



Inquiry into establishing a Modern Slavery Act in Australia  
Committee Secretary  
Joint Standing Committee on Foreign Affairs, Defence and Trade  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600

**By email:** [jscfadt@aph.gov.au](mailto:jscfadt@aph.gov.au)

19 May 2017

Dear Committee Secretary

**Inquiry into establishing a Modern Slavery Act in Australia**

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade (**Committee**) in relation to its inquiry into establishing a Modern Slavery Act (**Inquiry**).

ELC is a community legal centre which specialises in employment law. It is the only not-for-profit legal service in Western Australia offering free employment law advice, assistance and representation. ELC assists thousands of callers each year through our Advice Line service and provides several hundred employees each year with further assistance. Through these activities, ELC has had first-hand experience assisting exploited foreign workers, including those displaying indicators of human trafficking.

Please see our submission below. We note that due to limited resources and time constraints we have kept our submission fairly brief. We would be happy to provide further information in relation to the Inquiry and to participate in public hearings in Western Australia should there be any opportunity to do so.

Yours faithfully

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## Summary of recommendations

ELC recommends as follows:

**Recommendation 1:** That consideration be given to whether the procedures set out in the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* should be enshrined in legislation.

**Recommendation 2:** That Australia adopt anti-slavery legislation which reflects the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* issued by the United Nations Office of the High Commissioner for Human Rights.

Such legislation should provide that people displaying indicators of human trafficking must be granted bridging visas and not detained.

**Recommendation 3:** That legislation comparable to the *Modern Slavery Act 2015* (UK) be introduced in Australia, with the improvements set out below.

**Recommendation 4:** That an Anti-Slavery Commissioner be established in Australia.

**Recommendation 5:** That the functions of the Commissioner be strengthened and set out more clearly than in the UK legislation. Regard should be had to other comparable pieces of legislation in which commissioners of this type are established. For example, we query whether the Commissioner should have the power to enter premises, to compel witnesses to answer questions, or to compel individuals or organisations to produce documents and so forth.

**Recommendation 6:** That the powers of the Commissioner to require cooperation from other government agencies be enhanced as compared to the UK legislation. For example, public authorities should not merely be obliged to comply with the Anti-Slavery Commissioner's requests "so far as reasonably practicable".

**Recommendation 7:** That all of the measures in Part 5 of the *Modern Slavery Act 2015* (UK) be adopted (with the necessary changes) including those below.

**Recommendation 8:** That a provision comparable to section 45 of the *Modern Slavery Act 2015* (UK) be introduced in Australian legislation, creating a defence for slavery or trafficking victims where they have been compelled to commit an offence due to slavery or exploitation.

**Recommendation 9:** That Australian modern slavery legislation contain a comparable obligation to that set out in section 52 of the *Modern Slavery Act 2015* (UK) requiring government agencies to notify a particular agency where they have reasonable grounds to believe that a person may be a victim of human trafficking.

Further consideration should be given to which agency would be suitable for receiving such notifications. The relevant agency should have expertise in dealing with victims of human trafficking and be sensitive to the needs of victims.

**Recommendation 10:** That Australia adopt legislation comparable to Part 6 of the *Modern Slavery Act 2015* (UK) requiring large businesses to report on their efforts to identify and eliminate modern slavery from their organisations and supply chains. However, the Australian legislation should mandate certain content in the anti-slavery statements.

**Recommendation 11:** That a publicly accessible repository of anti-slavery statements be established in Australia.

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## 1. The nature, extent and prevalence of modern slavery

*Terms of Reference 1 and 2*

Walk Free estimates that there are approximately 4,300 people in modern slavery in Australia<sup>1</sup> and 45.8 million people in modern slavery worldwide.<sup>2</sup>

According to estimates by the International Labour Organisation (ILO), there are approximately 21 million victims of forced labour worldwide.<sup>3</sup>

In our view, these estimates are unlikely to reflect the true extent and prevalence of modern slavery due to under-reporting by victims. Unfortunately, in our view, the current approach of Australian enforcement agencies in dealing with potential human trafficking situations is likely to further exacerbate this under-reporting. This is discussed further below in the next section.

ELC regularly assists exploited migrant workers and has had some involvement in cases where workers displayed indicators of human trafficking. Below are details of two such cases.

These cases:

- indicate that modern slavery – including forced labour and wage exploitation – is potentially occurring in Western Australia;
- provide some insight into the nature of cases occurring in Western Australia; and
- demonstrate some of the problems with Australia's current response to potential cases of modern slavery and human trafficking. This will be discussed further in the next section.

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### Case study 1: Carabooda agricultural workers

On 3 May 2014, police and other enforcement agencies raided a market garden compound in Carabooda, Western Australia.

