s 1(h)(i).

[185] See, eg, *Crimes Act* (n 179) s 16A(2); *CSPA* (n 181) s 21A.

where a corporate offender self-reports misconduct, cooperates with relevant law enforcement authorities or demonstrates remorse, contrition and a genuine desire to facilitate its own rehabilitation.[186] Finally, prosecution and sentencing under s 270.14 may not occur where the parties enter into a deferred prosecution agreement ('DPA') as will be discussed in Part V.

### D *HRDD Defence*

As in the bribery context, a failure to prevent modern slavery offence should have a full, statutory defence of HRDD. The suggested framing is as follows:

270.14 Failure of commercial organisations to prevent modern slavery

> (2) It is a defence for R to prove that it undertook comprehensive human rights due diligence to prevent its associate from causing or contributing to modern slavery.

#### 1 *Policy Rationale and Design*

It is not the objective of a failure to prevent modern slavery offence 'to bring the full force of the criminal law' upon a well-organised commercial organisation, with a strong compliance culture, that experiences an isolated incident of modern slavery.[187] Such corporations, with demonstrated HRDD compliance, ought to be protected by a full defence were such an isolated incident to occur.

An HRDD defence is proposed for the modern slavery provision rather than the 'adequate procedures' defence available in the bribery context. These defences operate in a strikingly similar manner, but a HRDD defence has been proposed to align with existing and emerging international norms. Both defences incentivise corporations to maintain strong measures to prevent, mitigate and address transnational issues to ensure protection against criminal sanction.[188] Both defences incorporate elements of supply chain due diligence to monitor for bribery and modern slavery risks.[189]

[186] This accords with the principle of proportionality, guarding against the imposition of unduly harsh sentences: see, eg, *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657, [162]–[187], [190]–[195] (Adamson J).

[187] *BAUK Guidance* (n 144) 8 [11], quoted in Rose (n 154) 496.

[188] See Campbell, 'Corporate Liability' (n 48) 64.

[189] See *BAUK Guidance* (n 144) 27 [4.1]–[4.2]; *UNGP*, UN Doc A/HRC/17/31 (n 56) principle 17.

However, the adequate procedures defence that exists in the bribery context lends itself more to transnational crimes of a financial character[190] whereas an HRDD defence has a strong nexus with transnational human rights issues. Additionally, HRDD is an international legal concept that is already widely understood, accepted and endorsed by modern slavery experts.[191] Indeed, the reporting criteria under the *MSA* already incorporate (non-binding) elements of HRDD.[192] Contrastingly, the concept of 'adequate procedures' has never been applied in the modern slavery context. Thus, an HRDD defence is more appropriate in respect of the proposed failure to prevent modern slavery offence, building on existing scholarship, corporate familiarity and emerging international norms.

Section 270.14(2) does not expressly stipulate what constitutes HRDD for the purposes of successfully arguing this defence. A prescriptive legislative approach to HRDD has been purposely avoided to allow the concept of HRDD to evolve with emerging best practice.[193] An overly prescriptive approach to the definition of HRDD could prevent the application of s 270.14(2) to new and evolving situations, corporate structures and emerging modern slavery risks.[194] Prescription risks placing an excessive focus on processes rather than promoting meaningful modern slavery prevention outcomes.[195] Keeping the parameters of HRDD broad helps to combat criticism that a failure to prevent model promotes a mere check box, paper compliance approach.[196]

Moreover, corporations are also exposed to different and variable modern slavery risks by virtue of their operations and design. Extractive industries

[190] For instance, the failure to prevent bribery and failure to prevent tax evasion offences are accompanied by an adequate procedures defence: *BAUK* (n 101) s 7(2); *Criminal Finances Act 2017* (UK) ss 45(2), 46(3).

[191] Nolan and Frishling (n 36) 114–15.

[192] Ibid 115–16.

[193] Particularly at the international law level: see, eg, the *Legally Binding Instrument*, UN Doc A/HRC/52/41/Add.1 (n 159) which is under a continuous process of revision as parties settle on a legal approach: *Eighth Session Report*, UN Doc A/HRC/52/41 (n 169) 10 [26].

[194] See, eg, *Eighth Session Report*, UN Doc A/HRC/52/41 (n 169) 5 [15].

[195] See Julia Black, 'Principles Based Regulation: Risks, Challenges and Opportunities' (Presentation Paper, Banco Court, Supreme Court of New South Wales, 27 March 2007) 5 <http://eprints.lse.ac.uk/62814/1/__lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Black%2C%20J_Principles%20based%20regulation_Black_Principles%20based%20regulation_2015.pdf>, archived at <https://perma.cc/B6CV-Y4QV>.

[196] See, eg, Lewis, 'Criminalising Corporate Failures' (n 150) 89; Campbell, 'Corporate Liability' (n 48) 63–4; Hui Chen and Eugene Soltes, 'Why Compliance Programs Fail and How To Fix Them' [2018] (March–April) *Harvard Business Review* 116, 118–19.

operating in the Democratic Republic of Congo are exposed to significant risks of child labour.[197] The Australian horticultural industry is exposed to significant risks of slavery-like practices, with international workers often having their passports confiscated.[198] The HRDD procedures implemented to prevent modern slavery must be uniquely designed, adapted and proportionate to the specific modern slavery risks of a given corporation, and thus a prescriptive definition is to be avoided.

### 2 *Guiding Framework for HRDD in Respect of Modern Slavery*

In lieu of a prescriptive legislative approach to HRDD, this article proposes that a 'Guiding Framework for HRDD in Respect of Modern Slavery' ('HRDD Framework') should be made available. Given there will be little judicial direction as to how corporations should comply with s 270.14 until this provision is contested at trial, guidance must emanate from the legislature, with appropriate recourse to expert stakeholders, to ensure that such guidance is fit for purpose.[199]

It is beyond the scope of this article to detail the structure and content of such a guiding framework; however, it is recommended that the guidance be modelled off the *UNGP* and the *Legally Binding Instrument*.[200] Incorporating these international legal instruments into the HRDD Framework is advantageous given these instruments are already widely understood, accepted and endorsed by experts on business and human rights.[201] Corporations are strongly

[197] See, eg, Annie Kelly, 'Apple and Google Named in US Lawsuit over Congolese Child Cobalt Mining Deaths', *The Guardian* (online, 16 December 2019) <https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths>, archived at <https://perma.cc/9CTN-JB3W>.

[198] Joanna Howe, Elizabeth Shi and Stephen Clibborn, 'Fruit Picking in Fear: An Examination of Sexual Harassment on Australian Farms' (2022) 45(3) *Melbourne University Law Review* 1140, 1151; Marinella Marmo, *Slavery and Slavery-Like Practices in South Australia* (Report, October 2019) 47–8 <https://researchnow-admin.flinders.edu.au/ws/portalfiles/portal/18836321/Flinders_Slavery_Report_2019_ibsn.pdf>, archived at <https://perma.cc/MZ9D-ABKR>.

[199] Though it is noted that the question of whether an organisation has adequate procedures in place to prevent modern slavery in the context of a particular prosecution can only be resolved by the courts, taking into consideration the relevant facts and circumstances of the individual case.

[200] *UNGP*, UN Doc A/HRC/17/31 (n 56); *Legally Binding Instrument*, UN Doc A/HRC/52/41/Add.1 (n 159).

[201] See, eg, Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 11th

encouraged to pursue these steps to demonstrate that they have undertaken comprehensive HRDD, although it should be made clear that these steps will not guarantee that the defence is successful as each case of modern slavery in business operations will be unique and context specific.

It is also noteworthy that Professor John McMillan AO has recently handed down the *MSA Review*.[202] Recommendation 11 therein proposes the amendment of the *MSA* to provide that a reporting entity must have a due diligence system meeting the requirements mentioned in the rules made under s 25 of the *MSA*.[203] To the extent this recommendation is legislated by Parliament, this may guide the scope and operation of an HRDD defence in the context of a failure to prevent slavery offence under the *Criminal Code*.

Ultimately, this article has proposed a failure to prevent modern slavery offence and supporting defence that is aligned with the objective of enhancing the effectiveness of Australia's modern slavery law framework. An attempt has been made to respond to potential challenges and limitations likely to be encountered during the drafting process. On this basis, this article now turns to the question of viability, which will be analysed and tested in Part V with reference to three important factors.

## V The Viability of a Failure To Prevent Modern Slavery Offence

Having considered the failure to prevent model and how it may be extended to modern slavery, it is pertinent to turn to a more targeted consideration of the primary question underpinning this article. That is, whether a failure to prevent modern slavery offence is a viable mechanism to enhance Australia's modern slavery legal framework.

