British Institute of International and Comparative Law

BIICL's response to the Australia government's consultation on a proposed new criminal offence for the failure to prevent modern slavery

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Question 1 Model

What are your views on the proposed legislative approach to the core components of a failure to prevent modern slavery offence?

A failure-to-prevent model is suitable for serious human rights harms occurring through complex corporate structures and global supply chains because it focuses liability on an organisation's failure to take reasonable preventive measures, rather than requiring prosecutors to establish that senior management authorised or intended the underlying exploitation. It can address an important accountability gap while incentivising companies to develop effective systems for identifying and preventing modern slavery.

The proposed offence should, however, be designed carefully. In particular, the legislation should distinguish between: (i) the underlying modern slavery conduct; (ii) the connection between that conduct and the corporation's products, services or business relationships; and (iii) the corporation's failure to take reasonable preventive measures. The existence of modern slavery somewhere in a multi-tiered supply chain should not, by itself, establish corporate criminal liability. Equally, the offence should not be limited so narrowly that it applies only where the person committing the underlying offence is an employee, agent or other person formally acting 'for or on behalf of' the corporation. Such a model risks excluding precisely the independent supplier, subcontractor and labour-provider relationships through which modern slavery frequently occurs.

The appropriate connection with the underlying conduct

This is the central design question. Existing 'failure to prevent' offences in Australia and the UK generally rely on an 'associated person' nexus. Australia's failure to prevent foreign bribery offence, for example, applies where an associate commits foreign bribery for the profit or gain of the corporation. That model provides an important domestic precedent, but it cannot simply be transplanted into the modern slavery context.

Bribery and fraud frequently involve employees, agents or intermediaries acting for the organisation. Modern slavery is structurally different. Exploitation may occur several tiers upstream, through independent suppliers, subcontractors, labour-hire companies or recruitment agencies that are commercially connected to the corporation but cannot readily be characterised as performing

services 'for or on behalf of' it. A conventional associated-person test would therefore provide legal certainty but risks being materially under-inclusive.

At the same time, there should be caution against making mere connection to a product or service sufficient for criminal liability. Under the UN Guiding Principles on Business and Human Rights (UNGPs), an enterprise may be 'directly linked' to an adverse human rights impact through a business relationship even where it neither caused nor contributed to that impact. Direct linkage is an appropriate threshold for triggering human rights due diligence responsibilities, but it is not necessarily an appropriate minimum threshold for criminal liability. Using direct linkage alone as the basis for criminal conviction would raise questions of remoteness, foreseeability, legal certainty and proportionality, particularly in complex multi-tiered supply chains.

Criminal liability should arise where there is a sufficiently close relationship between the corporation and the underlying exploitation, including where:

- the corporation caused the modern slavery conduct;
- the corporation's own conduct materially contributed to the modern slavery conduct; or
- the modern slavery offence was committed by an associated person in connection with obtaining or retaining a profit, gain, cost advantage, supply advantage or other business benefit for the corporation.

'Contribution' is particularly important in the supply-chain context. A corporation should not be insulated from liability merely because the immediate perpetrator is an independent supplier where the corporation's own commercial practices materially contributed to the conditions giving rise to exploitation. Relevant conduct could include, depending on the circumstances, purchasing practices involving prices incompatible with lawful labour costs, unreasonable production deadlines, repeated last-minute changes to orders, delayed payments, or knowingly maintaining a sourcing or labour model that depends upon exploitative practices.

By contrast, where a corporation is only directly linked to modern slavery through a business relationship and has not caused or contributed to it, that relationship should trigger robust due diligence, prevention, mitigation and remediation responsibilities, but should not automatically establish criminal liability. This distinction would allow the legislation to reflect the UNGP framework while recognising the different functions and standards of criminal law and human rights due diligence.

The 'reasonable steps' defence

The inclusion of a defence based on reasonable preventive measures is integral to the logic of a failure to prevent offence: liability should incentivise effective prevention rather than impose strict liability whenever modern slavery is discovered in a supply chain.

The defence should, however, be framed as 'reasonable steps in all the circumstances' and interpreted through risk-based human rights due diligence. It should not create a compliance safe harbour. The existence of policies, contractual clauses, supplier codes, social audits or certification schemes should be relevant evidence, but should not in themselves establish the defence.

Guidance should make clear that reasonable steps are context-specific and proportionate to the severity and likelihood of the risk, the corporation's relationship to the relevant business partner, and the leverage reasonably available to it. Relevant considerations should include effective governance and senior-level oversight; risk identification and assessment; meaningful engagement with workers and other affected rightsholders; responsible purchasing practices; contractual and commercial leverage; grievance and reporting mechanisms; monitoring; remediation; and processes for escalating, suspending or responsibly terminating relationships where prevention or mitigation is unsuccessful.

