Australia's Proposed 'Failure to Prevent Modern Slavery' Offence

Dr Irene Pietropaoli

In July 2026, the Australian Government announced its intention to introduce a new criminal offence of 'failure to prevent modern slavery'. The proposed offence would apply to companies with annual consolidated revenue above A$100 million where they fail to prevent modern slavery in their supply chains subject to a defence where the company can demonstrate that it took 'reasonable steps' to prevent the conduct. The Government also announced its intention to introduce civil penalties and associated enforcement powers for non-compliance with existing obligations under the Australia's Modern Slavery Act 2018. If enacted, the legislation would represent the first attempt by any jurisdiction to adapt the 'failure to prevent' model (developed in anti-bribery and economic crime legislation) to modern slavery in global supply chains.

The Attorney General department launched a consultation (that closed on 25 September) to inform the details of the proposed offence and enforcement options, including the possible introduction of a Deferred Prosecution Agreement (DPA) scheme for relevant modern slavery offences and remedies for victims. This insight summaries BIICL's response to the consultation. **Read here the full consultation brief.**

Why a failure to prevent offence?

Australia's Modern Slavery Act follows a disclosure model, requiring large businesses to identify and report modern slavery risks in their operations and supply chains, modelled on the UK Modern Slavery Act 2015. The statutory review of the Act and subsequent recommendations by the Office of the Australian Anti-Slavery Commissioner (OAASC) concluded that its disclosure-based model has resulted in uneven reporting quality, limited enforcement and insufficient evidence of meaningful changes in corporate behaviour. The Government's proposal responds directly to the Act's current limitations. In January 2026, the OAASC called for mandatory risk-based due diligence and a mechanism for declaring high-risk products, services or industries. Australia's proposal comes at a moment when several jurisdictions, including the UK, are reconsidering the limits of transparency legislation. The OAASC expressed concerns that jurisdictions without stronger measures may become destinations for goods excluded elsewhere, and it welcomed the government's failure to prevent modern slavery proposal.

Corporate criminal liability has traditionally depended on attributing the conduct and mental state of individuals to the company. This approach can be poorly suited to multinational businesses operating through layered networks of subsidiaries, contractors, labour providers and suppliers. Modern slavery may occur several tiers removed from the lead company, while corporate decision-making is dispersed and senior management may neither commit nor authorise the underlying abuse. A failure-to-prevent offence adopts a different approach. Rather than requiring prosecutors to establish that the company, through its senior management, committed or authorised the underlying offence, it creates a distinct organisational offence focused on whether the company took reasonable measures to prevent the relevant misconduct.

The rationale is preventive as well as attributive. As we have previously argued, the failure-to-prevent model shifts attention towards the adequacy of an organisation's systems for preventing foreseeable harms, rather than requiring enforcement authorities to reconstruct senior-management knowledge or intent within complex corporate structures. The relevant organisational failure may lie in inadequate risk assessment, governance, due diligence, monitoring or other preventive measures. This makes the model potentially well suited to global supply chains, where the underlying exploitation may be committed by persons outside the lead company and traditional principles of attribution may not capture failures at the organisational level.

Australia already has a close domestic analogue. Section 70.5A of the Criminal Code creates a corporate offence of failure to prevent foreign bribery where an associate commits foreign bribery for the profit or gain of the corporation, unless the corporation can establish that it had adequate procedures designed to prevent the commission of the offence. The concept of an associate extends to officers, employees, agents, contractors, subsidiaries, controlled entities and persons otherwise performing services for or on behalf of the corporation. Official Australian guidance accordingly focuses on organisational prevention, including top-level responsibility, risk assessment, communication and training, reporting, and monitoring and review. Academic proposals for a failure to prevent modern slavery offence have similarly presented the model as a means of grounding corporate criminal responsibility in organisational failure rather than solely in the identification of an individual corporate decision-maker's guilty mind.

The corporate harm nexus

Existing failure to prevent offences in Australia and the UK generally rely on an 'associated person' model. Australia's failure-to prevent foreign bribery offence, for example, applies where an associate commits foreign bribery for the corporation's profit or gain. Modern slavery presents a different problem. Exploitation may occur several tiers upstream, through independent suppliers, subcontractors, labour-hire companies or recruitment agencies that are commercially connected to a lead company without necessarily performing services 'for or on behalf of' it. Simply importing the associated-person model may exclude precisely the relationships in which modern slavery is frequently found.

The opposite solution (criminal liability) whenever a corporation is 'directly linked' to modern slavery through a business relationship might go too far. Under the UN Guiding Principles on Business and Human Rights, direct linkage can exist even where a company neither caused nor contributed to an adverse impact. It is an appropriate basis for due diligence responsibilities, but not necessarily for criminal guilt. A more differentiated approach is needed. Criminal liability could arise where a corporation caused or materially contributed to modern slavery, or where an associated person committed the offence in connection with obtaining a profit, cost advantage, supply advantage or other business benefit for the corporation. Contribution is especially important: purchasing practices such as unrealistic prices or production deadlines, delayed payments or sourcing models dependent on exploitative labour can themselves contribute to conditions in which modern slavery occurs. Direct linkage should remain legally significant, but primarily as a trigger for due diligence, prevention and mitigation rather than automatically for criminal liability.

Reasonable steps defence

The proposed 'reasonable steps' defence is fundamental to this model. Its purpose should be to incentivise effective prevention. Policies, contractual clauses, supplier codes, audits and certification may provide relevant evidence but should not themselves establish the defence. Instead, reasonable steps should be assessed through risk-based human rights due diligence, considering governance, risk identification, worker engagement, purchasing practices, leverage, grievance mechanisms, monitoring and remediation. Nor should companies be expected to map every supplier at every tier. A risk-based approach should concentrate resources on the most salient risks. But lack of visibility cannot become a defence where a company failed to investigate foreseeable high-risk areas. There is another potential perverse incentive: companies may become reluctant to investigate or disclose modern slavery for fear that finding it demonstrates failure. The opposite principle should apply. Effective due diligence sometimes finds abuse because it works. Detection, appropriate disclosure, remediation and cooperation should therefore provide evidence about the effectiveness of a company's systems.

Finally, criminal liability should not stand alone. The proposed offence should form part of a wider architecture encompassing human rights due diligence, modern slavery reporting, administrative enforcement and, where appropriate, high-risk product measures or forced-labour import restrictions. Deferred prosecution agreements could also play a role, particularly by encouraging disclosure, cooperation and organisational reform. But modern slavery differs from many economic crimes for which DPAs were designed: there are identifiable people whose rights have been seriously violated. Any DPA regime should place victim-centred remediation at its core, potentially requiring compensation, repayment of wages and recruitment fees, changes to purchasing practices and reform of corporate due diligence systems.

Author:

Dr Irene Pietropaoli, Senior Fellow in Business and Human Rights and Director, Business and Human Rights Forum, BIICL

URL: https://www.biicl.org/blog/137/australias-proposed-failure-to-prevent-modern-slavery-offence

© 2026 BIICL | A company limited by guarantee | Registered in England No. 615025 | Registered Charity No. 209425