Viability will be assessed with reference to three factors: (i) the ability of this model to remedy the deficiencies in Australia's modern slavery legal

sess, Agenda Item 3, UN Doc A/HRC/11/13 (22 April 2009) 3–4 [3]–[5]. See also John Gerard Ruggie and John F Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathon Bonnitcha and Robert McCorquodale' (2017) 28(3) *European Journal of International Law* 921, 923–4; James Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (2013) 31(2) *Impact Assessment and Project Appraisal* 107, 107, citing *UNGP*, UN Doc A/HRC/17/31 (n 56).

202 *MSA Review* (n 58).

203 Ibid 12.

framework;[204] (ii) the model's compatibility with Australia's criminal law tradition; and (iii) the model's compatibility with Australia's existing system of corporate regulation.

### A *The Failure To Prevent as a Remedy to Deficiencies in Australia's Modern Slavery Legal Framework*

#### 1 *Overcoming the Limitations of Nominalism*

A failure to prevent modern slavery offence remedies the deficiencies in Australia's modern slavery legal framework by overcoming the constraints of Australia's nominalist corporate criminal liability approach. A nominalist theory of corporate criminal liability positions corporations as an abstract legal fiction, lacking independent existence beyond the individuals within the corporate collective.[205]

It should be recalled that pt 2.5 of the *Criminal Code* establishes the principles for attributing corporate criminal liability. These principles, and Australian criminal law more generally, are underpinned by nominalist theory.[206] This is evidenced by the requirement that the physical and fault elements of a criminal offence will only be attributable to the corporation where the offence is committed by an employee, agent or officer of the corporation acting with authority.[207]

It is recognised jurisprudentially that a corporate criminal law approach grounded in nominalist principles is neither fit for purpose nor appropriately adapted to the reality of contemporary corporations and transnational issues such as modern slavery.[208] Contemporary corporate structures are diffuse in

[204] As previously identified above in Part II.

[205] See Celia Wells, 'Containing Crime: Civil or Criminal Controls?' in James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge, 2011) 13, 20.

[206] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 1–3, 29–30; Tahnee Woolf, 'The Criminal Code Act 1995 (Cth): Towards a Realist Vision of Corporate Criminal Liability' (1997) 21(5) *Criminal Law Journal* 257, 257. See generally W Robert Thomas, 'Making Sense of Corporate Criminals: A Tentative Taxonomy' (2019) 17 (Special Issue) *Georgetown Journal of Law and Public Policy* 775.

[207] *Criminal Code* (n 9) s 12.2.

[208] See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507 (Lord Hoffmann for the Judicial Committee) (Privy Council); *Tesco* (n 43) 170–1 (Lord Reid), 179–81 (Lord Morris), 187 (Viscount Dilhorne), 190–1 (Lord Pearson), 193–4

nature and opaque by design.[209] Control of corporate operations is decentralised to a variety of individuals and spread across vast, transnational supply chains.[210] Individuals in the middle and lower tiers of corporate management are typically the key facilitators of modern slavery.[211] However, they are not the class of individuals through which criminal liability may flow to the corporation, in accordance with nominalism.[212] Resultingly, this has facilitated corporate impunity for modern slavery.[213]

The proposed failure to prevent modern slavery offence remedies this deficiency. The proposed offence embodies a realist approach to corporate criminal liability. A realist theory of corporate criminal liability is premised on organisational culpability, viewing the corporation as a distinct entity with its own objectives, culture and personality beyond its officers, employees and agents.[214]

The proposed offence does not require criminality to flow from a select few individuals in order to impute liability on the corporation. Rather, liability extends deep into the corporate supply chain, capturing a variety of actors cross-jurisdictionally, involved both within and beyond primary business operations.

This means the failure to prevent modern slavery offence is responsive to the decentralised and opaque nature of contemporary corporate structures. The offence anticipates that personnel beyond employees, officers and agents may cause or contribute to modern slavery.[215] However, this fact does not impede the attribution of criminal liability as it would under the nominalist tradition.

(Lord Diplock); *DPP Reference No 1 of 1996* [1998] 3 VR 352, 355 (Callaway JA, Phillips CJ agreeing at 352, Tadgell JA agreeing at 352); Woolf (n 206) 258; Crofts, 'Three Recent Royal Commissions' (n 20) 395–7. See also Brent Fisse and John Braithwaite, *Corporations Crime and Accountability* (Cambridge University Press, 1993) 218–19, 229; Peter A French, *Collective and Corporate Responsibility* (Columbia University Press, 1984) 78–9, 173–8; WB Fisse, 'Consumer Protection and Corporate Criminal Responsibility: A Critique of Tesco Supermarkets Ltd v Nattrass' (1971) 4(1) *Adelaide Law Review* 113, 133; Judicial College of Victoria, 'Corporate Accused' in Judicial College of Victoria, *Bench Book: Criminal Proceedings Manual* (Online Manual) [5] <https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27586.htm>, archived at <https://perma.cc/4DHF-3MJ9>.

209 Nolan and Frishling (n 36) 111; Woolf (n 206) 258.

210 Nolan and Frishling (n 36) 111; Woolf (n 206) 258.

211 See above n 46 and accompanying text.

212 Woolf (n 206) 258.

213 Ibid.

214 Colvin (n 206) 2.

215 See generally Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18(3–4) *Criminal Law Forum* 267; Barry D Baysinger,

### 2 *Leveraging Criminal Law To Effect Meaningful Changes in Corporate Behaviour*

Part III suggested stronger legislative design, giving rise to criminal liability, was more influential in shaping substantive private governance practices than a softer framework with minimal penalties for noncompliance. A softer framework fails to elicit meaningful changes in private governance behaviours as there is no real incentive to make such changes.

Australia's *MSA* falls within the latter category: a piece of ineffective legislation predicated on a misplaced faith in consumer purchasing power and lacking penalties for noncompliance. Conversely, the proposed failure to prevent modern slavery offence gives rise to corporate criminal liability. The offence is also accompanied by substantial monetary penalties. Additionally, where a corporation is found guilty of failing to prevent this serious human rights abuse it will incur significant reputational damage. This harder approach to modern slavery regulation will reassert modern slavery as a serious operational risk within corporate governance discourse and practice.[216] This will act as a powerful incentive for corporations to incorporate robust and meaningful anti-slavery standards and practices across their operations.

It should also be recalled that the *MSA* is predicated on market-outsourced enforcement.[217] However, the particular role of this 'market mechanism' is inflated, significantly hampering the effectiveness of Australia's modern slavery legal framework.[218] The proposed failure to prevent modern slavery offence relieves consumers and the broader market of the modern slavery enforcement burden. Rather, the enforcement burden is shifted back to prosecutorial agencies who must decide whether to bring charges against a corporate defendant for failing to prevent modern slavery on the basis of available evidence. Enforcement will require the allocation of additional resources by government to allow prosecutors to dispense with this mandate.

To supplement this increased enforcement burden, the proposed provision enhances the compliance burden on the corporate defendant. The proposed failure to prevent modern slavery offence is accompanied by an HRDD defence. To rely on this defence and avoid criminal sanction, corporations must

'Organization Theory and the Criminal Liability of Organizations' (1991) 71(2) *Boston University Law Review* 341.

216 Cf LeBaron and Rühmkorf (n 18) 25.

217 See above nn 59–60 and accompanying text.

218 See above nn 61–3 and accompanying text.

undertake comprehensive HRDD in accordance with the HRDD Guiding Framework proposed in Part IV. This shifts the responsibility onto corporations to prevent and address modern slavery within their supply chains.[219] It is anticipated that shifting the enforcement of modern slavery from the market onto expert
prosecutorial authorities and corporate defendants themselves, as in the current approach to bribery,[220] will enhance the effectiveness of Australia's modern slavery legal framework.

3 *Promoting HRDD over Superficial Social Auditing*

A significant deficiency in Australia's modern slavery legal framework is that disclosure-based legislative schemes have resulted in the proliferation of social auditing in substitution of comprehensive HRDD. It should be recalled that social auditing is an inherently superficial tool in detecting and measuring exploitative labour conditions.[221] Social auditing provides low-quality information outcomes, which are often the result of supplier fraud and coercion.[222] Social auditing targets tier one suppliers, notwithstanding that labour exploitation primarily occurs in the lower tiers of corporate production.[223] Moreover, social auditing often becomes a check box approach to modern slavery compliance, unsuited to addressing the underlying causes of this issue.[224] It is proposed that preventing modern slavery in global supply chains requires recourse to robust HRDD approaches rather than superficial social auditing.[225]

HRDD offers a meaningful and holistic way for corporations to actively manage and prevent human rights impacts connected to their business activities.[226] Whilst social auditing may reveal modern slavery risks or issues within

[219] This aligns with consumer perspectives that modern slavery prevention should emanate from corporate entities: Carrington, Chatzidakis and Shaw (n 63) 434.

[220] See below nn 254–6 and accompanying text.