The defence should also recognise the realities of multi-tiered supply chains. Corporations cannot reasonably be expected to possess complete information about every supplier at every tier. Conversely, lack of visibility should not itself constitute a defence where the corporation has failed to take reasonable steps to understand parts of its supply chain presenting significant modern slavery risks. A risk-based approach should therefore prioritise the most severe risks rather than requiring exhaustive mapping or auditing of every business relationship.

Guidance should also discourage automatic disengagement when modern slavery is identified. Depending on the circumstances, responsible engagement, remediation and increased leverage may better protect affected workers than immediate termination. The assessment of reasonable steps should therefore focus on outcomes for people at risk of exploitation, rather than simply on whether the corporation removed a problematic supplier from its supply chain.

Relationship with human rights due diligence

The offence should sit within, rather than substitute for, a broader mandatory human rights due diligence framework. The criminal offence and human rights due diligence perform related but distinct functions. Criminal law should address sufficiently serious organisational failures connected to underlying modern slavery offences. A wider due diligence obligation should require companies to identify, prevent, mitigate and account for adverse human rights impacts across their operations and business relationships, including situations in which they are directly linked to harm without causing or contributing to it.

This distinction is important. A failure-to-prevent offence alone may create strong incentives in relation to modern slavery but does not provide a comprehensive framework for addressing human rights risks throughout corporate operations and value chains. The proposed offence should therefore complement the mandatory risk-based due diligence framework recommended by the Office of the Australian Anti-Slavery Commissioner, rather than being treated as an alternative to it. The same applies to product-based measures. High-risk product, service or sector declarations and, where appropriate, forced-labour import restrictions can address situations in which goods are connected to forced labour even though the evidential threshold for corporate criminal liability cannot be established. Different regulatory mechanisms can therefore address different relationships between corporations, products and exploitation.

Guidance

Detailed statutory guidance should be published following consultation with businesses, trade unions, civil society, affected workers and survivors, and should be aligned with the UNGPs and OECD risk-based due diligence standards. Guidance should include practical examples illustrating

when a corporation causes, contributes to or is directly linked to modern slavery; when suppliers or labour intermediaries may constitute associated persons; how purchasing practices may contribute to exploitation; and what reasonable preventive measures look like in different risk contexts. The case studies accompanying the consultation could provide the foundation for this approach. There should also be an appropriate implementation period between enactment and commencement, accompanied by final guidance sufficiently in advance of the offence taking effect. This is particularly important because the purpose of the legislation should be to change corporate behaviour before exploitation occurs, rather than primarily to generate prosecutions after harm has occurred.

Are there any other components that should be included within the legislation, or alternative approaches considered, to clearly establish its scope, application and interaction with existing modern slavery and broader legislative frameworks?

Additional matters should be addressed expressly in the legislation or accompanying framework to ensure that the offence operates coherently with Australia's existing modern slavery regime and broader developments in human rights due diligence.

First, the legislation should clarify the relationship between the 'failure to prevent' offence, modern slavery reporting and any future mandatory human rights due diligence obligation. These mechanisms perform different but complementary functions. Reporting promotes transparency; human rights due diligence establishes an ongoing process for identifying, preventing, mitigating and accounting for adverse impacts; and the proposed offence attaches criminal consequences to specified failures to prevent particularly serious conduct. Compliance with reporting requirements under the Modern Slavery Act 2018 (Cth) should therefore neither establish the reasonable-steps defence nor operate as a safe harbour from liability. Conversely, the framework should enable corporations with effective risk-based human rights due diligence systems to rely on relevant elements of those systems as evidence of reasonable prevention. This distinction would also support the development of a coherent Australian framework in which the criminal offence addresses the most serious organisational failures while mandatory human rights due diligence, administrative enforcement and reporting address a wider range of corporate relationships with adverse human rights impacts.

Second, the territorial scope of the offence should be addressed expressly. Modern slavery connected with Australian corporations will frequently occur outside Australia. The effectiveness of the offence would therefore be substantially reduced if its application depended upon the underlying exploitation occurring within Australia. The legislation should clearly specify the circumstances in which overseas modern slavery conduct can constitute the underlying conduct for the failure-to-prevent offence, while ensuring an appropriate nexus with Australia and consistency with the territorial principles applicable under the Criminal Code. Clear rules are preferable to leaving this central question to implication or subsequent litigation.

Third, the legislation should address corporate groups and changes in corporate structure. Modern supply chains frequently operate through subsidiaries and other controlled entities, while corporate restructuring, outsourcing and the use of intermediaries can alter the formal relationship between the lead corporation and the entity closest to the exploitation. The legislation should be designed so

that liability turns on the substantive relationship with the relevant conduct and the corporation's preventive responsibility, rather than being readily avoided through changes in contractual or corporate form. At the same time, membership of the same corporate group should not, without more, automatically establish criminal liability.

