



GOVERNMENT HOUSE
SYDNEY

**Australian Institute of International
Affairs
Charteris Oration**

**Her Excellency the Honourable
Margaret Beazley AO QC
Governor of New South Wales**

Wednesday, 27 November 2019

**Hilton Hotel
Sydney**

FULL SPEECH

I am delighted to join you here this tonight and deliver this, the 8th Charteris Oration. As we meet here on the land of the Gadigal people of the Eora Nation, I pay my respects to First Nations elders, past, present and emerging, and particularly those present here tonight.

- [1] Corporate social responsibility, as bywords – if not buzz words – have been part of the corporate lexicon for over half a century. As a concept, it has been described as ‘a self-regulating business model [of social accountability of corporations to the community in which they operate], including economic, social and environmental’.¹
- [2] Corporate social responsibility has, at times, also been seen as a clash between liberal activists who would have the corporate world reflect their view of society and the corporate world which espouses financial returns to shareholder as its primary corporate responsibility.
- [3] The latter approach, that a corporation’s essential rationale is to provide returns to its shareholders, is well supported in economic theory² and practice, and is underpinned by legal authority.³ Some in this room may remember Friedman’s statement in 1970 in the New York Times that ‘*there is one and only one social responsibility of business – to use its resources and engage in activities to increase its profits*’,⁴ although he recognised that in achieving that goal the company would ‘*comply with the basic rules of the society, both those embodied in law and those embodied in ethical custom*’.⁵
- [4] The former view, that corporate social responsibility is a ‘beat up’ by socio- liberal activists, can probably be best described as a tabloid view of corporate social responsibility and not one that responsible corporates would embrace.

¹ Chen, James: Investopedia 27 October 2019:

² Milton Friedman, ‘The Social Responsibility of a Business is to Increase its Profits’ *New York Times Magazine* (September 13, 1970); T Levitt, ‘The Dangers of Social Responsibility’ *Harvard Business Review* 36 (1958), 41-50.

³ *Corporations Act 2001* (Cth), s 180; *Daniels v Anderson* (1995) 37 NSWLR 438.

⁴ Milton Friedman, ‘The Social Responsibility of a Business is to Increase its Profits’ *New York Times Magazine* (September 13, 1970).

⁵ *Ibid.*

- [5] However, given the degree of activity in the regulatory space in recent years, it seemed to be me that tonight presented an occasion to reflect upon the concept of corporate social responsibility and why that might be of interest or indeed concern to the role of Governor in Australia's modern liberal democracy.
- [6] Sir Ninian Stephen said of the role of Governor General that it was to hold a mirror to society. For myself, I like to reflect that notion in slightly different terms. As I see it, in my role as Governor, I should see society as it is and encourage and promote the society to which we, collectively, aspire to be. The relevance of that for tonight's purposes is that a corporation is as much a citizen of the society in which we live as is the individual.⁶
- [7] A corporation, although an independent legal entity, acts through human agency, and apart from small family corporations, invariably has a much larger social and economic footprint than does the individual. For that reason alone it is appropriate that the role of Governor encompass a concern for the manner in which corporations operate in our society.
- [8] The way in which a Governor may do so is necessarily constrained, just as it is with individuals. What the role of Governor permits, as I have said, the encouragement and promotion of the society to which we aspire. One way in which that can be done is through informed engagement with the community – including the corporate community.
- [9] Let me then return to a consideration of corporate social responsibility.
- [10] In 1979, Professor Archie E Carroll of the Terry School of Business, University of Georgia, described corporate social responsibility as encompassing *'the economic, legal, ethical and discretionary expectations that society has of organisations at a given point*

⁶*Salomon v A Salomon and Co Ltd* [1897] AC 22; *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567.

*of time*⁷. A decade later he developed a 'Pyramid of Corporate Social Responsibility' to explain how the 4-part concept of corporate social responsibility operated.

- [11] At the wide base of the pyramid was the economic aspect of corporate operations. That meant that the corporation had to be profitable. At the second level of the pyramid stood the legal obligations of the corporation. Moving up to the next level was a corporation's ethical responsibilities. This was said to be "expected" corporate activity, but was not required, as was the case with the economic base and legal obligations. Sitting at the apex was philanthropy, characterised as being 'desired'. In other words, it was a discretionary feature of corporate activity, a feature of being a 'good corporate citizen'.
- [12] In 2003, Professor Carroll, together with Mark Schwarz, Chief Accounting Officer of Loews Corporation re-examined the corporate pyramid. In their review they collapsed philanthropic activity - which you will recall was considered to be totally discretionary - into the desired 'ethical' functioning of a corporation. Carroll and Schwartz also considered the proper functioning of a corporation was better reflected in a Venn diagram, rather than a pyramid form.
- [13] The 2003 study also set about to deconstruct what was meant by the 'ethical obligations' of a corporation. In his earlier work, Carroll referred to the ethical domain of corporate social responsibility as activities that:

'embody those standards, norms or expectations that reflect a concern for what consumers, employees, shareholders, and the community regard as fair, just, or in keeping with the respect or protection of stakeholders' moral rights.'

