



Law Council
OF AUSTRALIA

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Mr Chris Crewther MP
Chair, Foreign Affairs and Aid Subcommittee
Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

By email: jscfadt@aph.gov.au

Dear Mr Crewther

Responses to Questions on Notice arising from the Law Council's appearance at the hearing for the inquiry into Establishing a Modern Slavery Act in Australia

1. Thank you for the opportunity to appear before the Joint Standing Committee on Foreign Affairs, Defence and Trade (**Committee**) for the inquiry into Establishing a Modern Slavery Act (**MSA**) in Australia (**Inquiry**) at the public hearing in Melbourne on 1 August 2017 (**Hearing**).
2. The Law Council supports the introduction of a MSA in Australia and welcomed the Committee's interim report setting out its in-principle support for the development of a MSA in Australia.¹ The Law Council looks forward to the Committee's final report and provides this supplementary submission to respond to two questions on notice that arose from the Hearing, which are set out as headings below.

Do you have any perspective on the sufficiency of current defences in Australian criminal law in relation to [defences to crimes that may be committed by a person who is otherwise a victim of modern slavery practices]?²

3. The Law Council notes that principle 7 of the United Nations High Commissioner for Human Rights' *Principles and Guidance on Human Rights and Human Trafficking* states that trafficked persons '...shall not be detained, charged or prosecuted... for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons'.³ A similar requirement exists in the International Labour Organization's (**ILO**) protocol updating the ILO Convention on Forced Labour.⁴

¹ Law Council of Australia, *Law Council welcomes Parliamentary Committee's recommendation for a Modern Slavery Act* (17 August 2017) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-welcomes-parliamentary-committees-recommendation-for-a-modern-slavery-act>>.

² Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Melbourne, 1 August 2017, 21 (Senator Fawcett).

³ United Nations High Commissioner For Human Rights, *Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1 (2002).

⁴ International Labour Organization, *Protocol of June 2014 to the Forced Labour Convention of 1930* (adopted 11 June 2014, entered into force 9 November 2016) art 4(2). Australia has ratified the Forced Labour Convention of 1930, however has not ratified the Protocol of June 2014. The government is currently

4. The Law Council considers that the principle of non-punishment of victims of trafficking and forced labour should logically extend to all victims of modern slavery in Australia, which includes not just victims of human trafficking and forced labour but other types slavery and slavery-like practices under the *Criminal Code Act 1995* (Cth) (**Criminal Code**). The Criminal Code currently does not contain any specific defences for victims of human trafficking, slavery and slavery-like practices (collectively, **modern slavery**) who commit an offence, nor are they contained in any other relevant Australian legislation. Conversely, in the UK, section 45 of the *Modern Slavery Act 2015* (UK) (**UK MSA**) sets out a defence for slavery or trafficking victims in certain circumstances and for certain criminal offences.⁵ Given the absence of a similar specific defence in Australia, victims of modern slavery who commit criminal offences in Australia can only rely on the general defences set out in Part 2.3 of the Criminal Code, if those general offences apply to the circumstances of their exploitation and/or trafficking.
5. Given the power imbalance that exists in situations of modern slavery as between victim and responsible person, the general defence that appears most relevant to situations is the defence of duress. For a person to establish that she or he was acting under duress in the commission of an offence, he or she must show that he or she reasonably believed that a threat has been made that will be carried out unless an offence is committed. He or she must also believe that there is no reasonable way the threat can be rendered ineffective, and the conduct committed in response is a reasonable response to the threat.⁶ Other less relevant, but potentially applicable, defences in Part 2.3 include mental incapacity, self-defence, sudden or extraordinary emergency, and involuntary intoxication.
6. The Law Council is not aware of any cases in which a person has been prosecuted for a crime they were forced to commit while subjected to modern slavery.⁷ Hypothetically, in such a case, it is likely that the victim would be able to claim the defence of duress, or the prosecution could exercise their discretion not to prosecute a victim for a crime they were forced to commit. That said, there are issues that could arise when attempting to apply general defences to specific situations of slavery and slavery-like practices. Some of those include that:⁸

considering ratification: Attorney-General's Department, 'Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement' (2017) *Australian Government* 3.

⁵ The UK defence is influenced by the existence of the EU Trafficking Directive, which provides that state parties shall provide for the possibility of not imposing penalties on victims of trafficking involved in unlawful activities where they have been compelled to do so. The section 45 defence applies where the person can show that, *inter alia*, the otherwise criminal conduct was committed under compulsion and is attributable to the 'slavery or relevant exploitation'. The defence is available in relation to offences other than those listed in Schedule 4 of the Modern Slavery Act (UK). For example, the common law offences to which the defence does not apply are false imprisonment, manslaughter, murder, perverting the course of justice, and piracy. The statutory offences exempted are numerous, and include specific offences like 'infanticide', 'hijacking' and 'racially or religiously motivated attacks'.