Fourth, the framework should expressly recognise remediation and corporate responses to identified modern slavery. A well-functioning human rights due diligence system may identify modern slavery precisely because the corporation has invested in effective detection mechanisms. Discovery of modern slavery should therefore not itself be treated as evidence that reasonable steps were absent. The corporation's response after identifying harm should be relevant to enforcement decisions and, where appropriate, to the assessment of its prevention framework. Relevant considerations include protecting affected workers, preventing retaliation, cooperating with appropriate authorities, providing or enabling remediation, addressing the conditions that allowed the exploitation to occur and taking measures to prevent recurrence.

Fifth, the legislation and enforcement policy should avoid creating disincentives to investigation and disclosure. A failure to prevent offence could unintentionally encourage corporations to minimise internal investigations or disclosure if identifying modern slavery is perceived as increasing criminal exposure. The framework should instead reward effective detection, timely escalation, appropriate self-reporting, cooperation and remediation, without creating immunity merely because a corporation self-reports.

Sixth, consideration should be given to responsible purchasing practices as part of the legislative framework. A corporation's own commercial decisions (including pricing, payment terms, production deadlines, changes to orders and labour-sourcing models) may create or exacerbate pressures associated with exploitation. This should be reflected in the reasonable-steps framework and guidance. Otherwise, the legislation risks encouraging corporations to transfer compliance obligations down the supply chain while leaving their own contribution to modern slavery risk unexamined.

Seventh, the relationship with other enforcement mechanisms should be made explicit. Criminal prosecution should form part of a wider regulatory architecture that may include civil and administrative enforcement, modern slavery reporting, procurement measures, high-risk product or sector measures, and potentially forced-labour import restrictions. These mechanisms should not necessarily use identical thresholds. Conduct that is directly linked to a corporation through a business relationship may appropriately trigger due diligence, regulatory or market-access consequences even where the more demanding nexus required for criminal liability is not established.

Finally, the legislation should provide for periodic review based on evidence of its operation. Given the innovative nature of applying failure to prevent liability to modern slavery in complex supply chains, the Government should review the regime after an appropriate period. The review should consider prosecutions and enforcement outcomes, as well as changes in corporate prevention practices, detection and reporting of modern slavery, remediation for affected workers, impacts on smaller suppliers, disengagement from high-risk markets, and any evidence of risk displacement or excessive compliance formalism. Attention should be paid to whether the corporate-harm nexus is

capturing the relationships in which companies can realistically exercise preventive responsibility without extending criminal liability too remotely.

Question 2 Impact

What measures could be adopted to minimise costs for affected corporations, while ensuring the offence remains effective in achieving its objective?

The most effective way to minimise unnecessary compliance costs is to ensure that the offence is implemented through a risk-based, proportionate and internationally aligned approach. The principal costs for corporations are likely to arise from uncertainty, duplication of existing compliance processes, excessive supply-chain mapping, repeated auditing, and the cascading of requirements onto smaller suppliers. These costs can be reduced without weakening the preventive objective of the offence.

First, the offence and accompanying guidance should be aligned with existing modern slavery reporting requirements and internationally recognised human rights due diligence standards, namely the UNGPs, the OECD Guidelines, and the CSDDD. Corporations already operating human rights due diligence systems should be able to integrate the 'reasonable steps' defence into those systems rather than establish a separate compliance architecture solely for the criminal offence. Guidance should identify where existing processes may satisfy relevant elements of the defence.

Second, implementation should be explicitly risk-based rather than exhaustive. Corporations should not be expected to achieve complete visibility over every entity at every tier of a global supply chain. Such an expectation would be both costly and unrealistic and could divert resources away from the most serious risks. Instead, companies should be expected to prioritise areas where the severity and likelihood of modern slavery are greatest, having regard to factors such as geography, sector, workforce vulnerability, recruitment practices and known risks associated with specific sourcing models.

Third, government should avoid creating incentives for excessive reliance on social auditing and certification. If companies understand the defence primarily as requiring documentary evidence that every supplier has been audited, the offence may generate substantial compliance costs without corresponding improvements for workers.

Fourth, the Government should provide clear and practical guidance before commencement, including case studies illustrating what may constitute reasonable steps in different circumstances. Guidance should address the extent of expected supply-chain visibility, the treatment of indirect suppliers, indicators that should trigger enhanced due diligence, the use of leverage, appropriate responses where abuse is identified, and circumstances in which continued engagement, suspension or termination may be appropriate. The Government could also develop common tools and resources, particularly for high-risk sectors, including risk indicators, model contractual provisions, guidance on responsible purchasing practices and information on recognised high-risk products, sectors and geographies. Where possible, companies should be encouraged to collaborate in addressing systemic risks. Such collaboration may be particularly valuable where several large corporations source from the same suppliers or labour providers.