[221] See above nn 67–72 and accompanying text. See also Carolijn Terwindt and Amy Armstrong, 'Oversight and Accountability in the Social Auditing Industry: The Role of Social Compliance Initiatives' (2019) 158(2) *International Labour Review* 245, 269.

[222] Ford and Nolan (n 6) 34–5.

[223] Ibid 35.

[224] Genevieve LeBaron and Jane Lister, 'Benchmarking Global Supply Chains: The Power of the "Ethical Audit" Regime' (2015) 41(5) *Review of International Studies* 905, 906–7.

[225] Ford and Nolan (n 6) 36, 39–40.

[226] *UNGP*, UN Doc A/HRC/17/31 (n 56) principles 15, 17–21; Justine Nolan, 'Chasing the Next Shiny Thing: Can Human Rights Due Diligence Effectively Address Labour Exploitation in

a supply chain, there is no binding requirement for corporations to remediate harmed persons or develop effective solutions to mitigate the issue. Contrastingly, HRDD specifically requires that where modern slavery risks or issues are identified, transparent remediation is pursued.[227]

The proposed failure to prevent modern slavery offence is accompanied by an HRDD defence. Evidence that a corporation undertakes a comprehensive and recurring programme of HRDD is necessary to successfully claim the defence under s 270.14(2). In this way, a failure to prevent modern slavery offence strongly incentivises corporations to undertake HRDD, unlike the superficial social auditing approaches which have emerged from mandatory modern slavery disclosure schemes. This proposed offence will significantly increase the quality of modern slavery prevention and remediation activities. Therefore, it seems likely that the proposed provision and defence will go some way to remedying existing limitations in Australia's modern slavery legal framework.

### B *The Failure To Prevent and Australia's Criminal Law Tradition*

Next, it is necessary to assess the compatibility of the proposed offence with Australia's criminal law tradition, given that the proposed failure to prevent modern slavery provision is drafted as a criminal offence. This section will traverse and dispel several criticisms of the failure to prevent model to demonstrate that the proposed failure to prevent modern slavery offence is compatible with Australia's criminal law tradition.

#### 1 *The Failure To Prevent Model, Fair Trial Rights and the Presumption of Innocence*

The failure to prevent model places a legal burden on the defendant.[228] The defendant is required to prove their innocence by presenting a successful defence.[229] This reverses the Australian criminal law tradition whereby the legal burden rests on the Crown to prove beyond reasonable doubt each element of

Global Fashion Supply Chains?' (2022) 11(2) *International Journal for Crime, Justice and Social Democracy* 1, 8–9.

227 Ford and Nolan (n 6) 38.

228 See generally Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Interim Report No 127, July 2015) 318–19 [11.35]–[11.40].

229 *BAUK* (n 101) s 7(2).

an offence.[230] Assigning the legal burden to the Crown guarantees an accused is presumed innocent.[231]

It could be contended that by reversing the legal burden, the failure to prevent model represents an unacceptable encroachment on the presumption of innocence and fair trial rights.[232] Offences reversing the legal burden certainly interfere with the presumption of innocence.[233] However, and in the Australian context, this argument does not undermine the viability of a failure to prevent modern slavery offence to enhance Australia's modern slavery legal framework.[234]

*(a) Common Law Protection of Fair Trial Rights*

Fair trial rights and the presumption of innocence are protected by Australia's common law.[235] These common law rights are considered 'fundamental',

[230] And disprove beyond reasonable doubt any defence presented by the defendant, as established in the seminal case of *Woolmington v DPP (UK)* [1935] AC 462, 481 (Viscount Sankey LC, Lord Hewart CJ agreeing at 483, Lord Tomlin agreeing at 483, Lord Wright agreeing at 483) ('*Woolmington*'); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501 (Mason CJ and Toohey J), 527 (Deane, Dawson and Gaudron JJ), 546 (McHugh J) ('*Environment Protection Authority*').

[231] This is a core element of the right to a fair trial and a critical protection for defendants in an adversarial justice system: Anthony Gray, 'Presumption of Innocence in Australia: A Threatened Species' (2016) 40(5) *Criminal Law Journal* 262, 262, 267, 269. See also *Environment Protection Authority* (n 230) 501 (Mason CJ and Toohey J), 527 (Deane, Dawson and Gaudron JJ), 546 (McHugh J); 'Presumption of Innocence', *Attorney-General's Department (Cth)* (Guidance Sheet) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/presumption-innocence>.

[232] See especially Lewis, 'Criminalising Corporate Failures' (n 150) 88–9. See also Campbell, 'Corporate Liability' (n 48) 61–2; Australian Institute of Company Directors, Submission No 3 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (10 January 2020) 2.

[233] Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 271 [9.64] ('*Traditional Rights and Freedoms Final Report*').

[234] 'Viability' is assessed by reference to three factors: (i) the ability of this model to remedy the deficiencies in Australia's modern slavery legal framework; (ii) the offence's compatibility with Australia's criminal law tradition; and (iii) the offence's compatibility with Australia's existing system of corporate regulation: see above Part I.

[235] See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 299–300 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J), 362–71 (Gaudron J) ('*Dietrich*'); *Environment Protection Authority* (n 230) 501–2 (Mason CJ and Toohey J), 526–7 (Deane, Dawson and Gaudron JJ), 539 (McHugh J); *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44], 51–2 [53]–[54] (French CJ), 200 [511]–[512] (Crennan and Kiefel JJ); *Woolmington* (n 230) 481 (Viscount Sankey LC,

meaning that they are essential to the efficacy of Australia's legal system.[236] There is a strong statutory presumption that Acts of Parliament cannot abrogate fundamental rights, such as the right to a fair trial.[237]

The courts have consistently held that statutes should not be construed as infringing fundamental common law rights unless the legislature is 'unambiguously clear'[238] in its intention to depart from such rights.[239] Where legislation encroaching on a fundamental common law right is unclear, it will be read down to prevent such an encroachment.[240] However, to the extent that it is the clear and unambiguous intention of parliament to introduce an offence reversing the legal burden (such as a failure to prevent modern slavery offence), the courts will construe and apply this legislation as drafted.[241]

The High Court provides that it is within the competence of the legislature to regulate the incidence and reversal of the legal burden.[242] As such, several reverse onus offences under Australian law, many of which are related to

Lord Hewart CJ agreeing at 483, Lord Tomlin agreeing at 483, Lord Wright agreeing at 483); *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ), 309 (Mason, Wilson and Dawson JJ), 311 (Murphy J); *Traditional Rights and Freedoms Final Report* (n 233) 221–2 [8.12]–[8.13], 223–4 [8.20], 260–1 [9.8]–[9.11]. See also *Jago v District Court of NSW* (1988) 12 NSWLR 558, 565 (Kirby P). It should be noted that there is no constitutionally enshrined right to a fair trial in Australia, nor is there a federal human rights charter offering statutory protection of fair trial rights: see *Dietrich* (n 235) 307, 309 (Mason CJ and McHugh J).

236 See *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28] (McHugh J) ('*Malika Holdings*'); Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2016) 251.

237 *Malika Holdings* (n 236) 298 [27]–[28] (McHugh J), 328 [121] (Kirby J); JJ Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79(12) *Australian Law Journal* 769, 780–1.

238 *Malika Holdings* (n 236) 298 [27] (McHugh J), quoting *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

239 *Malika Holdings* (n 236) 298 [27]–[28] (McHugh J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19]–[20] (Gleeson CJ). See also *CPCF v Minister for Immigration and Border Protection* (2015) 225 CLR 514, 548 [76] (Hayne and Bell JJ), 579 [194] (Crennan J).

240 Spigelman (n 237) 777.

241 See *Traditional Rights and Freedoms Final Report* (n 233) 271–2 [9.64]; *Malika Holdings* (n 236) 298 [27]–[28] (McHugh J).

242 *Kuczborski v Queensland* (2014) 254 CLR 51, 122 [240] (Crennan, Kiefel, Gageler and Keane JJ), citing *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12 (Knox CJ, Gavan Duffy and Starke JJ), 17–18 (Isaacs J) ('*Melbourne Harbour Trust Commissioners*').

corporate regulation,[243] have been passed by Parliament and not read down by the High Court.[244] This suggests that the proposed failure to prevent modern slavery offence will not automatically be disallowed by Parliament or the courts due to its status as a reverse onus offence.[245]

*(b) Reconceptualising Fair Trial Rights in an Age of Corporatocracy*

The right to a fair trial and the presumption of innocence are common law rights developed by the courts in light of colliding interests and values.[246] These rights essentially reflect the proper relationship between a vulnerable defendant and the well-resourced state, affording protection to the former by placing higher standards on the latter.[247] However, conditions in society have radically changed since the institution of such fundamental common law rights. Corporations have become vast entities, operating transnationally, exponentially increasing revenue and engaging in significant human rights abuses.[248] Corporate defendants often possess resourcing capabilities far exceeding governments and prosecutorial agencies.[249]

243 See, eg, *Criminal Code* (n 9) ss 102.3(2), 302.5; *Taxation Administration Act 1953* (Cth) ss 8K(2), 8L(2), 8Y(1)–(2). It should also be noted that cls 6–7 of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 ('Combatting Corporate Crime Bill') which sought to introduce a reverse onus failure to prevent bribery offence, was generally supported; Jacqueline Wootton and Madeleine Ryan, 'Gone but Not Forgotten: Combatting Corporate Crime Bill Lapsed but Combatting Bribery Remains in Focus', *Herbert Smith Freehills* (Legal Briefing, 24 March 2023) <https://www.herbertsmithfreehills.com/latest-thinking/gone-but-not-forgotten-combatting-corporate-crime-bill-lapsed-but-combatting-bribery>, archived at <https://perma.cc/C35H-ZXBE>.