A large number of migrant workers were taken into custody – the estimates given in media reports varied, but according to one source, 130 foreign nationals were detained.<sup>4</sup> We understand the large majority of those workers were deported very shortly afterwards.<sup>5</sup>

ELC initially found out about the Carabooda workers through reports in the media (by which time, we understand most of the workers had already been detained and possibly deported). We later received a referral about a smaller number of workers who remained in the workplace, (as they had valid visas). These workers displayed some indicators of human trafficking but did not seem as vulnerable as the workers who were detained and deported. The workers who remained in the workplace were nonetheless very vulnerable and being exploited by the employer.

We provided some advice to the workers who remained and asked the Fair Work Ombudsman to investigate, which they did. We also represented one of the workers in a matter before the

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<sup>1</sup> Walk Free, *Global Slavery Index 2016 – Asia-Pacific Region*, <https://www.globalslaveryindex.org/region/asia-pacific/>.

<sup>2</sup> Walk Free, *Global Slavery Index 2016*, <https://www.globalslaveryindex.org/>.

<sup>3</sup> ILO, *Forced Labour, modern slavery and human trafficking - facts and figures*, [www.ilo.org/global/topics/forced-labour/lang-](http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm)

<sup>4</sup> Walk Free, *Global Slavery Index 2016*, <https://www.globalslaveryindex.org/>.

<sup>5</sup> "Carabooda raids: Numerous charges after WA operation targets organised crime", *ABC News* (online), 5 May 2014, <http://www.abc.net.au/news/2014-05-05/ten-charged-after-carabooda-raids-uncover-foreign-workers/5429852>.

<sup>6</sup> "Illegal migrant workers could help do in criminals involved in human trafficking", *ABC News* (online), 28 July 2015, <http://www.abc.net.au/news/rural/2015-07-28/salvos-warn-human-trafficking-agworkers-is-rife/6651322>; David, Fiona, "Companies must ensure suppliers don't use forced labour", *The Sydney Morning Herald* (online), 5 May 2015, <http://www.smh.com.au/comment/companies-must-ensure-suppliers-dont-use-forced-labour-20150504-ggu52a.html>.

Fair Work Commission.

The workers at Carabooda displayed numerous indicators of human trafficking, as demonstrated in the below table.

Circumstances of Carabooda workers	Relevant human trafficking indicator(s) <sup>6</sup>
<ul style="list-style-type: none"> <li>• “The men, women and children, believed to be from three or four different countries, were taken from a compound in Carabooda early this morning during police raids”<sup>7</sup></li> <li>• “The foreign workers were found in a walled compound”<sup>8</sup></li> <li>• “Australian Federal Police Assistant Commissioner Ramzi Jabbour said:               <ul style="list-style-type: none"> <li>○ “It’s alleged that the syndicate used foreign nationals who entered this country lawfully, many of whom over-stayed their visas and were subsequently illegally harboured by the syndicate,”<sup>9</sup></li> <li>○ “The syndicate allegedly developed a sophisticated money-laundering scheme enabling underpayment to these foreign workers and allegedly avoiding taxation payment”<sup>10</sup></li> </ul> </li> <li>• “WA Police Minister Liza Harvey said on Sunday the workers had been shanghaied into working at low rates and in conditions that other Australian workers would never tolerate.”<sup>11</sup></li> <li>• “The workers were living on the premises in sub-standard conditions and being paid below the award wage.”<sup>12</sup></li> <li>• “WA Police state crime assistant commissioner Craig Ward:               <ul style="list-style-type: none"> <li>○ “These are people who are put</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Come from a place known to be a source of human trafficking – <i>being Malaysia, Hong Kong and Taiwan</i><sup>16</sup></li> <li>• Live in poor or substandard conditions</li> <li>• Be found in, or connected to, a type of location likely to be used for exploiting people</li> <li>• Be in a situation of dependence</li> <li>• Be unfamiliar with the local language</li> <li>• Show signs that their movements are being controlled</li> <li>• Live in groups in the same place where they work and leave those premises infrequently, if at all</li> </ul>

<sup>6</sup> Refer to United Nations, *Recommended Principles & Guidelines on Human Rights & Human Trafficking*, 20 May 2002.

<sup>7</sup> “Raids target organised crime in WA” The West Australian (online) 3 May 2014 <https://thewest.com.au/news/australia/raids-target-organised-crime-in-wa-ng-ya-258922>

<sup>8</sup> “Carabooda raids: Numerous charges after WA operation targets organised crime”, *ABC News* (online), 5 May 2014, <http://www.abc.net.au/news/2014-05-05/ten-charged-after-carabooda-raids-uncover-foreign-workers/5429852>.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> “Ten WA men charged over raids on Carabooda market garden compound” PerthNow (online) 5 May 2014 <http://www.perthnow.com.au/news/western-australia/ten-wa-men-charged-over-raids-on-carabooda-market-garden-compound/news-story/be801d1af8c99e08fc8447cfba48deb7>