There was superimposed on such ethical expectations the implied levels of ethical performance suggested by a consideration:

*'of the great ethical principles of . . . justice, rights, and utilitarianism'*⁸

⁷ Archie B Carroll 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' (1991) *Business Horizons* 34(4), 39-48, quoted in Mark S. Schwartz and Archie B Carroll, 'Corporate Social Responsibility: A Three-Domain Approach' (2003) *Business Ethics Quarterly* 13(4), 503.

⁸ Archie B Carroll 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' (1991) *Business Horizons* 34(4), 40-42.

Carroll's theorisation of the ethical obligations of a corporation is a study in itself. Importantly, it is not outmoded.⁹

[14] What is interesting is that, within the framework of corporate social responsibility, which I described earlier as a 'self-regulating business model' is the entry of government into the space. It has done so most notably in the area of Modern Slavery. Legislative instruments relevant to modern slavery can be found in California's pioneering *Transparency in Supply Chains Act 2010*, in the UK in its *Modern Slavery Act 2015* and particularly its *Transparency in Supply Chain Clause* adopted in 2016, the Netherlands in its *Child Labour Due Diligence Bill 2017*, in the French *Corporate Duty of Vigilance Law 2017* and Australia's *Modern Slavery Act 2019* (Cth) and the *Modern Slavery Act 2018* (NSW), although this Act is has not yet come into force.

[15] Human enslavement has a long, savage and sad history. In the 300-year history of transatlantic slave trade approximately 12.5 million people were enslaved in the Americas. In a description of the conditions under which she worked, slave Mary Prince, wrote in 1831:

*'...my mistress taught me to do all sorts of household work: ... And she taught me (how can I ever forget) more things than these. She caused me to know the exact difference between the smart end of the rope, the cart whip and the cow skin when applied to my naked body by her own cruel hand...'*¹⁰

[16] It might be thought therefore, that it was an humanitarian triumph when slavery was outlawed in the United Kingdom and its colonies by the *Slavery Abolition Act* of 1833¹¹ and later in the United States of America, by the 13th amendment to the *US Constitution*, introduced in 1865. That Amendment provided:

⁹ Colin Mayer, 'The future of the corporation: Towards humane businesses' in (2018) *Journal of the British Academy* 6(S1).

¹⁰ M Prince, *The History of Mary Prince, A West Indian Slave. Related by Herself. With a Supplement by the Editor. To Which is Added, the Narrative of Asa-Asa, a Captured African* (1831), in Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 32.

¹¹ *Slavery Abolition Act 1833* (Imp) 3 4 Will.4 c. 73.

'Neither slavery nor involuntary servitude, [a phrase that needs to be emphasised] except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States or in any place subject to their jurisdiction'.¹²

[17] Why then do we talk about slavery in 2019. Perhaps Beatrice from Sri Lanka explains it when she says:

'My chores seem unending. ... After 20 hours I am not done. There's no food on my plate for dinner so I scavenge in the trash... I try to call the job agency but the woman who now owns me has blocked the phone. I try to flee... but she has locked the door...Grasping me by the hair she bangs my head into the wall and throws me to the floor. She kicks me and hits me with a broom... If I scream or fight back, she will kill me so I bite my lips to bare (sic) the pain and then I pass out. This is my daily routine, the life of a slave'.¹³

[18] Beatrice is but one of an estimated 40.3 million slaves worldwide. That translates into 5.4 victims of slavery for every 1000 people in the world. It is reported that there are 15,000 slaves in Australia.¹⁴ According to the ILO index, 16 million of the 40 odd million slaves are found in the private economy. 10 million slaves are children, 4.8 million are in forced sexual exploitation and 4 million are exploited by Governments.¹⁵ It is said that in Greece, following the influx of refugees there are 89,000 modern slaves, or 1 in every 125 people.¹⁶ In 2017, the ILO reported that there were more than 1.1 million victims in the agricultural sector.¹⁷

¹² *Constitution of the United States of America*, amend XIII.