244 Ibid. See also *Melbourne Harbour Trust Commissioners* (n 242) 17–18 (Isaacs J).

245 It is also pertinent to consider that *An Act To Ensure That Goods Made with Forced Labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China Do Not Enter the United States Market, and for Other Purposes*, Pub L No 117–78, § 3(a), 135 Stat 1525, 1529 (2021) establishes a rebuttable presumption that the importation of goods produced in Xinjiang are prohibited under the *Tariff Act 1930*, 19 USC § 1307 (2021). This further justifies the reverse onus approach in this field.

246 JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 (July) *Law Quarterly Review* 392, 409.

247 Pamela R Ferguson, 'The Presumption of Innocence and Its Role in the Criminal Process' (2016) 27(2) *Criminal Law Forum* 131, 148.

248 Campbell, 'Corporate Liability' (n 48) 57.

249 The sum of $203,610,000 was appropriated for the services of the Office of the Director of Public Prosecutions (NSW) in 2022–23: *Appropriation Act 2022* (NSW) s 26. This should be contrasted with a major corporation recently subject to criminal prosecution by Australian authorities, Citigroup, which generated $71.9 billion of revenue in 2021: Citi, *2021 Annual*

Justice Isaacs has provided instructive commentary on this issue: '[t]he usual path leading to justice, if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct the vindication of the law', and as such, there are circumstances which justify and indeed require reversing the legal burden.[250] Justice McHugh in *Malika Holdings Pty Ltd v Stretton* further identified that

> [w]hat [rights are] fundamental in one age or place may not be regarded as fundamental in another age or place. When community values are undergoing radical change … few principles or rights can claim to be so fundamental that it is unlikely that the legislature would want to change them.[251]

The right to a fair trial and presumption of innocence (as they apply to corporate defendants) must be viewed in light of contemporary corporate operations, the gross human rights abuses perpetrated by corporations and the emerging power imbalances between influential, well-resourced corporate defendants and prosecutorial agencies. This jurisprudence demonstrates that statutory offences reversing the legal burden are not inherently incompatible with Australia's criminal law tradition and may indeed be required to facilitate the administration of justice in light of changing societal expectations and values.

The proposed failure to prevent modern slavery offence is clearly and unambiguously drafted to reverse the legal burden; this is a permissible encroachment on common law rights adapting to meet societal expectations in the age of corporatocracy.[252]

### 2 *The Failure To Prevent and DPAs: Reconceptualising Criminal Justice?*

It is likely, given the UK experience,[253] that a DPA scheme would need to be introduced in the Australian context to support the operation of the proposed

*Report* (Report) 10, 291 <https://www.citigroup.com/rcs/citigpa/storage/public/ar21_en.pdf?ieNocache=325>, archived at <https://perma.cc/XSL9-UCA3>.

250 *Williamson v On* (1926) 39 CLR 95, 113.

251 *Malika Holdings* (n 236) 298 [28].

252 See generally Hillary J Shaw, 'The Rise of Corporatocracy in a Disenchanted Age' (2008) 1(1) *Human Geography* 1.

253 'Deferred Prosecution Agreements', *Serious Fraud Office* (Web Page) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/>, archived at <https://perma.cc/UKW7-772M> ('Deferred Prosecution Agreements'); '2020-040: Bribery Act 2010', *Serious Fraud Office* (Web Page, 1 March 2020) <https://www.sfo.gov.uk/foi-request/2020-040-bribery-act-2010/>, archived at <https://perma.cc/MM3T-ZY5E> ('2020-04: Bribery Act 2010').

failure to prevent modern slavery offence. Thus, it is important to consider this prosecutorial tool as part of the failure to prevent framework. This article contends that DPAs strengthen the viability of the failure to prevent modern slavery offence and complement Australia's criminal law tradition.

*(a) What Is a DPA?*

A DPA is a negotiated agreement entered into between a prosecutor and a corporation at the prosecutor's discretion.[254] The negotiation and enforcement of DPAs, including actions for material contraventions, are supervised by a judge.[255] A DPA allows the suspension of prosecutorial action, notwithstanding evidence of criminal wrongdoing, if the corporation complies with certain conditions specified by the prosecutor and endorsed by a judge.[256]

DPAs are an alternative strategy in the prosecutorial toolkit to respond to corporate crime, transcending the traditional binary choice: to prosecute or not to prosecute.[257] Additionally, and for corporations, entering into a DPA and cooperating with prosecutors to rectify criminal wrongdoing minimises reputational damage.[258] DPAs have preventative and restorative aims.[259] DPAs may require payment of a penalty to deter future wrongdoing[260] or payment of compensation to a community significantly

[254] 'Deferred Prosecution Agreements' (n 253); Serious Fraud Office (UK) and Crown Prosecution Service (UK), *Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013* (Code of Practice) 3 [1.1] <https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf>, archived at <https://perma.cc/9XJ9-MQY9>; Liz Campbell, 'Trying Corporations: Why Not Prosecute?' (2019) 31(2) *Current Issues in Criminal Justice* 269, 275.

[255] 'Deferred Prosecution Agreements' (n 253).

[256] *Corporate Criminal Responsibility* (n 21) 494 [11.7], 496 [11.11].

[257] DPAs also minimise many of the costs and inefficiencies associated with contentious litigation: Liz Campbell, 'Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales' (2021) 43(2) *Sydney Law Review* 187, 188, 192–3 ('Revisiting and Re-Situating Deferred Prosecution Agreements in Australia').

[258] Rani John and Alexandra Cameron, 'Greater Clarity on Self-Reporting Foreign Bribery Offences', *Lexology* (Web Page, 30 January 2018) <https://www.lexology.com/library/detail.aspx?g=ba22f237-50d7-4c9d-a4ff-6cc8a883737a>, archived at <https://perma.cc/4RCH-8FGX>.

[259] See Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventative Justice: Deferred Prosecution Agreements' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 211, 215, 222–3.

[260] In two separate DPAs, approved in July 2021, two companies were required to pay £2,510,065 as a financial penalty for the rolling use of bribes to obtain UK contracts: 'SFO Secures Two DPAs with Companies for Bribery Act Offences', *Serious Fraud Office*

impacted by corporate crimes.[261] DPAs may also require the review and improvement of compliance programs to a standard specified by prosecutorial agencies[262] or the appointment of independent auditors.[263]

Early research suggests that DPAs may increase the likelihood of effecting behavioural and cultural change within corporations.[264] However, there is currently no evidence that DPAs prevent future corporate crime, though they remain highly preferable to no prosecution at all or a failed prosecution.[265]

In 2019, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sought to introduce a DPA scheme in Australia.[266] This Bill has since lapsed,[267] so it is pertinent to look to comparative jurisdictions. A

(News Release, 20 July 2021) <https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/>, archived at <https://perma.cc/H5JG-Z4UX> ('SFO Secures Two DPAs with Companies for Bribery Act Offences'); *Director of the Serious Fraud Office v AB Ltd* (Southwark Crown Court, May J, 19 July 2021) [121]–[124], [130].

261 Amec Foster Wheeler Energy Ltd ('Amec') was recently required to pay compensation to the people of the Federal Republic of Nigeria in relation to bribes that achieved a reduction in tax payable in Nigeria by Amec: *Serious Fraud Office v Amec Foster Wheeler Energy Ltd* (Deferred Prosecution Agreement, 28 June 2021) [7(a)(x)] ('*Amec Foster*'); 'SFO Investigation Delivers over £200,000 Compensation for the People of Nigeria', *Serious Fraud Office* (News Release, 21 February 2022) <https://www.sfo.gov.uk/2022/02/21/sfo-investigation-delivers-over-200000-compensation-for-the-people-of-nigeria/>, archived at <https://perma.cc/CSW4-M54F>.

262 *Serious Fraud Office v Serco Geografix Ltd* (Deferred Prosecution Agreement, 2 July 2019) 6 [29], 8 [34]–[35], 9–10 [41]–[42].