<p>through conditions that we wouldn't accept,"<sup>13</sup></p> <ul style="list-style-type: none"> <li>• "Children were found on the premises, but it was not yet clear if they had been working"<sup>14</sup></li> <li>• "There's been workers basically warehoused on this property, in substandard conditions, being paid substandard wages and just appalling conditions and I think a lot of us as consumers are going to find that shocking," [the Police Minister] said."<sup>15</sup></li> </ul>	
<ul style="list-style-type: none"> <li>• "WA Police Minister Liza Harvey said on Sunday the workers had been shanghai'd into working at low rates and in conditions that other Australian workers would never tolerate."<sup>17</sup></li> <li>• "The workers were living on the premises in sub-standard conditions and being paid below the award wage."<sup>18</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Receive little or no payment</li> <li>• Be forced to work under certain conditions</li> </ul>
<ul style="list-style-type: none"> <li>• "Many of them are Malaysian and have overstayed their visas"<sup>19</sup></li> <li>• "Some of them are on legitimate work visas, but they are working in conditions that are not acceptable by Australian standards in any way shape or form. There are also some workers that are not legally allowed to work."<sup>20</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Be afraid of revealing their immigration status</li> <li>• Be distrustful of the authorities</li> </ul>

<sup>16</sup> Interviews with workers.

<sup>13</sup> "Ten WA men charged over raids on Carabooda market garden compound" PerthNow (online) 5 May 2014 <http://www.perthnow.com.au/news/western-australia/ten-wa-men-charged-over-raids-on-carabooda-market-garden-compound/news-story/be801d1af8c99e08fc8447cfba48deb7>

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>17</sup> "Carabooda raids: Numerous charges after WA operation targets organised crime", ABC News (online), 5 May 2014, <http://www.abc.net.au/news/2014-05-05/ten-charged-after-carabooda-raids-uncover-foreign-workers/5429852>.

<sup>18</sup> Ibid.

<sup>19</sup> "Two more Perth raids for crime syndicate" News.com.au (online) 6 May 2014 <http://www.news.com.au/national/breaking-news/two-more-perth-raids-for-crime-syndicate/news-story/f3d7b2c1fe84150c0eae144c13adcdae>

<sup>20</sup> Ibid.

## Case study 2: Pemberton agricultural workers

On 2 March 2017, Taskforce Cadena carried out raids on foreign workers in Pemberton.

We understand that 50 foreign workers were targeted in the raids, of which 45 were detained in immigration detention.<sup>21</sup>

Based on the information available in the government’s media release and in media reports, it appears that the Pemberton workers were exploited and also displayed multiple indicators of human trafficking, as illustrated in the below table.

Circumstances of Pemberton workers	Relevant human trafficking indicator(s) <sup>22</sup>
<ul style="list-style-type: none"> <li>• “[m]ore than 40 of the mostly Malaysian nationals were found at a motel...where they were living in cramped six-bed dormitory-style rooms designed to house just two people”<sup>23</sup></li> <li>• the rooms were “dirty”<sup>24</sup></li> <li>• “[t]wo other homes were also hit in central Pemberton where another 10 workers were taken into custody”<sup>25</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Come from a place known to be a source of human trafficking</li> <li>• Live in poor or substandard conditions</li> <li>• Be found in, or connected to, a type of location likely to be used for exploiting people</li> <li>• Be in a situation of dependence</li> <li>• Be unfamiliar with the local language</li> </ul>
<ul style="list-style-type: none"> <li>• the “labour hire intermediaries and employers [were] suspected of exploiting foreign workers”<sup>26</sup></li> <li>• “[i]t is believed the workers were employed by labour hire intermediaries who supply them to local farmers at market rates”<sup>27</sup></li> <li>• “[j]ust a fraction of that money makes its way into the pockets of the workers, whose pay is also docked by up to \$150 a week by the contractor to cover their accommodation”<sup>28</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Receive little or no payment</li> <li>• Be forced to work under certain conditions</li> </ul>
<ul style="list-style-type: none"> <li>• “27 [of the workers] are said to have overstayed and were working without a</li> </ul>	<ul style="list-style-type: none"> <li>• Be afraid of revealing their immigration status</li> </ul>

<sup>21</sup> Department of Immigration & Border Protection, “50 non-citizens located in major Taskforce Cadena operation in WA” (Media release, 2 March 2017), <http://newsroom.border.gov.au/releases/50-non-citizens-located-in-major-taskforce-cadena-operation-in-wa>.

<sup>22</sup> Refer to United Nations, *Recommended Principles & Guidelines on Human Rights & Human Trafficking*, 20 May 2002.

<sup>23</sup> “Raid on illegal workers in WA’s South West”, *PerthNow* (online), 2 March 2017, <http://www.perthnow.com.au/news/western-australia/raid-on-illegal-workers-in-was-south-west/news-story/103d172e142d4e3e93c3fe8e83786187>; Yahoo and Agencies, “Early morning WA raids find 50 illegal foreign workers crammed into dorm-style rooms”, *7 News* (online), 2 March 2017,.