¹³ B Fernando, *In Contempt of Fate*, (Bearo Publishing, Merrimac, Massachusetts, 2013), in Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 33.

¹⁴ *Global Slavery Index 2018*, 'Country studies: Australia'
<https://www.globalslaveryindex.org/2018/findings/country-studies/australia/>.

¹⁵ M Tutton, '40 million slaves in the world, finds new report', *CNN*, 2017, <edition.cnn.com/2017/09/19/world/global-slavery-estimates-ilo/index.html> in Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 3.

¹⁶ *Ibid.*

¹⁷ International Labor Organization, 'Global estimates of modern slavery, forced labour and forced marriage', 2017, www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm.

- [19] According to the United States Department of Labour, 148 different products are produced by child or forced labour in 76 different countries. The most common are bricks, cotton, garments, cattle and sugar cane.¹⁸
- [20] Whilst these figures reflect the increase in population, especially in the latter part of the 20th century and into the 21st century, they are also explained by a very different feature of the modern economy from the days of the American slave trade, namely the existence of ‘supply chains’ in nearly all aspects of modern commerce, where the ultimate consumer is separated from the primary product source, often many times over. It is only necessary to mention the major components of the supply chain: the primary producer, the manufacturer, the transporter, the distributor and the retailer, to recognise the degree of separation between source product and the consumer. That is at the macro level. However it is at the micro level of each stage, particularly the more remote early stages of the supply chain, that slavery is most prevalent and the most hidden.
- [21] It is also important, so that our thinking is not constrained by 18th and 19th century practices, to understand the difference between slavery of that time and modern slavery. Slavery of the 18th and 19th century was all about legal ownership. The slave was a product that was bought and sold. Although such practices still exist, the concept of slavery in its modern emanation revolves around ‘illegal control’¹⁹.
- [22] Modern slavery, as identified in official reports including the work of the International Labour Organisation, the United Nations and Australian legislation includes: forced labour; debt bondage or bonded labour; human trafficking; descent-based slavery; forced early marriage; child slavery, which includes child trafficking; child soldiers; child marriage and child domestic slavery. The last is to be distinguished from child labour, which harmful in itself, hindering education and normal social and economic development.

¹⁸ United States Department of Labour, ‘List of Goods produced by child labour or forced labour’: www.dol.gov/sites/default/files/documents/ilab/ListofGoods.pdf

¹⁹ Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 8.

- [23] The Australian Modern Slavery Act, 2018 defines modern slavery by reference to the International Labour Organisations and UN Conventions as well as to certain provisions of the Commonwealth Criminal Code. The correspondence of Australian legislation with international protocols thus forms part of a worldwide response to a recognised worldwide problem.
- [24] Whilst it is important to understand what constitutes slavery in today's world, it is sometimes a little too easy to acknowledge the problem but to see it as something that occurs on someone else's turf own and therefore not something about which we can or should do anything. Both propositions are erroneous, as recognised in the Australian Parliament's *Hidden in Plain Sight Report*.²⁰ Let me explain how close to home this all really is.
- [25] The wage underpayment of 7-Eleven workers, resulting in a Fair Work Ombudsman Inquiry is an example. 7-Eleven operates as a franchisor of 7-Eleven outlets. The Inquiry revealed that practices of various 7 Eleven franchisees, who were the employers of those working in the stores, involved up to 7 individual contraventions of the Fair Work Act and Regulations.²¹ Underlying those breaches were the stories of employees who were underpaid, often by half; employees who were threatened that if they complained they would be reported to immigration. A high proportion of the employees were international students working outside the terms of their student visas. Had they been paid in accordance with their award conditions that problem would, at least, have been minimised. And it must be remembered that international students provide a significant underpinning of the viability of our university sector. There also were widespread practices of falsification of records; and there was the infamous cash back system where pay levels and hours worked were properly recorded but employees were required to return a portion of their wages to the employer in cash.

²⁰ Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Hidden in Plain Sight Report', *Inquiry into establishing a Modern Slavery act in Australia* (December 2017, Canberra).

²¹ Commonwealth of Australia Fair Work Ombudsman, 'A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network' (April 2016), 61-62.