263 See, eg, *Serious Fraud Office v Standard Bank plc* (Deferred Prosecution Agreement, 2015) 5–6 [28]–[30]; *Serious Fraud Office v Rolls-Royce plc* (Deferred Prosecution Agreement, 2017) 5 [25]–[27] ('*Rolls Royce DPA*').

264 See, eg, Jennifer Arlen, 'Prosecuting beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements' (2016) 8(1) *Journal of Legal Analysis* 191, 200–2. See also Attorney-General's Department (Cth), *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (Public Consultation Paper, March 2017) 3 <https://www.ag.gov.au/sites/default/files/2020-03/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf> ('*Proposed Australian DPA Scheme*'). It must be noted there are several United States ('US') corporate offenders that have repeatedly contravened DPAs, giving rise to concerns that such agreements are not strong enough in the US context to elicit meaningful corporate compliance: Brandon L Garrett, *Too Big To Jail: How Prosecutors Compromise with Corporations* (Belknap Press, 2014) 102–3, 165–6, 273–4.

265 See Campbell, 'Corporate Liability' (n 48) 59, 61, 63.

266 Combatting Corporate Crime Bill (n 243) sch 2. This would involve the insertion of a new provision into the *Director of Public Prosecutions Act 1983* (Cth) enabling such a scheme in the bribery context: Combatting Corporate Crime Bill (n 243) sch 2 cl 1.

267 'Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s1246>, archived at <https://perma.cc/W53W-TA5P>.

DPA scheme was introduced in the UK in 2013.[268] DPAs are now available in respect of a wide range of economic offences,[269] including the offence of failing to prevent bribery.[270]

For instance, in 2017, the SFO entered into a DPA with Rolls-Royce after the company's alleged commission of multiple offences, including the failure to prevent bribery.[271] In consideration of £497,252,645 (representing disgorgement of profit and penalties before interest) and guarantees by Rolls-Royce (to cooperate with the SFO, to amend anti-bribery compliance programmes to SFO specifications and to undergo independent audit), prosecutors suspended criminal proceedings.[272] The SFO has negotiated eight such DPAs with corporate defendants for failing to prevent bribery.[273] In light of the UK experience, it is clear that a failure to prevent modern slavery offence should be accompanied by a DPA regime in the Australian context.

### *(b) Criticisms of the Failure To Prevent Model and DPAs*

Existing literature presents two main arguments to suggest that DPAs undermine Australia's criminal law tradition. First, a failure to prevent offence contains an in-built defence. For bribery, this is the adequate procedures defence.[274] A similar HRDD defence is proposed in respect of a failure to prevent modern slavery offence. The corporate defendant has the opportunity to raise

[268] Pursuant to the *Crime and Courts Act 2013* (UK) sch 17 ('*UK DPA Scheme*'). DPAs are also available and extensively used in the US. However, the US DPA model is not subject to a legislative framework or judicial oversight: see Joseph Warin, Kendall Day and Melissa Farrar, *Trends in DOJ Nonprosecution, Deferred Prosecution Deals* (Report, 29 January 2019) <https://www.gibsondunn.com/wp-content/uploads/2019/01/Warin-Day-Farrar-Trends-In-DOJ-Nonprosecution-Deferred-Prosecution-Deals-Law360-01-29-2019.pdf>, archived at <https://perma.cc/HP5N-3SUX>. Thus, the US approach has not been considered in this article as it diverges so significantly from other common law legal systems.

[269] This includes common law offences of conspiracy to defraud and offences under statutes, such as the *Fraud Act 2006* (UK) and the *Criminal Finances Act* (n 190): *UK DPA Scheme* (n 268) ss 15–16, 25–26A.

[270] *UK DPA Scheme* (n 268) s 26(d).

[271] *Serious Fraud Office v Rolls Royce plc* (Southwark Crown Court, Leveson P, 17 January 2017) [4].

[272] *Rolls Royce DPA* (n 263) 2 [6].

[273] See '2020-040: Bribery Act 2010' (n 253); 'SFO Secures Two DPAs with Companies for Bribery Act Offences' (n 260); 'SFO Enters into Deferred Prosecution Agreement with Airline Services Limited', *Serious Fraud Office* (News Release, October 2020) <https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/>, archived at <https://perma.cc/ZB7T-JBRJ>.

[274] *BAUK* (n 101) s 7(2).

this defence and will avoid criminal liability to the extent that this defence is successfully argued.

The inclusion of DPAs in the failure to prevent model duplicates the mechanisms through which a corporation may avoid a finding of criminal guilt. In such circumstances, a DPA may be considered a 'second bite of the cherry'.[275] This is arguably contrary to Australia's criminal law tradition which allows defendants to rely on an exception or defence; to the extent that the defence is not successfully argued, criminal guilt ensues.

Additionally, the inclusion of DPAs raises important questions about equality before the law.[276] It is a unique advantage for corporate offenders to have dual means of circumventing criminal liability. Such an advantage is not bestowed on individual defendants, at least not in Australia.[277] While an individual defendant may enter a plea bargain, they are required to make an admission of criminal guilt. Entering a DPA, however, requires no such admission.[278]

Despite these criticisms, it is argued here that the existence of an in-built defence and the availability of a DPA settlement should not be framed as inequitable or undermining Australia's criminal law tradition. Rather, they should be viewed as additional safeguards for the corporate defendant in the context of a particularly onerous offence that reverses the legal and evidentiary burden (interfering with certain fair trial rights).

An additional critique is that DPAs may erode and ultimately replace criminal prosecution, significantly undermining Australia's criminal law tradition.[279] In this regard, it is noted that only five failure to prevent bribery cases in the UK have involved criminal trial and conviction.[280] Conversely, the SFO

[275] Campbell, 'Corporate Liability' (n 48) 65.

[276] Vicky Comino, Submission No 51 to Australian Law Reform Commission, *Review into Australia's Criminal Responsibility Regime* (6 February 2020) 5 ('Submission No 51'). See also David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72(4) *Maryland Law Review* 1295, 1326–7.

[277] It should be noted that DPAs actually have their origins in the US criminal justice system where they are available to individual defendants: see Uhlmann (n 276) 1303.

[278] Serious Fraud Office (UK) and Crown Prosecution Service (UK) (n 254) 11 [6.3].

[279] Monash Transnational Criminal Law Group, Submission No 35 to Australian Law Reform Commission, *Review into Australia's Corporate Criminal Responsibility Regime* (31 January 2020) 5–6.

[280] Swan (n 146) [3.4].

has entered into eight DPAs with separate corporate defendants in relation to failures to prevent bribery.[281]

Because the DPAs are specifically designed to suspend criminal prosecution, to the extent that the DPA is appropriately performed, criminal conviction is avoided. This has provoked scholarly criticisms that DPAs are the corporate version of a '[g]et [o]ut of [j]ail [f]ree [c]ard', 'state-sanctioned "corporate payoffs"' or a mere 'cost of doing business'.[282] This arguably reduces the deterrent impact of a DPA and also the underlying criminal offence to which it applies. Moreover, prosecuting criminal activity involves legal contestation and judicial interpretation of legal principles. Where DPAs supersede criminal prosecution, the development of judicial precedent is impacted, potentially undermining a core feature of Australia's criminal law tradition which ensures legal consistency and predictability.

Contrary to the above critique, evidence from comparative jurisdictions that have had a functioning DPA regime for over a decade offers no statistical support for the assertion that DPAs have superseded or replaced criminal prosecution.[283] Whilst DPAs have grown in popularity, they have not replaced traditional criminal justice settlements such as plea deals nor have they replaced the use of criminal prosecution against major corporate defendants.[284] Rather the evidence suggests that DPAs have emerged as an additional tool which prosecutors may employ in appropriate circumstances.[285]

[281] See above n 273.

[282] Comino, Submission No 51 (n 276) 5.

[283] See, eg, Campbell, 'Revisiting and Re-Situating Deferred Prosecution Agreements in Australia' (n 257) 202; Andrew Matheson et al, 'Guidance from Canada's First Remediation/Deferred Agreement for Foreign Corruption', *McCarthy Tetrault* (Web Page, 14 June 2023) <https://www.mccarthy.ca/en/insights/blogs/terms-trade/guidance-canadas-first-remediation-deferred-prosecution-agreement-foreign-corruption>, archived at <https://perma.cc/CXG6-9Q26>. But see Frederick T Davis, 'Judicial Review of Deferred Prosecution Agreements: A Comparative Study' (2022) 60(3) *Columbia Journal of Transnational Law* 751, 755–6, 759–60.

[284] See Cindy R Alexander and Mark A Cohen, 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution and Plea Agreements' (2015) 52(3) *American Criminal Law Review* 537, 538, 540.

[285] Mark Lewis, 'Deterring Corporate Crime through the Use of Deferred Prosecution Agreements: An Analysis of the Proposed Australian Deferred Prosecution Agreement Regime' (2018) 42(2) *Criminal Law Journal* 76, 76, 78 ('Deterring Corporate Crime').