<sup>24</sup> Grant Taylor, “Rude awakening for sleepy farm workers”, *The West Australian* (online), 2 March 2017, <https://thewest.com.au/news/wa/rude-awakening-for-sleepy-workers-ng-b88399983z>.

<sup>25</sup> “Raid on illegal workers in WA’s South West”, *PerthNow* (online), 2 March 2017, [www.perthnow.com.au; http://www.perthnow.com.au/news/western-australia/raid-on-illegal-workers-in-was-south-west/news-story/103d172e142d4e3e93c3fe8e83786187](http://www.perthnow.com.au/news/western-australia/raid-on-illegal-workers-in-was-south-west/news-story/103d172e142d4e3e93c3fe8e83786187).

<sup>26</sup> Department of Immigration & Border Protection, “50 non-citizens located in major Taskforce Cadena operation in WA” (Media release, 2 March 2017), <http://newsroom.border.gov.au/releases/50-non-citizens-located-in-major-taskforce-cadena-operation-in-wa>.

<sup>27</sup> “Raid on illegal workers in WA’s South West”, *PerthNow* (online), 2 March 2017, [www.perthnow.com.au; http://www.perthnow.com.au/news/western-australia/raid-on-illegal-workers-in-was-south-west/news-story/103d172e142d4e3e93c3fe8e83786187](http://www.perthnow.com.au/news/western-australia/raid-on-illegal-workers-in-was-south-west/news-story/103d172e142d4e3e93c3fe8e83786187).

<sup>28</sup> Ibid.

<p>visa and 23 were working in breach of their student or visitor visa conditions”<sup>29</sup></p> <ul style="list-style-type: none"> <li>• “[F]or one man, the threat of deportation was obviously too much and he darted out through a back door.”<sup>30</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Be distrustful of the authorities</li> </ul>
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ELC contacted government agencies involved in the raids to offer free legal assistance to the workers and enquire about whether the workers might be victims of human trafficking, based on the factors above.

ELC also enquired about whether the workers had been referred to the Australian Federal Police (**AFP**) and expressed our concerns that the workers should not be detained or deported, based on the procedures outlined in the *National Action Plan to Combat Human Trafficking and Slavery 2015-19 (National Action Plan)*.

We understand that interviews were conducted with the workers by at least one government agency, namely Australian Border Force (the operational arm of the Department of Immigration and Border Protection (**Immigration Department**)). Despite the fact that the workers displayed numerous human trafficking indicators – as illustrated above – we understand the workers were not referred to the AFP, as required under the National Action Plan.

Further, we understand that these workers were detained almost immediately after the raids.<sup>31</sup> Media reports indicated that the workers were “facing deportation”.<sup>32</sup> It is unclear whether these workers have now been deported, as government officials refused to confirm this. The issues raised by this case study are discussed further below.

<sup>29</sup> “Immigration raids find 50 ‘illegal workers’ in Western Australia”, *SBS* (online), 2 March 2017, <http://www.sbs.com.au/yourlanguage/punjabi/en/article/2017/03/02/immigration-raids-find-50-%E2%80%98illegal-workers%E2%80%99-western-australia>.

<sup>30</sup> Grant Taylor, “Rude awakening for sleepy farm workers”, *The West Australian* (online), 2 March 2017, <https://thewest.com.au/news/wa/rude-awakening-for-sleepy-workers-ng-b88399983z>.

<sup>31</sup> Department of Immigration & Border Protection, “50 non-citizens located in major Taskforce Cadena operation in WA” (Media release, 2 March 2017), <http://newsroom.border.gov.au/releases/50-non-citizens-located-in-major-taskforce-cadena-operation-in-wa>.

<sup>32</sup> “Raid on illegal workers in WA’s South West”, *PerthNow* (online), 2 March 2017, [www.perthnow.com.au](http://www.perthnow.com.au/news/western-australia/raid-on-illegal-workers-in-was-south-west/news-story/103d172e142d4e3e93c3fe8e83786187); <http://www.perthnow.com.au/news/western-australia/raid-on-illegal-workers-in-was-south-west/news-story/103d172e142d4e3e93c3fe8e83786187>; “Immigration raids find 50 ‘illegal workers’ in Western Australia”, *SBS* (online), 2 March 2017, <http://www.sbs.com.au/yourlanguage/punjabi/en/article/2017/03/02/immigration-raids-find-50-%E2%80%98illegal-workers%E2%80%99-western-australia>.

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## 2. The need for a Modern Slavery Act in Australia

*Terms of Reference 3, 4, 6 and 7*

### 2.1. Weaknesses in Australia's current response to slavery and human trafficking

In ELC's view, there are a number of weaknesses in Australia's current response to slavery and human trafficking. Some of the key problems are as follows:

- There have been numerous recent cases involving migrant workers who were potentially victims of human trafficking, in which the workers were almost immediately detained after raids occurred and were either deported or at least "facing deportation"<sup>33</sup> because they did not have valid visas. This occurred regardless of the fact that they displayed multiple indicators of human trafficking.