Impact on suppliers and smaller businesses

Attention should be paid to the potential for compliance costs to be transferred from corporations subject to the offence to smaller businesses within their supply chains. Large corporations may respond to the offence by imposing extensive questionnaires, audit requirements, contractual warranties and indemnities on suppliers. This could create disproportionate burdens for small and medium-sized enterprises, including suppliers outside Australia, without necessarily improving modern slavery prevention. Guidance should make clear that reasonable steps cannot simply consist of transferring responsibility contractually down the supply chain. Companies should be expected to consider how their own commercial practices affect modern slavery risk, including pricing, payment terms, production deadlines, forecasting and changes to orders. A preventive model should discourage the use of contractual compliance mechanisms that place unrealistic obligations on suppliers while leaving purchasing practices unchanged.

Reporting and disclosure

The introduction of criminal liability may also affect companies' incentives to disclose modern slavery risks. There is a potential tension between encouraging companies to identify and report exploitation and creating a concern that such disclosure may increase exposure to investigation or prosecution. The legislation should avoid creating incentives for companies to report less information in their annual modern slavery statements or to avoid investigating suspected cases.

The identification of modern slavery should not be treated as evidence that the corporation failed to take reasonable steps. On the contrary, effective due diligence should be capable of identifying cases of exploitation. A company that detects abuse, reports it appropriately, cooperates with authorities and takes effective steps to protect and remedy affected workers should be in a stronger position to demonstrate that its preventive systems were functioning than a company whose systems consistently report no incidents despite operating in high-risk environments.

Unintended consequences

Some unintended consequences should be anticipated. One is defensive disengagement. Corporations may seek to reduce criminal exposure by terminating relationships with suppliers, sectors or countries perceived as high risk. Immediate disengagement may sometimes be necessary, but in other circumstances it can harm workers, eliminate corporate leverage and drive production into less visible parts of the economy. The reasonable steps framework should recognise responsible engagement and remediation as potentially appropriate responses and should assess disengagement in light of its foreseeable human rights consequences.

A second risk is compliance formalism: the development of increasingly elaborate policies, contractual clauses and audit systems designed primarily to demonstrate the defence rather than prevent exploitation. The statutory test and guidance should focus on whether measures were appropriate and effective considering the relevant risks.

A third is risk displacement. Companies may restructure supply chains, use intermediaries or reduce direct contractual relationships in ways that make exploitation less visible while formally increasing distance from the underlying conduct. The design of the offence should avoid rewarding such restructuring.

Finally, there is a risk of disproportionate effects on smaller suppliers. The legislation should encourage large corporations to support suppliers in improving labour standards and due diligence capacity rather than simply transferring compliance obligations and costs onto them.

Additional measures

The Government should consider the following measures:
alignment of the offence, the Modern Slavery Act reporting regime and any future mandatory human rights due diligence requirements around a common risk-based methodology;
publication of detailed guidance and sector-specific case studies well before commencement;
recognition of existing effective human rights due diligence systems, without creating automatic safe harbours based on certification or formal compliance;
government-supported risk information and tools for high-risk sectors and products;
encouragement of responsible industry collaboration and information-sharing, subject to appropriate competition and confidentiality safeguards;
explicit guidance against indiscriminate cascading of compliance costs to smaller suppliers;
proportionate expectations concerning supply-chain mapping, prioritising severe risks rather than exhaustive tracing of all tiers;
protection of incentives to identify, disclose and remediate modern slavery, including clarity that detection of abuse is not itself evidence of failure; and
monitoring after commencement of the effects of the offence on suppliers, workers, reporting practices, referrals to authorities and corporate sourcing decisions.

Question 3 Support

What support might corporations need to effectively understand and comply with the proposed offence and defence, including to help business more broadly take action to combat modern slavery?

Guidance on the reasonable steps defence

The Attorney-General should publish statutory or other authoritative guidance explaining the factors relevant to determining whether a corporation took 'reasonable steps'. The guidance should be sufficiently detailed to provide legal certainty while preserving the flexibility inherent in a risk-based standard. It should explain that reasonable steps are context-specific and should be assessed having regard to the severity and likelihood of modern slavery risks, the nature and complexity of the corporation's operations and supply chains, the corporation's connection to the relevant risk, and the leverage reasonably available to it.