⁶ Criminal Code, part 2.3, s 10.2 (2). Note that pursuant to s 10.2 (3), 'this section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out'.

⁷ This does not include persons who have committed migration offences due to their exploitation and/or trafficking, of which there are numerous examples: see Law Council of Australia, *People Who Have Been Trafficked and Exploited Consultation Paper* (August 2017) 26-31 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/People%20Who%20Have%20Been%20Trafficked%20and%20Exploited.pdf>>.

⁸ The Law Council is grateful to Felicity Gerry QC for sharing her research and insights regarding the principle of non-punishment of victims of trafficking as well as her concerns regarding inadequacies of current defences

- (a) in some circumstances, it may be difficult to establish the conditions that satisfy the defence of duress, including whether a threat has been made and the reasonableness of the belief that it will be carried out, especially when victims are not controlled through physical imprisonment, restraint and force, but rather, through financial and emotional means, as in many cases of modern slavery in Australia;⁹
 - (b) while modern slavery has been proven to have serious adverse effects on victims' mental health,¹⁰ those effects may not rise to the level of mental impairment required to establish a defence on the grounds of mental incapacity; and
 - (c) the defence of sudden or extraordinary emergency does not account for the types of short or long-term abuse and exploitation often suffered by victims of modern slavery that does not necessarily arise 'suddenly'.
7. In addition, the Law Council notes that the general defences in the Criminal Code are available only for Commonwealth crimes. Therefore, general Commonwealth defences would be available for victims of modern slavery forced to, for example, act as 'drug mules' and transport illicit drugs across borders, which is a Commonwealth crime.¹¹ However, for victims who, for example, engage in assault to escape their captors, this would be covered by State-level criminal law. General defences, such as self-defence, can vary in their iteration and application across states. Given slavery and slavery-like practices are Commonwealth offences, this creates an undesirable inconsistency whereby the state in which victims happen to be trafficked and/or exploited determines which criminal laws to which they are subject should they be compelled to commit a criminal offence.
8. Nonetheless, at this stage, these concerns remain hypothetical, at least in Australia. The UK Anti-Slavery Commissioner has identified that in the UK, there are 'far too many unacceptable instances where trafficked adults and children have been misidentified as offenders and subsequently prosecuted' and he has made non-prosecution of victims a priority.¹²
9. The Law Council recommends that, should a MSA be adopted in Australia, the Committee consider whether the Criminal Code should be amended to contain a specific defence for victims of modern slavery who commit certain criminal offences. As a practical matter, the Law Council recommends that any provision purporting to create a such a defence should be inserted into the Criminal Code, rather than any

under Australian law for victims of modern slavery who commit criminal offences, some of which have been incorporated into this submission.

⁹ Frances Simmons, Brynn O'Brien, Fiona David and Laura Beacroft, 'Human trafficking and slavery offenders in Australia' (2013) *Australian Institute of Criminology* 4, 10 <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi464.pdf>; see also *DPP v Ho* [2009] VSC 437 (29 September 2009) [32].

¹⁰ For a summary of studies showing the prevalence of post-traumatic stress disorder and other mental illness in victims of trafficking, see the United Nations Association of Australia, Submission no 90 to this Inquiry (28 April 2017) Attachment 1, 9-11.

¹¹ Criminal Code, Part 9.1.

¹² Independent Anti-Slavery Commissioner, *Strategic Plan 2015-17* (October 2015) 18 <http://www.antislaverycommissioner.co.uk/media/1075/iasc_strategicplan_2015.pdf>; for examples of victims prosecuted as offenders in the UK, see the report by Paul Peachey, 'Slavery victims are being jailed for crimes they were forced to commit, warns anti-slavery tsar' (18 October 2015) *The Independent* <<http://www.independent.co.uk/news/uk/crime/slavery-victims-are-being-jailed-for-crimes-they-were-forced-to-commit-warns-anti-slavery-tsar-a6698996.html>>.

standalone MSA which may subsequently be enacted in Australia. While in the UK, the defence is contained in the standalone UK MSA, as noted in the Law Council's submission to the Inquiry dated 28 April 2017,¹³ the UK does not have a criminal code.