For example, we understand this occurred in both the Carabooda and the Pemberton matters discussed above (case studies 1 and 2). We understand this is occurring elsewhere in Australia as well.<sup>34</sup>

Australia's current approach to potential slavery and trafficking cases does not reflect international best practice.

The *Recommended Principles and Guidelines on Human Rights and Human Trafficking* issued by the United Nations Office of the High Commissioner for Human Rights (**UN OHCHR Recommended Principles**), state that:<sup>35</sup>

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.
2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.
3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.
- ...
7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

- Some of the principles in the UN OHCHR Recommended Principles are reflected in the National Action Plan. However, it appears that Australian government agencies do not always adhere to the National Action Plan. Further, the National Action Plan is not legally binding.

Under the National Action Plan, the AFP, the Commonwealth Director of Public Prosecutions are obliged to ensure that trafficked people are not detained, charged or prosecuted for "status-related offences"<sup>36</sup> – i.e. offences that are a direct consequence of

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<sup>33</sup> We use the term "facing deportation" here because government officials refused to confirm whether some of the relevant workers were indeed deported.

<sup>34</sup> See e.g. "Border Force crackdown: Illegal blueberry farm workers detained on NSW Mid North Coast", *ABC News* (online), 24 August 2016, <http://www.abc.net.au/news/2016-08-24/illegal-workers-detained-on-woolgoolga-blueberry-farm/7782064>.

<sup>35</sup> Office of the High Commissioner for Human Rights, *Recommended Principles & Guidelines on Human Rights and Human Trafficking*, Text presented to the Economic and Social Council as an addendum to the report for the United Nations High Commissioner for Human Rights (E2002/68/Add.1)

<sup>36</sup> *National Action Plan to Combat Human Trafficking and Slavery 2015-19*, Action item 59.

their situation as trafficked persons.<sup>37</sup>

Additionally, the Immigration Department is required to refer a person who displays indicators of human trafficking to the AFP.<sup>38</sup> If the person is “unlawful” and assessed by the AFP as a suspected trafficked person, then the person must be granted a bridging visa and not detained.<sup>39</sup>

We are aware of several instances where Australian government agencies do not appear to have adhered to the National Action Plan. For example, as discussed earlier, in the Pemberton matter above, we understand that Border Force officials interviewed a large number of foreign workers who displayed multiple indicators of human trafficking, but did not refer the matter to the AFP, as required under the National Action Plan.

As noted above, the National Action Plan is not legally binding. In our view, in order to ensure that government agencies comply with any obligations regarding potential victims of slavery, such obligations need to be enshrined in legislation instead.

**Recommendation 1: That consideration be given to whether the procedures set out in the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* should be enshrined in legislation.**

**Recommendation 2: That Australia adopt anti-slavery legislation which reflects the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* issued by the United Nations Office of the High Commissioner for Human Rights.**

**Such legislation should provide that people displaying indicators of human trafficking must be granted bridging visas and not detained.**

- Where government agencies take the above approach and promptly detain and deport potential victims of human trafficking after conducting raids, this makes it far less likely that any such victims will participate in any criminal investigation or prosecution.
- Based on our research, it appears that there have been no convictions for modern slavery offences in Western Australia.
- The potential victims of human trafficking therefore appear to be the ones bearing the brunt of the enforcement action, whereas the criminal syndicates who organise visa fraud and the exploitation of foreign workers seem to have largely escaped liability to date.
- The approach by enforcement agencies is highly likely to create fear amongst potential human trafficking victims and discourage such victims from reporting unlawful conduct to authorities, contrary to the stated intention of the Employment Minister, Michaelia Cash, in a recent media release.<sup>40</sup>
- This in turn is likely to make it harder to stamp out modern slavery, since there is little to deter rogue employers from relying on a business model involving modern slavery and such situations are likely to go vastly under-reported.

<sup>37</sup> See Office of the High Commissioner for Human Rights, *Recommended Principles & Guidelines on Human Rights and Human Trafficking*, Text presented to the Economic and Social Council as an addendum to the report for the United Nations High Commissioner for Human Rights (E2002/68/Add.1), Guideline 5.

<sup>38</sup> *National Action Plan to Combat Human Trafficking and Slavery 2015-19*, Action item 59.

<sup>39</sup> *Ibid.*

<sup>40</sup> Senator the Hon Michaelia Cash, “Cracking down on dodgy bosses” (Media release, 1 March 2017), <https://ministers.employment.gov.au/cash/cracking-down-dodgy-bosses>.

The above propositions are supported by the UN OCHCHR Recommended Principles, which note that:<sup>41</sup>

Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended.