[26] In its examination of the unlawful practices of the 7 Eleven store operators the report referred to a case involving Coles and a trolley collection supply chain. Coles sat at the top of the supply chain, in which 'the contract price paid was not sufficient to cover workers' minimum entitlements' and workers of the employing entity 'were significantly underpaid'.²² The contractor and the employing entity, at the mid and bottom level of the supply chain respectively were prosecuted and significant penalties imposed.²³

[27] For its part, Coles, which had been charged under the accessorial provisions of the Act,²⁴ entered into an Enforceable Undertaking with the Fair Work Ombudsman in 2014 pursuant to s 715 of the *Fair Work Act*,²⁵ admitting that it had 'an ethical and moral responsibility' for the conduct of all persons involved in its business'.²⁶ Under the Enforceable Undertaking, the supermarket chain was required to:

- Communicate the existence of the Enforceable Undertaking and provide copies to all employees and independent contractors,
- Monitor and support the conduct United Trolley Collections to ensure its audit requirements are complied with.
- Continue to offer a hotline service, where store managers are required to escalate complaints of wage underpayments by trolley collectors directly to the Coles Head Office and advertise the existence of the hotline at any site in which trolley collection is being undertaken by a contractor, as well as investigating any complaints made within 28 days and advise the Fair Work Ombudsman of the results.
- Produce annual reports to the Fair Work Ombudsmen on the complaints received, the actions taken to investigate, as well as the average time taken to conclude investigations and the amounts of any underpayments.

²² Commonwealth of Australia Fair Work Ombudsman, 'A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network' (April 2016), 70.

²³ *FOW v Al Hilfi* [2016] FCA 193, SAD 27/2012; *FOW v Al Basry* SAD 108/2012.

²⁴ *Fair Work Act 2009* (Cth) s 550.

²⁵ *Fair Work Act 2009* (Cth) s 715.

²⁶ Commonwealth of Australia Fair Work Ombudsman, 'A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network' (April 2016).

- Make ex-gratia payments totalling nearly \$221,000 to 10 employees of contractor companies.
- Establish a \$500,000 guarantee reserve fund, available for distribution in any future event of underpayment.
- Conduct annual audits of a minimum of 20% direct sub-contractors of United Trolley Collections for each year of the Enforceable Undertaking, which will be independently reviewed by a Certified Public Accountant.
- Design and implement a workplace relations training program for roles identified as managing or procuring trolley collection services, reporting directly to the General Manager.²⁷

This was the first time that a major supermarket had accepted responsibility for compliance with work place laws in its supply chain.

[28] In the period 2013 to 2018 the Fair Work Ombudsman, as part of its Harvest Trail Inquiry Report, recovered over \$1 million for 2503 underpaid employees involving 444 employers and 194 labour-hire companies.²⁸ In 2017, a Sydney based cleaning company that provided services to Bunnings, Wilson Parking and NSW Ambulance was ordered to pay back nearly \$250,000 to 49 employees it had exploited.

[29] Those are a few statistics based on activities in Australia. The international picture reveals systemic slavery practices across the global economy. Taking the 2012 figure of 21 million people in modern slavery, the ILO estimated a figure of \$US 150 billion in illegal profits generated in the private economy each year.²⁹ In 2016, a US District Judge ordered Global Horizons, an American recruitment company, to pay \$US 7,658,500 in damages to claimants, Thai nationals who were enslaved, mostly in the US agricultural sector which supplies some of the largest international food companies. Its practices included confiscation of passports and the deduction of food

²⁷ Enforceable Undertaking between The Commonwealth of Australia (Fair Work Ombudsman) and Coles Supermarkets Australia Pty Ltd (6 October 2014).

²⁸ *Modern Slavery Act 2018* (Cth) s 6.

²⁹ C Meldrum-Hanna, A Russell & M Christodoulo 'Labour exploitation, slave-like conditions found on famrs supplying biggest supermarkets', *Australian Broadcasting Corporation*, 2015, <www.abc.net.au/2015-05-04/supermarkets-food-outlets-exploit-black-market-migrant-workers/64414496>.

and accommodation costs from wages, in circumstances where the food was inedible and the accommodation consisted of shipping containers shared with 20 people.³⁰

[30] It is also instructive to look at industries that use minerals cobalt, an essential component of lithium-ion batteries used in mobile phones, lap tops, tablets and computers.

[31] The world's main supply of cobalt comes from the Democratic Republic of the Congo and it is expected that demand will double by 2025.³¹ UNICEF estimated that 40,000 children, some as young as seven, worked in these mines in 2014. Forms of exploitation include physical, sexual and drug abuse; theft of minerals and forced concessional payments to guards, for entrance to the mine.³²

[32] Why is any of this important? I spoke earlier about corporate social responsibility. There is an argument, and indeed an increasing awareness that corporations, like individuals, should simply do the right thing, regardless of whether the entity is directly involved in illegal or reprehensible activity. For example, in 2015, 8 companies Woolworths, Coles, Big W, Masters, Simplot, Goodman Fielder, Inghams and Office Works pledged to work together to reduce and ultimately eliminate slavery in their various supply chains. That group commissioned a consultative business study, culminating, in June 2018, in a report entitled a 'Business Response to Remediating Human Rights Infringements'.³³ Its recommendations included the establishing of minimum standards, establishing clear procedures and taking an advocacy role in respect of issues associated with modern slavery.