Guidance should address the full prevention process, including governance and senior-level responsibility; identification and assessment of risks; prioritisation of the most severe risks; due diligence on suppliers, labour providers and other relevant business relationships; meaningful engagement with workers and other affected stakeholders; responsible purchasing practices; grievance and reporting mechanisms; monitoring and verification; use and development of leverage; remediation; and decisions concerning continued engagement, suspension or responsible disengagement.

Attention should be given to multi-tiered supply chains. Guidance should clarify what corporations are reasonably expected to know about indirect suppliers and when identified risk factors should trigger deeper investigation. It should make clear that risk-based due diligence does not require

exhaustive mapping or auditing of every entity in every tier. A corporation should not be able to rely on lack of supply-chain visibility where it has failed to take reasonable steps to investigate areas in which serious modern slavery risks were foreseeable. Guidance should also explain what will generally not be sufficient. Supplier codes of conduct, contractual warranties, social audits and certification schemes may form part of reasonable prevention measures but should not automatically establish the defence.

Alignment with international standards

The guidance should be expressly informed by the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, including the OECD's risk-based due diligence framework and relevant sectoral guidance. Guidance should also take account of comparable mandatory regimes in other jurisdictions where appropriate – for example failure to prevent offences guidance in the UK.

Coherence between Australian guidance

The introduction of the offence provides an opportunity to rationalise Australia's existing guidance. Guidance issued by the Attorney-General's Department should explain the criminal-law architecture of the offence and defence. Guidance from the Australian Anti-Slavery Commissioner can play a complementary role in explaining effective modern slavery prevention, risk-based due diligence and good corporate practice. Existing guidance developed by the NSW Anti-slavery Commissioner provides a further useful resource, particularly in relation to reasonable steps and responsible responses to identified risks.

There is also a useful precedent in Australia's existing guidance on failure to prevent foreign bribery. Its emphasis on top-level responsibility, risk assessment, proportionate prevention procedures, communication and training, reporting, and monitoring and review demonstrates how principles-based guidance can accompany a failure-to-prevent offence. Those elements can be adapted to modern slavery, while recognising that human rights due diligence requires additional attention to affected workers, business relationships, purchasing practices and remediation.

Practical tools and sector-specific support

Case studies are particularly important because concepts such as reasonable steps, contribution, leverage and responsible disengagement are highly context dependent. The Government and Australian Anti-Slavery Commissioner should therefore consider developing sector-specific guidance for industries presenting significant modern slavery risks. Practical resources could include risk indicators, due diligence checklists, examples of responsible purchasing practices, guidance on worker engagement, model escalation processes and examples showing how corporations should respond when modern slavery indicators are identified. The Government should also provide examples distinguishing situations in which a corporation causes, contributes to, or is directly linked to exploitation. Case studies should address difficult scenarios involving indirect suppliers, recruitment agencies, labour-hire arrangements, subcontracting and sourcing from high-risk jurisdictions.

Supporting detection, reporting and remediation

An important function of guidance will be to avoid creating perverse incentives around detection. The discovery of modern slavery should not itself be treated as evidence that prevention procedures

were inadequate. Guidance should make this explicit and explain that the corporation's response (including protection of affected workers, remediation, cooperation with relevant authorities and measures to prevent recurrence) is relevant to assessing the effectiveness of its prevention framework. Businesses will also require clear protocols concerning when and how suspected modern slavery should be referred to law enforcement, regulators, the Anti-Slavery Commissioner or specialist victim-support organisations. Guidance should address confidentiality, retaliation risks, worker safety and the vulnerabilities of migrant workers. Engagement with affected workers should be victim-centred and should avoid interventions that inadvertently expose them to immigration, employment or security risks.

Implementation framework

Guidance should be published sufficiently in advance of the offence taking effect to allow corporations to review and adapt existing systems. Government should provide webinars, sector-specific training and practical implementation resources, particularly during the transitional period. Guidance should subsequently be reviewed considering enforcement experience, developments in international standards and evidence concerning the effectiveness of corporate prevention measures. Engagement with businesses, trade unions, civil society organisations, survivors and affected workers should inform this process.

Question 4 DPA scheme

What are the benefits and limitations of a DPA scheme in addressing failure to prevent modern slavery offences?

A Deferred Prosecution Agreement (DPA) scheme could complement a failure to prevent modern slavery offence, if it is subject to strong safeguards and designed around the distinctive nature of modern slavery harms. A DPA should be an additional enforcement mechanism, with its principal value in incentivising early disclosure, cooperation, remediation and improvements to corporate prevention systems.