*Given you have quoted ... the example of the US company [Signal International] and talked about the legislation that was introduced in 2003 [Trafficking Victims Protection Reauthorization Act], could you ... provide information about the number of cases there and whether that has been rising exponentially or whether it has remained at a very small number? — just so we get a sense of how it has operated in the US.*¹⁴

10. The Human Trafficking Pro-Bono Legal Center (**Center**) reported in 2015 that, since a right to civil remedy was introduced in the US in 2003, trafficking victims have filed 'just' 152 cases nationwide, an average of approximately 12 cases per year.¹⁵ The Center reported that most cases allege domestic servitude (41%), many of which allege abuses by labour recruiters, and more than half (57%) include corporate entities as defendants, most of whom are labour recruiters, like Signal International. Only 11 cases allege sex trafficking.¹⁶
11. In the timeframe for preparing this submission, the Law Council was unable to find much information regarding the success of these actions, aside from high-profile jury awards, or settlements like the one involving Signal International. However, it would appear these actions are not immune to challenges, including those regarding the nature of trafficking and exploitation,¹⁷ and those involved with bringing class actions generally, as noted by the Southern Poverty Law Center, who acted for the plaintiffs in the Signal International case.¹⁸ It should also be noted that under the *Trafficking Victims Protection Reauthorization Act 2003 (TVPRA)*, any civil claim must be stayed until any criminal action arising from the same facts and involving the same victim has been resolved.¹⁹
12. There are several other cases regarding modern slavery from the United States and Canada, respectively which may assist the Committee. These cases demonstrate how the absence of legislation on modern slavery, or legislation that permits companies to take no tangible steps to eliminate slavery in their supply chains, leaves victims without redress, highlighting the need for a right to civil remedy.

¹³ Law Council of Australia, Submission no 60 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017) [95].

¹⁴ Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Melbourne, 1 August 2017, 24 (Senator Fawcett).

¹⁵ The Human Trafficking Pro-Bono Legal Center, *Ending impunity, securing justice: Using strategic litigation to combat modern-day slavery and human trafficking* (2015) 13 <http://www.htprobono.org/wp-content/uploads/2015/12/FF_SL_AW02_WEB.pdf>.

¹⁶ *Ibid.*

¹⁷ Exploited and/or trafficked persons often face considerable barriers to access to justice, including reluctance to act due to fearfulness of reprisals against themselves or their families, limited awareness of how or where to report the abuse, distrust of law enforcement and criminal justice authorities, uncertainty as to whether a response will ensure, and if that response will be favourable to them: see Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: An Indonesian case study' (2013) 451 *Trends and Issues in crime and criminal justice* <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi451.pdf>.

¹⁸ For commentary on bringing a civil case for trafficking, the challenges involved, and potential benefits, see generally Southern Poverty Law Center, *Civil Litigation on Behalf of Victims of Human Trafficking* (2008) <https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/splc_human_trafficking.pdf>.

¹⁹ *Ibid.* 6.

13. The risk of slavery in supply chains involving the Thai shrimp/prawn (henceforth, prawn) fishing industry is well-known.²⁰ Despite relevant supply chain and other legislation, cases brought to date in California have largely failed to hold companies accountable for profiting from the sale of prawn products made using slavery.
14. In August 2015, a class action suit was filed against Nestlé, alleging that Nestlé violated consumer protection laws by not disclosing that prawns used in its cat food products may have been sourced using forced labour.²¹ The Court dismissed the suit, as it found that pursuant to the Californian Supply Chains Transparency in Supply Chains Act (**California Supply Chains Act**), Nestlé was only required to disclose the efforts it was undertaking to prevent forced labour, and was not obligated to disclose the actual risk of forced labour in its supply chain.²² The Law Council's submission to the Inquiry dated 28 April 2017 noted flaws with the California Supply Chains Act, including that a company could comply with it by reporting that it took no steps at all to eliminate slavery from its supply chains.²³ A similar case brought later against Mars, Inc. in relation to the risk of slavery in supply chains involving cocoa used in chocolate production, was dismissed for similar reasons.²⁴
15. Also in August 2015, a separate law suit was filed against Costco, who were accused of knowingly selling frozen prawns farmed in Thailand using forced and slave labour.²⁵ The suit was brought under state-level misrepresentation laws, as Costco's website at the relevant time claimed that it had a 'supplier Code of Conduct which prohibits human rights abuses in our supply chain' (**Costco's statement**).²⁶ The case was dismissed on the basis that the plaintiffs lacked standing as they had not specifically traced the products to Costco's suppliers, nor could they show that they had taken into account and relied upon Costco's statement prior to purchasing the frozen prawns.²⁷ This case demonstrates the limitations of using actions like misleading and deceptive conduct as an indirect way of holding companies accountable. It also underlines the need for a civil remedy enacted through specific legislation targeted at providing redress for victims of modern slavery.