More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand.

An adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms.

- While we understand that the Fair Work Ombudsman and Immigration Department recently agreed to a particular protocol around the cancellation of temporary visas,<sup>42</sup> this agreement only addresses the above problems to a limited extent.

The Fair Work Ombudsman and Immigration Department have agreed that a person's temporary visa will not be cancelled if:<sup>43</sup>

- the temporary work visa holder had an entitlement to work as part of their visa;
- the visa holder believes they have been exploited at work;
- the visa holder has reported their circumstances to the Fair Work Ombudsman;
- the visa holder commits to abiding by visa conditions in the future; and
- there is no other basis for visa cancellation (e.g. national security, character, health or fraud grounds).

Although it is encouraging that some steps are being taken to improve the rights of visa holders who have been exploited, this agreement has two significant limitations:

- It only applies if the workers have reported their circumstances to the Fair Work Ombudsman.

In our experience, many migrant workers are unaware of who the Fair Work Ombudsman is. It seems highly likely that potential victims of human trafficking will not be aware that they can get assistance from the Fair Work Ombudsman and will not be aware that their visa might not be cancelled if they have reported their circumstances to the Fair Work Ombudsman.

Any workers who do not report their circumstances to the Fair Work Ombudsman will not be protected by this agreement.

- It only applies to workers on temporary visas who had an entitlement to work as part of their visa.

Many exploited migrant workers may not have visas with an entitlement to work or any visas at all. This may not be the fault of the workers themselves. For example, the employer or recruiter may have claimed to have obtained the appropriate work visa for the worker before they entered the country and the worker later discovers

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<sup>41</sup> Office of the High Commissioner for Human Rights, *Recommended Principles & Guidelines on Human Rights and Human Trafficking*, Text presented to the Economic and Social Council as an addendum to the report for the United Nations High Commissioner for Human Rights (E2002/68/Add.1)

<sup>42</sup> Migrant Workers' Taskforce, Chair's Public Statement January 2017 meeting, <https://www.employment.gov.au/chairs-public-statement-january-2017-meeting>.

<sup>43</sup> Ibid.

that they have been working illegally.<sup>44</sup>

These limitations are therefore unlikely to improve significantly the problems outlined above.

## **2.2. Other reasons to introduce a Modern Slavery Act in Australia**

In addition to addressing some of the weaknesses in Australia's current approach to dealing with potential cases of human trafficking and modern slavery, there are numerous other reasons to introduce a Modern Slavery Act in Australia.

For example:

- It would put the onus on relevant companies to examine to what extent modern slavery is occurring in their supply chains and to consider how to address it, rather than allowing companies to claim that they had no knowledge of the practices of their contractors;
- It would ensure that Australia's legislation reflected community standards and growing public pressure for companies to conduct their businesses ethically and sustainably;
- It would show leadership in the Asia-Pacific region;
- It would improve consistency in worldwide corporate reporting of efforts to tackle modern slavery.

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<sup>44</sup> See e.g. United Nations Office on Drugs and Crime, *The role of recruitment fees and abusive and fraudulent recruitment practices of recruitment agencies in trafficking in persons*, Vienna 2015, [https://www.unodc.org/documents/human-trafficking/2015/15-05035\\_ebook-Recruitment\\_Fees.Agencies.pdf](https://www.unodc.org/documents/human-trafficking/2015/15-05035_ebook-Recruitment_Fees.Agencies.pdf), pp. 10,12,16.

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### 3. Provisions in the UK legislation and whether similar or improved measures should be introduced in Australia

*Terms of Reference 3 and 5*

As discussed above, there are numerous weaknesses in the way that human trafficking and slavery cases are currently dealt with in Australia. There are also many other good reasons for Australia to strengthen the existing legislative framework.

The *Modern Slavery Act 2015* (UK) (**Modern Slavery Act**) provides a useful example of how Australia's legislative framework could be strengthened. In our view, comparable legislation should be introduced in Australia, with some improvements, as set out below.

**Recommendation 3: That legislation comparable to the *Modern Slavery Act 2015* (UK) be introduced in Australia, with the improvements set out below.**

#### 3.1. Anti-Slavery Commissioner

The UK's Modern Slavery Act creates the role of an Anti-Slavery Commissioner who "must encourage good practice in... the prevention, detection, investigation and prosecution of slavery and human trafficking offences; and the identification of those offences."<sup>45</sup>

In carrying out this role, the Commissioner is empowered to do the following things (the list is not exhaustive):<sup>46</sup>

- (a) make reports;
- (b) make recommendations to any public authority about the exercise of its functions;
- (c) undertake or support the carrying out of research;
- (d) provide information, education or training;
- (e) consult public authorities, voluntary organisations and other persons; and
- (f) co-operate with or work jointly with public authorities, voluntary organisations and other persons.