Potential benefits

A significant advantage of a DPA scheme is its potential to encourage corporations to identify and disclose suspected modern slavery rather than conceal it. Modern slavery in complex supply chains can be difficult for enforcement authorities to detect independently. Relevant evidence may be held by corporations and suppliers across multiple jurisdictions and may include procurement records, audit findings, worker interviews, recruitment records and internal communications. An enforcement framework that provides meaningful incentives for self-reporting and cooperation may increase the likelihood that serious exploitation is identified and addressed.

Experience with DPAs in the UK provides some support for this rationale. UK DPAs can impose financial penalties and compensation requirements as well as obligations to implement or improve corporate compliance programmes. UK prosecutorial guidance also treats corporate cooperation and self-reporting as relevant to whether a DPA is appropriate, while preserving the possibility of prosecuting responsible individuals. The UK's experience with failure to prevent offences demonstrates the potential interaction between organisational liability and DPAs as mechanisms for encouraging corporate self-reporting and improvements to prevention systems.

A DPA may also allow remedies that are more closely tailored to preventing recurrence than a financial penalty following conviction alone. Conditions could require a corporation to strengthen governance, revise procurement and purchasing practices, improve due diligence and worker-engagement mechanisms, address deficiencies in recruitment practices, exercise greater leverage over suppliers, provide periodic reporting and, where appropriate, submit to independent monitoring.

Victim-centred remediation

Modern slavery differs in an important respect from many economic crimes for which DPAs have traditionally been used. The underlying offence involves serious violations of the rights of identifiable people. The design of a DPA scheme should place victims and survivors at its centre.
Where appropriate, DPA conditions should include measures to remediate harm suffered by workers. These could include compensation, reimbursement of recruitment fees and unlawfully withheld wages, return of identity documents, access to appropriate support services and measures to address retaliation or continuing vulnerability. Remediation should be designed regarding the circumstances and wishes of affected persons.

A DPA should also address the conditions that contributed to the exploitation. Where corporate purchasing or sourcing practices played a role, remediation conditions should be capable of requiring changes to the corporation's own practices, including pricing, lead times, payment practices, contracting arrangements or use of labour intermediaries.

Relationship with self-reporting and human rights due diligence

The identification of modern slavery should not itself be regarded as evidence that a corporation failed to take reasonable steps. Effective human rights due diligence may uncover exploitation that weaker systems fail to detect. A corporation that identifies abuse through effective due diligence, acts promptly to protect affected workers, reports serious conduct appropriately, cooperates with authorities and takes measures to prevent recurrence should be treated differently from a corporation that ignored warning signs, concealed information or maintained ineffective prevention systems.

The availability of a DPA could reinforce this distinction by providing an incentive for genuine self-reporting and cooperation. However, eligibility should not depend exclusively on voluntary self-reporting. Serious modern slavery may come to light through workers, trade unions, civil society organisations, journalists or enforcement authorities. A corporation should not necessarily be excluded from consideration for a DPA merely because it was not the first actor to identify the conduct, although the timing and quality of its subsequent cooperation should be relevant.

Limitations and safeguards

The principal risk of a DPA scheme is that it could be perceived, or operate in practice, as allowing large corporations to avoid criminal accountability through negotiated settlements. DPAs should be reserved for cases in which there is a clear public-interest justification for resolving the corporate offence without proceeding to conviction. Relevant considerations should include the seriousness and duration of the underlying exploitation; the corporation's connection to the harm; whether senior management knew of or ignored relevant risks; the quality of prevention systems before the offence;

the speed and completeness of self-reporting; cooperation with investigators; steps taken to protect and remediate affected workers; previous misconduct; and the extent of organisational reform.

Prosecution should ordinarily remain available where there is evidence of deliberate or systematic exploitation, concealment, repeated misconduct, obstruction of an investigation, retaliation against workers or complainants, or serious failures that continued after the corporation became aware of the risk. A DPA with the corporation should not prevent investigation or prosecution of individuals responsible for underlying modern slavery offences.

Transparency and independent oversight

DPAs should be subject to independent judicial approval, with the decision-maker required to be satisfied that the agreement is in the interests of justice and that its terms are fair, reasonable and proportionate. Agreements should ordinarily be published together with an agreed statement of facts and reasons for approval, subject to necessary protections for victims, witnesses and related criminal proceedings.

Public information should explain the corporation's conduct, the deficiencies in its prevention systems, the remedial measures required and the consequences of non-compliance. There should also be effective monitoring of compliance. Where a corporation materially breaches the agreement, prosecution should be capable of being resumed.

What terms and conditions should be available for inclusion in a DPA scheme?

A DPA scheme should permit a broad and flexible range of terms, tailored to the circumstances of the offence and the corporation's connection to the underlying modern slavery. The legislation should provide a non-exhaustive list of permissible conditions rather than prescribe a uniform set of requirements for every case.