²⁰ See for example, Ian Urbina, 'Sea Slaves: The Human Misery that Feeds Pets and Livestock' (27 July 2015) *New York Times* <<https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>>; Margie Mason et al, 'Shrimp sold by global supermarkets is peeled by slave labourers in Thailand' (15 December 2015) *Associated Press/The Guardian* <<https://www.theguardian.com/global-development/2015/dec/14/shrimp-sold-by-global-supermarkets-is-peeled-by-slave-labourers-in-thailand>>; Sarah Danckhert, 'Woolies, Coles, Aldi all caught up in child labour scandal' (15 December 2015) *Sydney Morning Herald* <<http://www.smh.com.au/business/consumer-affairs/woolies-coles-aldi-caught-up-in-child-labour-scandal-20151214-glnagx.html>>; Kate Hodal, 'Slavery and trafficking continue in Thai fishing industry, claim activists' (25 February 2016) *The Guardian* <<https://www.theguardian.com/global-development/2016/feb/25/slavery-trafficking-thai-fishing-industry-environmental-justice-foundation>>; Felicity Lawrence and Kate Hodal, 'Thailand accused of failing to stamp out murder and slavery in fishing industry' (30 March 2017) *The Guardian* <<https://www.theguardian.com/global-development/2017/mar/30/thailand-failing-to-stamp-out-murder-slavery-fishing-industry-starvation-forced-labour-trafficking>>. The Law Council also notes evidence given by representatives of Konica Minolta to this Committee during this Inquiry regarding their interaction with the existence of slavery in the Thai fishing industry: Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Sydney, 23 June 2017, 18 (Dr Cooke).

²¹ *Melanie Barber et al v Nestlé USA Inc, and Nestlé Purina Petcare Co* (SD Cal, SACV 15-01364-CJC(AGR), 9 December 2015).

²² *Ibid* slip op 10.

²³ Law Council of Australia, Submission no 60 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017) [62].

²⁴ See *Robert Hodson et al v Mars, Inc. et al* (ND Cal, 15-cv-04450-RS, 17 February 2016).

²⁵ See *Monica Sud et al v Costco Wholesale Corp., et al*, (ND Cal, 4:15-cv-03783, 15 January 2016).

²⁶ *Ibid* slip op 2.

²⁷ *Ibid* slip op 7-14.

16. In June 2016, seven Cambodian former employees at a Thai seafood factory that produced seafood for export to the USA, including for sale to Wal-Mart, brought a federal class action law suit against two Thai companies and two US companies, alleging violations of the TVPRA. The defendants filed a motion for dismissal, arguing that the matters the subject of complaint had already been amicably resolved, which the plaintiffs disputed, and in November 2016 the Court decided that the case could proceed. The case has yet to be resolved.
17. In Canada, a law suit was filed in November 2014 by victims of forced labour in Eritrea,²⁸ who alleged that a Canadian mining company was complicit by subcontracting to a local company who used forced labour. The law suit alleges violations of international law, given Canada does not have modern slavery legislation under which the case might otherwise be brought.²⁹ While the Court has agreed to hear the case, this case and other cases implicating Canadian mining companies in conduct that may violate human rights have encountered hurdles regarding jurisdiction. That is, whether or not actions involving the offshore conduct of Canadian companies can be heard in Canadian courts.³⁰ This underlines the need for any MSA in Australia to ensure it considers the offshore aspects of Australian companies' operations.³¹

Yours sincerely



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President

²⁸ See Business and Human Rights Resource Centre, *Nevsun lawsuit (re Bisha mine, Eritrea)* (2014) <<https://business-humanrights.org/en/nevsun-lawsuit-re-bisha-mine-eritrea>>. The case will be heard in September 2017.

²⁹ See Business and Human Rights Resource Centre, 'Canadian Govt. urged to follow UK's example & introduce modern slavery legislation' (9 March 2016) *Business and Human Rights Resource Centre* <<https://business-humanrights.org/en/canadian-govt-urged-to-follow-uks-example-introduce-modern-slavery-legislation>>.

³⁰ See Business and Human Rights Resource Centre, *Hudbay Minerals lawsuits* <<https://business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0>>.

³¹ Law Council of Australia, Submission no 60 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017) [69].