Additionally, the Commissioner has the power to request that a public authority co-operate with the Commissioner in any way that he or she considers necessary for the purposes of the Commissioner's functions.<sup>47</sup> Where a public authority receives such a request, it must "so far as reasonably practicable" comply with the request.<sup>48</sup>

In our view, an Anti-Slavery Commissioner should exist in Australia. By providing an independent Commissioner with the specific task of considering Australia's responses to modern slavery and providing that person with some ability to hold other government agencies to account, this would potentially assist in addressing some of the problems identified in section 2 above.

For example, the Commissioner could recommend that a public authority carry out its functions in a particular way and thereby seek to address the fact that potential victims of human trafficking seem to have borne the brunt of enforcement action to date, whereas employers and others involved in facilitating modern slavery seem to have largely escaped liability.

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<sup>45</sup> *Modern Slavery Act 2015* (UK) s 41(3).

<sup>46</sup> *Ibid* s 41(3).

<sup>47</sup> *Ibid* s 43(1).

<sup>48</sup> *Ibid* s 43(2).

Having said that, the powers of the Commissioner in the UK legislation seem to be relatively weak and, in our view, do not go far enough.

For example, the Commissioner's duty to "encourage good practice" in human trafficking seems fairly vague. Additionally, the power to "make reports" and "make recommendations" are reasonably weak if the Commissioner's recommendations are not binding.

In our view, the functions of the Commissioner should be strengthened and set out more clearly. Regard should be had to other comparable pieces of legislation in which commissioners of this type are established. For example, should the Commissioner have the power to enter premises, to compel witnesses to answer questions, or to compel individuals or organisations to produce documents and so forth?

Another weakness of the UK legislation is that other public authorities are merely obliged to comply with the Anti-Slavery Commissioner's requests "so far as reasonably practicable". This appears to give other agencies a fair degree of leeway not to comply with the Commissioner's requests. In our view, in order for the Commissioner to be effective, his or her powers to require cooperation from other government agencies should be enhanced.

**Recommendation 4: That an Anti-Slavery Commissioner be established in Australia.**

**Recommendation 5: That the functions of the Commissioner be strengthened and set out more clearly than in the UK legislation. Regard should be had to other comparable pieces of legislation in which commissioners of this type are established. For example, we query whether the Commissioner should have the power to enter premises, to compel witnesses to answer questions, or to compel individuals or organisations to produce documents and so forth.**

**Recommendation 6: That the powers of the Commissioner to require cooperation from other government agencies be enhanced as compared to the UK legislation. For example, public authorities should not merely be obliged to comply with the Anti-Slavery Commissioner's requests "so far as reasonably practicable".**

## 3.2. Protection of victims

The Modern Slavery Act contains a number of measures in Part 5 which seek to protect victims of human trafficking and slavery.

These measures are consistent with the UN OHCHR Recommended Principles which emphasise that protecting trafficking victims is paramount. For example, as noted above, the UN OCHR Recommended Principles state as follows:<sup>49</sup>

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.

In our view, measures which protect trafficking victims are what is most lacking in Australia's current regulatory framework, as discussed above.

We recommend that all of the measures set out in Part 5 of the Modern Slavery Act be adopted in Australia (with the necessary changes), including the key provisions below.

**Recommendation 7: That all of the measures in Part 5 of the *Modern Slavery Act 2015* (UK) be adopted (with the necessary changes), including those below.**

### 3.2.1. Defence for slavery or trafficking victims who commit an offence

Section 45 of the Modern Slavery Act provides that slavery or trafficking victims are not guilty of an offence where that offence is committed because the person was compelled to do so due to slavery or exploitation.

This provision was designed not only to protect victims of human trafficking from being prosecuted for offences but also to "provide further encouragement to victims to come forward and give evidence without the fear of being convicted of offences that they were compelled to commit".<sup>50</sup>

This provision is consistent with the UN OHCHR Recommended Principles, which state:<sup>51</sup>

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

As far as we are aware, no comparable provision exists in Australian legislation – the closest equivalent of which we are aware is Action Item 59(1) in the National Action Plan, which provides that Australian government agencies must "ensure trafficked people are not detained, charged or prosecuted for status-related offences, or held in immigration detention."

However, as noted above, the National Action Plan is not legally binding and does not always appear to have been adhered to.

In our view, a provision comparable to section 45 of the Modern Slavery Act should be introduced in Australian legislation to protect human trafficking victims from being prosecuted for offences which they were compelled to commit.

<sup>49</sup> Office of the High Commissioner for Human Rights, *Recommended Principles & Guidelines on Human Rights and Human Trafficking*, Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E2002/68/Add.1).

<sup>50</sup> Explanatory Notes to the Modern Slavery Bill as brought from the House of Commons on 5 November 2014, para 211.

<sup>51</sup> Office of the High Commissioner for Human Rights, *Recommended Principles & Guidelines on Human Rights and Human Trafficking*, Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E2002/68/Add.1). See also item 5 of Guideline 4.