The terms should serve four related objectives: i) remedying harm to affected persons; ii) ensuring accountability; iii) correcting the organisational failures that permitted the conduct to occur; and iv) preventing recurrence.

First, remediation of affected workers and other victims should be a central component of any DPA where remediation is feasible and appropriate. Conditions should be capable of requiring compensation for harm suffered; payment of unpaid wages and other employment entitlements; reimbursement of recruitment fees or other debts connected with exploitation; return of passports or identity documents; access to legal, medical, psychological or other support; and other measures appropriate to restoring affected persons to the position they would have occupied absent the abuse, so far as possible.

Second, a DPA should be capable of requiring remediation of the corporation's own systems and practices. Conditions might require changes to governance and senior-management oversight; modern slavery risk assessment and human rights due diligence processes; supplier and labour-provider due diligence; grievance mechanisms; worker engagement; recruitment practices; monitoring and escalation procedures; and processes for responding to identified exploitation. These conditions should extend beyond conventional compliance systems where the corporation's commercial practices contributed to the risk. A DPA therefore be capable of requiring changes to purchasing practices, including unrealistic pricing or production deadlines, late payment, last-minute

changes to orders, procurement incentives or contracting arrangements that contributed to conditions in which exploitation became more likely.

Third, DPAs should permit financial sanctions that are effective, proportionate and dissuasive. Relevant terms could include a financial penalty, disgorgement of profits or economic benefits associated with the offending conduct, payment of reasonable investigation and enforcement costs and, where appropriate, contributions towards remediation programmes.

Fourth, agreements should be capable of imposing cooperation and disclosure obligations. These could require the corporation to provide relevant documents and information, preserve evidence, cooperate with continuing investigations and provide reasonable assistance concerning investigations of individuals or other entities implicated in the underlying conduct.

Fifth, a DPA should be capable of requiring independent monitoring and periodic reporting where justified by the seriousness or systemic nature of the deficiencies identified. Monitoring should assess whether agreed reforms are being implemented and effective, rather than simply whether additional policies and procedures have been adopted. Independent monitors should have appropriate expertise in modern slavery, human rights due diligence and, where relevant, the sector concerned.

Sixth, agreements should contain clear timeframes, measurable obligations and consequences for non-compliance. The corporation could be required to report periodically on implementation and, where appropriate, demonstrate improvements against specified indicators. Material breach should permit enforcement action and, ultimately, resumption of prosecution.

Conditions that require safeguards

Three safeguards are important. First, entering into a DPA should not provide immunity to individuals responsible for trafficking, forced labour or other underlying offences. Nor should it necessarily prevent investigation of other corporations or suppliers implicated in the conduct. Second, a DPA should not require affected workers to waive private claims as a condition of receiving remediation. Compensation provided through the DPA should therefore be coordinated with, but should not automatically extinguish, independent rights to civil redress. Third, confidentiality should be limited. Subject to protection of victims, witnesses and ongoing proceedings, the DPA, an agreed statement of facts and the reasons for approving it should ordinarily be public.

Question 5 Civil remedies

What existing civil remedies would be available to victims and survivors seeking redress in connection with a failure to prevent modern slavery offence?

Four principal avenues are relevant: i) civil claims in tort; ii) workplace remedies, particularly under the Fair Work Act 2009 (Cth); iii) reparation orders associated with criminal proceedings; and iv) state and territory victims-of-crime financial assistance schemes. Depending on the circumstances, other causes of action may also be available. H,owever, the Modern Slavery Act 2018 (Cth) itself does not create a civil cause of action or compensation mechanism for victims of modern slavery.

Tort claims

A victim may potentially pursue a claim under existing principles of tort law, depending on the circumstances. Negligence may be relevant where a defendant owed the claimant a duty of care, breached that duty and thereby caused compensable harm. Other intentional torts may potentially apply depending on the conduct involved. These causes of action were not designed specifically to address modern slavery or harms occurring through global corporate supply chains. Significant obstacles may arise in establishing the necessary duty, breach, causation and corporate responsibility, particularly where exploitation was perpetrated by an independent supplier or other entity rather than the Australian corporation itself. Claims involving exploitation occurring overseas may create additional procedural and substantive difficulties, including questions of applicable law and jurisdiction, access to evidence, limitation periods, litigation costs and the practical ability of workers located outside Australia to bring proceedings. The existence of a commercial relationship between an Australian corporation and the immediate perpetrator of modern slavery does not itself establish civil liability under existing tort law.