### *(c) Advantages of the Failure To Prevent Model and DPAs*

Considering the above critiques and counterarguments, it is asserted that the DPA is a pragmatic mechanism which complements, rather than undermines, Australia's criminal law tradition. The availability of DPAs does not necessarily mean that such a mechanism will be used to settle every situation of corporate criminal misconduct. Where the circumstances are appropriate, and at the sole discretion of the prosecutor, a DPA may be negotiated with a corporate defendant.[286]

In the modern slavery context, a DPA may also support restorative outcomes, for example by requiring a corporate defendant to compensate employees or contractors who were not paid a living wage. The DPA may specify an HRDD framework that the corporate defendant must implement under supervision of an independent auditor and may also require cooperation with law enforcement in pursuing the prosecution of individual persons associated with the commission of modern slavery. Importantly, where DPA terms are not met by the corporate defendant to the requisite standard, the prosecutor retains the ability to pursue criminal proceedings.[287] This advances restitutionary and rehabilitative criminal law aims rather than completely undermining the criminal law.[288] A DPA can be seen as a first avenue for remediation rather than a circumvention of the legal framework.

Entering into a DPA in respect of a failure to prevent modern slavery offence may also increase efficiency and decrease costs by enabling parties to produce a statement of agreed facts and negotiate a settlement where appropriate, rather than participate in adversarial criminal contest.[289]

[286] See above n 254 and accompanying text.

[287] Campbell, 'Corporate Liability' (n 48) 59.

[288] Comino, Submission No 51 (n 276) 4.

[289] Michael Yangming Xiao, 'Deferred/Non Prosecution Agreements: Effective Tools To Combat Corporate Crime' (2013) 23(1) *Cornell Journal of Law and Public Policy* 233, 243; Qingxiu Bu, 'The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global Anti-Bribery Compliance' (2021) 22(1) *European Business Organization Law Review* 173, 178–9; Senate Economics References Committee, Parliament of Australia, *Foreign Bribery* (Report, March 2018) 102 [5.38]–[5.39] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/~/media/Committees/economics_ctte/Foreignbribery45th/report.pdf>, archived at <https://perma.cc/LUM3-6FZU> ('*Foreign Bribery*'). However, expediency and cost effectiveness should not offer the only justifications for entering into a DPA. Prosecutors must assess the appropriateness of enforcement actions having regard to the circumstances of each case. Equally, the federal government must equip prosecutors with sufficient resourcing to facilitate criminal prosecution where appropriate: see Xiao (n 289) 250, 252.

It should also be noted that if a DPA is available in respect of a failure to prevent modern slavery offence, this may encourage early self-reporting of modern slavery incidents occurring within supply chains.[290] That is, corporations may be less inclined to conceal human rights abuses where there are alternative settlement options to criminal sanction available.[291]

Finally, research suggests that the use of enforceable undertakings, which are very similar to DPAs, has driven meaningful changes to compliance practices amongst peer corporate stakeholders.[292] Enforceable undertakings are an administrative remedy to address contraventions of legislation administered by certain regulators.[293] Enforceable undertakings may be initiated by either an offender or a regulator. The terms of an enforceable undertaking are negotiated by the parties and the undertaking can be enforced by a court. Arguably, DPAs have the potential to similarly deter infringing conduct to positively shift industry behaviour in support of strong human rights outcomes.

In light of these arguments, it appears that the primary concerns associated with DPAs may be alleviated if a precondition to entering a DPA is that the corporate offender make an admission of wrongdoing.[294] This resolves criticism that DPAs completely undermine the moral authority of criminal investigation and prosecution, as there is a clear and public admission of wrongdoing.[295] It also minimises corporate perceptions of DPAs as merely a 'cost of doing

[290] See *Foreign Bribery* (n 289) 98 [5.23].

[291] Norman Keith, 'Will DPAs Lead to Better White Collar Compliance?' (2017) 64(1–2) *Criminal Law Quarterly* 225, 232–3.

[292] See, eg, Marina Nehme et al, *The General Deterrence Effects of Enforceable Undertaking on Financial Services and Credit Providers* (Report, 2018) 24–7 <https://download.asic.gov.au/media/4916053/18-325mr-deterrence-effects-of-enforceable-undertakings-on-financial-services-and-credit-providers.pdf>, archived at <https://perma.cc/3YH7-8URK>.

[293] For instance, the Australian Securities and Investments Commission ('ASIC') administers the *Australian Securities and Investments Commission Act 2001* (Cth). ASIC is empowered to accept court enforceable undertakings in respect of breaches against this legislation: at ss 93AA–93A. The Australian Competition and Consumer Commission ('ACCC') administers the *Competition and Consumer Act 2010* (Cth) ('*CCA*') and has the ability to accept and enforce in the Federal Court of Australia written undertakings in respect of breaches of the *CCA* (n 293) s 87B. See also Australian Securities and Investments Commission, 'Court Enforceable Undertakings' (Regulatory Guide No 100, November 2021) <https://download.asic.gov.au/media/kyfp0jpa/rg100-published-22-november-2021-20220630.pdf>, archived at <https://perma.cc/N8CV-HYYR>.

[294] Such an approach is aligned with the preventative, restitutionary and restorative aims of Australian criminal law and the preventive potential of DPAs: see Bronitt (n 259) 215, 224.

[295] See, eg, Comino, Submission No 51 (n 276) 5.

business' to placate prosecutorial authorities.[296] Combined with other established benefits, it seems that a failure to prevent offence, accompanied by an HRDD defence and the possibility of a negotiated DPA, establishes a well-rounded suite of legal tools that are compatible with Australia's criminal law tradition and responsive to the unique challenges of transnational corporate regulation and modern slavery risks.

### C *The Failure To Prevent and Australia's System of Corporate Regulation*

The proposed failure to prevent modern slavery offence specifically targets corporations. Therefore, the viability of this offence must also be assessed by reference to its compatibility with Australia's broader system of corporate regulation.

#### 1 *Australia's Approach to Corporate Regulation*

One of Australia's predominant regulatory strategies is responsive regulation, derived from responsive regulation theory ('RTT').[297] This is perhaps most obviously evidenced by the pyramidal enforcement models adopted by Australia's major corporate regulators.[298] It is beyond the scope of this article to critically analyse RRT, though a brief background is necessary. RRT proposes that effective and legitimate corporate regulation is premised on an escalating approach, maximising incentives for early compliance and reserving sanctions for egregious corporate misconduct.[299]

[296] See, eg, ibid.

[297] See *ASIC Performance Review* (n 74) 28 [4.10].

[298] Ibid 28–30 [4.10]–[4.12]. See also 'ASIC's Approach to Enforcement', *Australian Securities and Investments Commission* (Information Sheet) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>; 'Compliance and Enforcement Policy and Priorities', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-policy-and-priorities>, archived at <https://perma.cc/5MAD-TXTR>.

[299] See generally *ASIC Performance Review* (n 74) 28–9 [4.10]–[4.11].

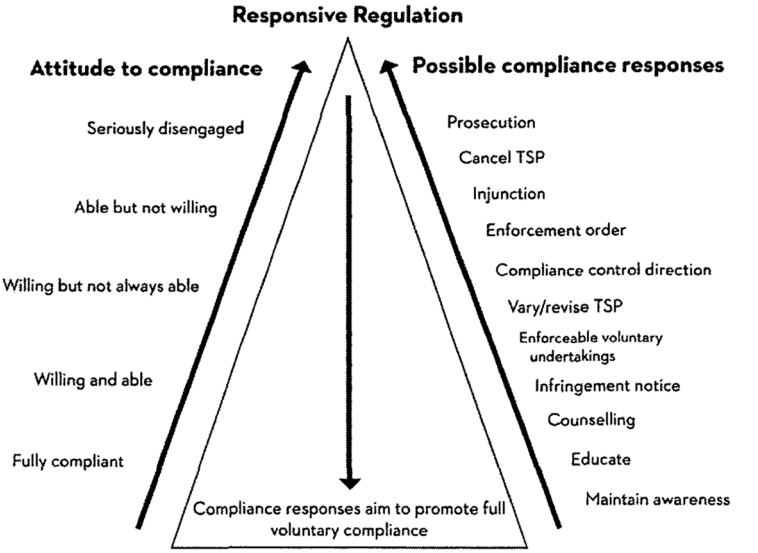


*Figure 1: Australian Office of Transport Safety Responsive Regulatory Philosophy*[300]

RRT emphasises the importance of 'collaborative capacity building': achieving positive regulatory outcomes through support, education, signalling and the use of sanctions (where necessary).[301] The essence of responsive regulation is that regulators should not immediately use compliance responses at the top of the regulatory pyramid. Rather, regulators should escalate response options as necessary.[302]

The proposed failure to prevent modern slavery offence is a criminal offence. The primary compliance responses to breaches of this offence are prosecution and criminal sanction. These compliance responses are, prima facie, at the apex of the regulatory pyramid.[303] It may be argued that recourse to prosecution for failing to prevent modern slavery is discordant with Australia's responsive, co-regulation logic, which reserves criminal sanction for extraordinary situations. However, this article contends that such an argument does not hold up to critical analysis.