**Recommendation 8: That a provision comparable to section 45 of the *Modern Slavery Act 2015* (UK) be introduced in Australian legislation, creating a defence for slavery or trafficking victims where they have been compelled to commit an offence due to slavery or exploitation.**

### **3.2.2. Duty to notify about suspected victims of slavery or human trafficking**

Under section 52 of the UK's Modern Slavery Act, certain government agencies are obliged to notify the Secretary of State where they have reasonable grounds to believe that a person may be a victim of human trafficking.

In commentary on section 52 of the Modern Slavery Act, the Home Office notes:<sup>52</sup>

Given the hidden nature of modern slavery, it is likely that only a small proportion of those who were victims of modern slavery...were encountered by public authorities... Reporting cases...not only provides victims of modern slavery with access to a range of support, it assists in developing our understanding of modern slavery, which can be used to improve our operational response and support for victims...

Section 52 of the act will further improve identification of victims by creating a statutory duty for specified public authorities to notify the Secretary of State where they have reasonable grounds to believe that a person may be a victim of slavery or human trafficking. This will help raise awareness of modern slavery and build a more comprehensive picture of the nature and scale of modern slavery, to inform the law enforcement response.

In our view, there is a need for an equivalent, legally binding provision in Australia. As discussed above, there are currently some notification obligations on Australian government agencies under the National Action Plan. For instance, the Department of Immigration is obliged under Action item 59 to refer persons displaying indicators of human trafficking to the AFP's human trafficking team so that they may assess whether someone is a victim of human trafficking. However, as discussed above, the National Action Plan is not legally binding and does not always appear to have been adhered to.

If such a provision were to be introduced in Australia, it would be necessary to consider which agency should be responsible for receiving such notifications. In our view, the relevant agency should have expertise in dealing with victims of human trafficking and be sensitive to the needs of victims. It is possible that this agency could be the AFP, as is the case under the National Action Plan, but further consideration should be given to this point.

By introducing an equivalent provision into Australian legislation, this may help in ensuring that victims of trafficking were identified and that they received appropriate support and assistance, rather than being detained and deported. This in turn would potentially help improve awareness of modern slavery and may increase the likelihood of successful prosecutions against the criminal syndicates that are involved in modern slavery.

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<sup>52</sup> Home Office, Circular 025/2015: duty to notify the Home Office of suspected victims of modern slavery, 2 November 2015, <https://www.gov.uk/government/publications/circular-025-2015-duty-to-notify-the-home-office-of-suspected-victims-of-modern-slavery/circular-025-2015-duty-to-notify-the-home-office-of-suspected-victims-of-modern-slavery>.

**Recommendation 9: That Australian modern slavery legislation contain a comparable obligation to that set out in section 52 of the *Modern Slavery Act 2015* (UK) requiring government agencies to notify a particular agency where they have reasonable grounds to believe that a person may be a victim of human trafficking.**

**Further consideration should be given to which agency would be suitable for receiving such notifications. The relevant agency should have expertise in dealing with victims of human trafficking and be sensitive to the needs of victims.**

### 3.3. Transparency in supply chains

#### 3.3.1. Requirement to publish anti-slavery statements

Part 6 of the UK's Modern Slavery Act requires large businesses to report on their efforts to identify and eliminate modern slavery within their organisations and supply chains. In our view, Australia should adopt comparable legislation.

Such legislation would send a message to businesses that they are responsible for ensuring that they do not use or benefit from modern slave labour. It would also make use of the power that business has to withdraw demand for slave labour, removing the profitability of modern slavery.

One key improvement which, in our view, should be made to any Australian legislation is that certain content in the anti-slavery statements should be mandatory. Section 54(5) of the Modern Slavery Act provides that organisations "may" include certain information in their anti-slavery statements. However, this allows organisations too much scope to provide vague and aspirational statements about what they have done to ensure that slavery is not taking place in their organisations or supply chains.

**Recommendation 10: That Australia adopt legislation comparable to Part 6 of the *Modern Slavery Act 2015 (UK)* requiring large businesses to report on their efforts to identify and eliminate modern slavery from their organisations and supply chains.**

**However, the Australian legislation should mandate certain content in the anti-slavery statements.**

#### 3.3.2. Statement repository

Any Australian legislation which provides for companies to publish anti-slavery statements should also provide for the creation and maintenance of a publicly accessible repository of anti-slavery statements.

The repository would ensure that businesses are held accountable for their duty to eliminate slave labour from their organisations and supply chains, and their duty to properly report their efforts to do so.

The repository would also ensure that the progress of efforts to eliminate slavery is measurable. It would enable consumers to make informed choices between competing businesses based on the extent to which slavery is prevalent in their supply chains and the extent to which they are taking steps to eliminate slavery from their business.

**Recommendation 11: That a publicly accessible repository of anti-slavery statements be established in Australia.**