Employment and workplace remedies

Where modern slavery involves employment-related exploitation within the scope of Australian workplace legislation, victims may have access to remedies under the Fair Work Act 2009 (Cth). These may be particularly relevant to unpaid or underpaid wages and other employment entitlements. Depending on the circumstances, proceedings may result in recovery of unpaid entitlements and other remedies. These mechanisms address only particular dimensions of modern slavery. Recovery of unpaid wages, for example, does not necessarily compensate a victim for the wider physical, psychological and dignitary harms associated with forced labour, servitude, debt bondage or trafficking. Workplace legislation may also provide limited assistance where the exploitation occurred overseas in the supply chain of an Australian corporation.

Reparation associated with criminal proceedings

Existing Commonwealth criminal law provides mechanisms through which reparation may be ordered following conviction for certain federal offences. This can provide an avenue for compensation in cases successfully investigated and prosecuted. Its effectiveness as a remedy for modern slavery victims is nevertheless necessarily linked to the criminal justice process. Access may depend upon an offender being identified, prosecuted and convicted.

State and territory 'victims of crime' schemes

Victims and survivors may also be eligible for state and territory 'victims of crime' financial assistance or compensation schemes. The Australian Government has specifically reviewed the availability of these schemes to victims and survivors of modern slavery. Eligibility, coverage and available financial assistance differ between jurisdictions. These schemes also generally focus on crimes occurring within the relevant jurisdiction and are not designed to establish the civil responsibility of corporations for modern slavery within global supply chains.

Are these remedies adequate? If not, what enhancements could be considered?

The remaining remedial gap

The availability of these mechanisms should not obscure the central issue raised by the proposed offence. Existing Australian law does not provide a general civil cause of action enabling a victim to

seek a remedy from a corporation merely because the corporation failed to take reasonable steps to prevent modern slavery connected with its supply chain. This distinction may become particularly important if the proposed criminal offence deliberately extends corporate responsibility beyond relationships already captured by conventional tort, employment or attribution principles. It would be possible for the law to recognise a corporation's organisational failure to prevent modern slavery for criminal law purposes while leaving the people harmed by that failure without a corresponding, practically accessible avenue for obtaining a remedy from the corporation.
The existing literature has identified this problem. Research mapping Australian remedies for modern slavery survivors has identified four principal pathways (reparation orders following conviction, state and territory 'victims of crime' schemes, Fair Work Act remedies and tort claims) while concluding that existing mechanisms remain difficult to access and do not provide a comprehensive pathway to material redress for modern slavery survivors. This is significant in relation to modern slavery occurring outside Australia but connected to the operations or supply chains of Australian corporations. Existing victim compensation and workplace mechanisms are predominantly designed around harms occurring within Australia, while transnational tort litigation can present substantial legal, evidential and financial barriers. The Government should assess not only whether a remedy theoretically exists under current law, but whether it is effective, accessible and capable of addressing the full range of harms caused by modern slavery, including where exploitation occurs in overseas supply chains.

Possible enhancements

The introduction of a failure to prevent offence provides an opportunity to consider whether this remedial gap should be addressed through a specific statutory civil cause of action. Such a cause of action could enable victims and survivors to seek redress where a corporation failed to comply with a legally defined duty to prevent modern slavery and that failure caused or contributed to the harm suffered. Criminal and civil liability perform different functions and may legitimately employ different thresholds. Criminal liability requires particular attention to legal certainty, fault and the appropriate proximity between the corporation and the underlying offence. A civil cause of action should instead be designed principally around effective access to remedy, while maintaining an appropriate causal connection between the corporation's failure and the harm.

In developing such a mechanism, the Government could draw on the approach increasingly adopted in mandatory human rights due diligence legislation, under which breach of a legally defined due diligence obligation may give rise to civil liability where the breach causes damage. This would also broadly reflect the UNGPs: where a business has caused or contributed to an adverse human rights impact, it should provide for or cooperate in its remediation. By contrast, direct linkage alone should not automatically give rise to damages liability. Where a corporation is directly linked to modern slavery through a business relationship but has not caused or contributed to the harm, its responsibility under the UNGPs is principally to use leverage to seek to prevent or mitigate the impact.

The Government should also consider the procedural barriers faced by modern slavery victims, particularly in transnational cases. Relevant measures could include appropriate limitation rules recognising the circumstances of survivors; mechanisms facilitating access to evidence held by corporations; collective or representative proceedings where appropriate; access to legal assistance; and appropriate costs protections. Consideration could also be given to addressing this information

asymmetry through appropriate evidential rules. For example, once a claimant establishes the underlying modern slavery harm and the requisite connection with the corporation's operations or supply chain, the corporation could bear the burden of establishing what reasonable preventive measures it took, where the relevant evidence lies predominantly within its control. Depending on the circumstances, courts could be empowered to award compensation for economic and non-economic harm, order repayment of recruitment fees or unlawfully withheld wages, and grant appropriate declaratory or injunctive relief where harmful practices are continuing.