[300] Braithwaite (n 74) 483. 'TSP' stands for Transport Safety Plan.

[301] Ibid 475–6.

[302] See ibid 476, 480.

[303] Ibid 483.

The failure to prevent modern slavery offence is accompanied by an HRDD defence. This defence represents an incentive for early compliance with the criminal law. To the extent that a corporation undertakes comprehensive HRDD, this will prevent recourse to criminal prosecution and sanction. This strongly aligns with responsive regulation, maximising incentives for early compliance.[304]

Moreover, the existence of a DPA regime to settle failure to prevent modern slavery offences strongly supports capacity building, a key feature of responsive regulation.[305] DPAs are a negotiated, dialogue-based approach enabling prosecutors to work with corporations to develop their procedures and internal processes, ultimately enhancing positive corporate performance.[306] To the extent that a DPA is not complied with, prosecutors may move up the pyramid and pursue criminal prosecution as per a responsive regulatory approach.[307] In this way, the proposed failure to prevent modern slavery offence is designed in a manner compatible with Australia's prevailing system of corporate regulation. This is a key indicator of the offence's viability.

### 2 *Regulatory Burden on Corporate Stakeholders*

A significant criticism levelled at the failure to prevent model is that imposing liability on a company for third-party criminal misconduct that occurs within its supply chain is unfair, disproportionately burdens corporate stakeholders and ultimately stifles legitimate economic activity (due to delayed and frustrated business transactions).[308] However, this article asserts that the purported regulatory burden is neither inefficient nor unfair and should not be presented as a factor undermining the viability of a failure to prevent modern slavery offence.

First, and under the current *MSA*,[309] there are no positive obligations imposed on corporations to prevent and address modern slavery in supply chains. This is unfortunate given transnational corporations are highly susceptible to

[304] Organisation for Economic Co-Operation and Development, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (Report, 2000) 43 [2.5] <https://www.oecd.org/gov/regulatory-policy/46466287.pdf>, archived at <https://perma.cc/MX8S-GDQA>.

[305] See Braithwaite (n 74) 475–6.

[306] *Proposed Australian DPA Scheme* (n 264) 1; Lewis, 'Deterring Corporate Crime' (n 285) 76.

[307] Braithwaite (n 74) 481.

[308] Lewis, 'Criminalising Corporate Failures' (n 150) 91.

[309] *MSA* (n 13).

being involved in the offence of modern slavery and are most able, economically and organisationally, to aid in its prevention.[310] The Australian Federal Police ('AFP') and Commonwealth Director of Public Prosecutions ('CDPP') are entirely responsible for modern slavery law enforcement.[311] The regulatory compliance burden for modern slavery also falls heavily on the market, with consumers expected to avoid transacting with corporations that have demonstrated a poor human rights record.[312]

In a context where the regulatory compliance burden on corporations in relation to modern slavery is so negligible, any attempt to allocate additional compliance obligations to enhance modern slavery prevention, such as via a failure to prevent modern slavery offence, will invariably be perceived by corporations as unduly burdensome. In reality, this approach more appropriately balances human rights protection between law enforcement, consumers and corporate stakeholders.

Second, in determining whether a failure to prevent modern slavery offence inefficiently allocates regulatory burden to corporate stakeholders, it is pertinent to examine the different resourcing capabilities of corporate defendants and law enforcement. In 2022–23, the CDPP and AFP were allocated an estimated $138.242 million and $1.977 billion in federal funding respectively to dispense their entire mandates, which include the investigation and prosecution of modern slavery.[313]

[310] See Select Committee on the Bribery Act 2010 (UK), *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper No 303, Session 2017–19) 52 [171]; Ford and Nolan (n 6) 27–8, 30. It is noted that recommendation 11 in the *MSA Review* (n 58) is amending the *MSA* (n 13) to provide that a reporting entity must have a due diligence system that meets the requirements mentioned in rules made under s 25 of the *MSA* (n 13): *MSA Review* (n 58) 12. However, Parliament has not yet moved to legislate this recommendation.

[311] See 'Human Trafficking and Slavery', *CDDP: Australia's Federal Prosecution Service* (Web Page) <https://www.cdpp.gov.au/crimes-we-prosecute/human-trafficking-and-slavery> ('Human Trafficking and Slavery'); 'Human Trafficking', *AFP* (Web Page) <https://www.afp.gov.au/what-we-do/crime-types/human-trafficking>, archived at <https://perma.cc/6CSG-VQSN>.

[312] For a more comprehensive overview, see above Part II(C).

[313] Attorney-General's Department (Cth), *Portfolio Budget Statements 2022–23* (Budget Related Paper No 1.2, October 2022) 122, 365 <https://www.ag.gov.au/system/files/2022-10/oct-00-2022-2023-attorney-generals-portfolio.pdf>; 'Human Trafficking and Slavery' (n 311); 'Reports of Human Trafficking and Slavery To Reach AFP New High', *AFP* (Web Page, 30 July 2022) <https://www.afp.gov.au/news-media/media-releases/reports-human-trafficking-and-slavery-afp-reach-new-high>, archived at <https://perma.cc/URA2-VVC9>.

Contrastingly, and by way of example, BHP generated USD65.098 billion,[314] Boohoo Group generated £1.982 billion[315] and Nestlé generated ₣94.424 billion[316] in annual revenue between 2021 and 2022. These corporations are exposed to significant modern slavery risks in their supply chains by virtue of their transnational reach and the nature of their products and services.[317]

Clearly, there is an incredible discrepancy in resourcing capabilities between prosecutors and corporations. Introducing a failure to prevent modern slavery offence, requiring corporations to address modern slavery risks in a preventative manner, cannot be considered an inefficient allocation of the regulatory burden in light of these resourcing disparities.

Third, it is claimed that failure to prevent offences are likely to frustrate or delay business transactions, disproportionately burdening corporate stakeholders.[318] This claim is rejected by this article. Suppliers, subcontractors and subsidiaries within a supply chain are in a position of vulnerability vis-a-vis the corporations that levy their services. Transnational corporations wield significant influence and are at liberty to leverage their status and strong

[314] BHP, *Annual Report 2022: Bringing People and Resources Together To Build a Better World* (Report) 126 <https://www.bhp.com/-/media/documents/investors/annual-reports/2022/220906_bhpannualreport2022.pdf>, archived at <https://perma.cc/24N9-M8AD>.

[315] Boohoo, *Annual Report & Accounts 2022* (Report) 104 <https://www.boohooplc.com/sites/boohoo-corp/files/2022-05/boohoo-com-plc-annual-report-2022.pdf>, archived at <https://perma.cc/94GL-AD8N>.

[316] Nestlé, *Financial Statements 2022* (Report) 72 <https://www.nestle.com/sites/default/files/2023-03/2022-corp-governance-compensation-financial-statements-en.pdf>, archived at <https://perma.cc/9DVG-BXV9>.

[317] See, eg, Sarah Butler, 'US To Investigate Claim of Forced Labour at Boohoo Suppliers', *The Guardian* (online, 3 March 2021) <https://www.theguardian.com/business/2021/mar/02/us-should-consider-ban-on-boohoo-clothing-says-charity>, archived at <https://perma.cc/W693-DQDK>; BHP, *Modern Slavery Statement 2022* (Report, 2022) 9–10 <https://www.bhp.com/-/media/documents/investors/annual-reports/2022/220906_bhpmodernslaverystatement2022.pdf>, archived at <https://perma.cc/KSA7-56GH>; Boohoo, *Modern Slavery Statement* (Report, August 2022) 3 <https://www.boohooplc.com/sites/boohoo-corp/files/2022-boohoo-group-modern-slavery-statement-26-08-48.pdf>, archived at <https://perma.cc/VNQ7-RPDP>; Nestlé, *Modern Slavery and Human Trafficking Report 2021* (Report) 3, 5 <https://au.factory.nestle.com/sites/g/files/pydnoa356/files/2022-07/Nestle%20Modern%20Slavery%20Statement%202021.pdf>, archived at <https://perma.cc/8HVH-8ATF>; Ford and Nolan (n 6) 27–8.

[318] Lewis, 'Criminalising Corporate Failures' (n 150) 91.

socioeconomic position to promote anti-slavery outcomes across their supply chain.[319]

Finally, corporate stakeholders often overlook the benefits of additional regulation. Corporate regulation is a valuable mechanism to '[level] the playing field'.[320] A failure to prevent modern slavery offence sets a clear standard that all corporations must prevent modern slavery in their supply chains, including through their associates. A corporation is unlikely to be economically or commercially disadvantaged for prioritising human rights protection in circumstances where its competitors, at least those subject to the proposed regime, are also required to invest in robust HRDD to prevent and address modern slavery.

In sum, criticisms that the failure to prevent modern slavery offence disproportionately burdens corporate stakeholders do not stand up to robust analysis. Rather, such an offence more appropriately balances the regulatory burden between corporations, law enforcement and the market, demonstrating compatibility with Australia's corporate regulation system.

### 3 *Criminal Law as a Valuable Approach to Corporate Regulation*

Given that corporations have neither a body to be imprisoned nor a soul to be damned,[321] a natural question with which this article must grapple is why the proposed failure to prevent modern slavery provision has been drafted as a criminal offence. Australian corporate regulation is strongly grounded in the civil law, casting doubt on the appropriateness of criminalisation as a tool to regulate corporate failures to prevent modern slavery.[322] However, a criminal failure to prevent modern slavery offence is justified by the following considerations.

[319] Natascha Weisert, 'The UN Guiding Principles for Business and Human Rights as a Framework for Action in Global Textile Supply Chains' in Sarah Margaretha Jastram and Anna-Maria Schneider (eds), *Sustainable Fashion: Governance and New Management Approaches* (Springer, 2018) 11, 15; Shift, *Using Leverage in Business Relationships to Reduce Human Rights Risks* (Report, November 2013) 14 <https://shiftproject.org/wp-content/uploads/2013/11/Shift_leverageUNGPs_2013.pdf>, archived at <https://perma.cc/9MRT-BK35>.

[320] Pietropaoli et al (n 83) 5.

[321] The paraphrased statement, '[c]orporations have neither bodies to be punished, nor souls to be condemned', is attributed to Lord Thurlow LC: John Poynder, *Literary Extracts from English and Other Works: Collected During Half a Century* (John Hatchard & Son) vol 1, 268.

[322] This doubt was probed during a meeting with Professor Justine Nolan (Faculty of Law and Justice, University of New South Wales).

The criminal law imbues 'a formal and solemn pronouncement' of the wider community's moral condemnation in respect of certain conduct.[323] There are serious consequences and stigma associated with a guilty criminal verdict. This stigma is illustrative of the unique expressive value of the criminal law, and it is this expressive value that justifies the imposition of criminal sanction over civil liability in relation to certain offence types.[324] This view aligns with Australia's corporate regulation approach whereby criminal sanction signals strong condemnation reserved for seriously harmful corporate wrongdoing.[325]

Turning to the proposed offence, the prevailing legal, jurisprudential and sociological discourse regarding modern slavery is that this practice constitutes a cruel and morally repugnant human rights violation.[326] Modern slavery unacceptably strips individuals of fundamental freedoms and human dignity.[327] This prevailing view is reflected in the strong participation at the international law level in conventions prohibiting human trafficking, labour exploitation and sexual servitude and the emergence of the prohibition against slavery as a *jus cogens* norm.[328] Additionally and increasingly, the international community is recognising corporate actors' complicity in, and significant contributions to, modern slavery in the private economy as cruel, degrading and requiring strong repudiation.[329]

323 Penny Crofts, 'Criminalising Institutional Failures To Prevent, Identify or React to Child Sexual Abuse' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 104, 117, quoting Henry M Hart Jr, 'The Aims of the Criminal Law' (1958) 23(3) *Law and Contemporary Problems* 401, 405.

324 Gregory M Gilchrist, 'The Expressive Cost of Corporate Immunity' (2012) 64(1) *Hastings Law Journal* 1, 45–56.

325 See Braithwaite (n 74) 482–3.

326 See, eg, Slavery Working Group, Centre for Social Justice, *It Happens Here: Equipping the United Kingdom To Fight Modern Slavery* (Policy Report, March 2023) 4 <https://www.centreforsocialjustice.org.uk/wp-content/uploads/2013/03/CSJ_Slavery_Full_Report_WEB5.pdf>, archived at <https://perma.cc/5NXG-QG88>.

327 *DPP (Cth) v Kannan* [2021] VSC 439, [103] (Champion J); 'Human Rights and Slavery', *End Slavery Now* (Web Page, 2022) <http://www.endslaverynow.org/act/educate/human-rights-and-slavery>, archived at <https://perma.cc/XMK8-5ZNQ>.

328 *UDHR*, UN Doc A/810 (n 162) art 4; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957) arts 1–6; *Forced Labour Convention* (n 115) art 1; *CRC* (n 115) art 32; Jan Klabbers, *International Law* (Cambridge University Press, 2013) 19.

329 Such views are evidenced by the international momentum to create a legally-binding instrument regulating transnational corporate activities to prevent human rights abuses: see, eg,

The prevailing discourse surrounding modern slavery (and corporate failures to prevent such abuses from occurring in transnational supply chains) as conduct deserving denunciation and community condemnation offers a strong, principled rationale for criminalising the corporate failure to prevent modern slavery. That is, failing to prevent modern slavery is an offence worthy of the expressive force and moral voice that the criminal law can provide. It is because of this expressive force that criminal sanction has historically necessitated stronger and more meaningful private governance responses to prevent and address transnational issues, as discussed in Part III. The failure to prevent bribery offence offers an illustrative example whereby the risk of criminal sanction has propelled robust approaches from corporate actors to address bribery across their supply chains.[330]

Finally, the criminal-civil law binary is largely irrelevant in the context of the proposed failure to prevent modern slavery offence. With the benefit of having analysed the operation of the UK's failure to prevent bribery offence over the last decade, it is evident that not all failure to prevent offences result in criminal conviction. In fact, the majority of bribery cases brought under s 7 of the *BAUK* have been settled via DPAs, with criminal prosecution stayed to the extent a corporate defendant complies with negotiated terms (similar to a civil settlement).[331] This article has argued that a failure to prevent modern slavery offence should be introduced alongside an accompanying DPA regime. The availability of a DPA to settle failure to prevent modern slavery offences (where appropriate) generates a hybrid legal approach to modern slavery that dispenses with the perennial criminal-civil law conflict.[332]

### D *Conclusion and Future Research*

This article has grappled with the continuing human rights catastrophe that is modern slavery, a practice that can result in serious physical, psychological,

*Legally Binding Instrument*, UN Doc A/HRC/52/41/Add.1 (n 159) Preamble. See generally *UNGP*, UN Doc A/HRC/17/31 (n 56) principle 1.

330 LeBaron and Rühmkorf (n 18) 25.

331 See Swan (n 146) [3.4], [6.1].

332 It is acknowledged that there are political constraints in proposing a criminal offence for failing to prevent modern slavery, and it may be that the Australian Parliament would only accept such an offence to the extent that it was accompanied by civil rather than criminal penalties. However, the politics of law reform in Australia are well beyond the scope of this article.

emotional and sexual trauma.[333] Equally, it has illuminated the manner in which large, transnational corporations facilitate this human rights abuse. Taking the perspective that Australia's current modern slavery legal framework is insufficient, this article has proposed the introduction of a failure to prevent modern slavery offence, modelled on the UK's failure to prevent bribery offence. The article has provided an original draft provision to this effect, and articulated how the provision should operate in practice, while responding to potential challenges and limitations that may be encountered during drafting.

Finally, the article assessed the viability of the proposed failure to prevent modern slavery offence by reference to three key indicators. First, it found that the proposed offence remedies core deficiencies in Australia's modern slavery legal framework. Second, it found that the proposed offence was compatible with Australia's criminal law tradition, increasing the offence's operability and the likelihood that it will be accepted by Parliament. Third, it found that the proposed offence was compatible with Australia's responsive regulatory approach and that such a criminal offence has a distinctive and highly necessary function within Australia's regulatory context. Taken together, these findings suggest that the proposed failure to prevent modern slavery offence offers a viable mechanism to enhance Australia's modern slavery legal framework.

The proposed failure to prevent modern slavery offence provides one path forward to addressing the continuing challenge of modern slavery in transnational supply chains. However, the limitations of this article should also be noted, allowing opportunity for further academic inquiry. The doctrinal method used in this article did not allow scope for deep exploration of the sociocultural context in which the relevant legal frameworks operate. It would be valuable for future research in the area to deploy a socio-legal methodology combined with field-based research to further explore and confirm the practicality of the proposal. Ultimately, this article has proposed an innovative model to enhance Australia's modern slavery legal framework. It is hoped that the findings of this article will contribute to meaningful legislative engagement and policy debate and stimulate further academic inquiry into this important area of global concern.

[333] Coral J Dando et al, 'Health Inequalities and Health Equity Challenges for Victims of Modern Slavery' (2020) 41(4) *Journal of Public Health* 681, 681.