³⁰ Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 52.

³¹ In 2015, 53,000 tons of cobalt were produced: L Nicholas, 'Cobalt supply chains need transparency as human rights violation continue in DRC', *Small Caps*, 2018 <smallcaps.com.au/cobalt-supply-chain-transparency-human-rights-violations-drc/>.

³² Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 57.

³³ 'The business response to remediating human rights infringements: The current and future state of corporate remedy' *Australian Business Pledge against Forced Labour* (June 2018) https://www.woolworthsgroup.com.au/content/Document/Remedy%20Report_Australian%20Business%20PIedge%20Against%20Forced%20Labour%20FINAL.pdf.

- [33] There is also a business case for taking steps to remove slavery from an individual corporation's supply chain, which includes '*increas[ing] profitability*' and market share in response to increasingly discerning and socially aware global customers³⁴ and '*improv[ing] investor and consumer confidence... and financing opportunities*'.³⁵
- [34] As is well recognised in the corporate world, reputational risk has an economic footprint. Woolworths, in supporting the introduction of the Commonwealth legislation stated, '*for large consumer facing businesses such as Woolworths, our brand is our most important asset and brand management is a critical aspect of the way our organisation operates*'.³⁶
- [35] The recent fallout around Westpac³⁷ is indicative of the adverse impact on an organisation and its executive subject to exposure of unsatisfactory corporate conduct. Headlines are not legal proof of wrongdoing. However, it can be accepted that it was not an easy day at the office when the *Australian Financial Review's* front-page headline read '*Westpac's Dirty Money Horror*' with the by-line '*23 million breaches [of Australia's anti-money laundering laws] include Asian child sex trade financing*'.³⁸ The newspaper report referred to the possible exploitation of children by a dozen customers including at least 2 sex offenders, stating that the bank was warned of this possibility as far back as 2016.³⁹ It is worth noting, in terms of potential adverse

³⁴ A 2017 survey of 1022 US customers found 66% believe brands should take public stands on social and political issues and that brands are most credible when an issue directly affects their customers (47%), employees (40%) and business operations (31%): Sproutsocial 'Championing change in the age of social media' (2017) <<https://sproutsocial.com/insights/data/championing-change-in-the-age-of-social-media/#key-findings>>. This is further supported by the Edelman Trust Barometer, which notes 67% of surveyed employees believed employers should join them in taking on societal issues: *Edelman Trust Barometer 2019*, <https://www.edelman.com/sites/g/files/aatuss191/files/2019-02/2019_Edelman_Trust_Barometer_Global_Report.pdf>; Commonwealth Government, 'Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities' (2018), 10.

³⁵ Commonwealth Government, 'Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities' (2018), 10.

³⁶ Woolworths Group, Submission No 47 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry* into establishing a Modern Slavery Act in Australia, 28 July 2017, 2.

³⁷ Westpac is not the only financial institution alleged to have engaged in practices indicating a connection with modern slavery. In 2018 ANZ through its Cambodian subsidiary ANZ Royal Bank was alleged to have lent tens of millions of dollars to Phnom Penh Sugar which is alleged to have engaged in forced evictions (forcing over a 1000 families off their land) child labour and workplace injuries. NOLAN p 99

³⁸ James Frost, James Eyers and Aleks Vickovich, 'Westpac's dirty money horror', *Australian Financial Review*, (Thursday 21 November 2019).

³⁹ James Frost, James Eyers and Aleks Vickovich, 'Westpac's dirty money horror', *Australian Financial Review*, (Thursday 21 November 2019).

impacts, that maximum penalties for the whole range of alleged illegal conduct sit between \$17m and \$23m.⁴⁰

[36] In so far as there were allegations of child sex trade financing, it must be recognised that child pornography and other off shore child sexual abuse crimes are not victimless crimes. One of the more compelling statements I read by a child pornography victim, fortunately long on the road to recovery was put as simply as this: *'how would you feel if a photo of your naked body was sent around the internet for anyone to see'*.

[37] So, what do we need to know and where can we source reliable information on modern slavery?

[38] We need to know at least this: Commonwealth Legislation is in force and it imposes mandatory reporting conditions on entities incorporated and trading in Australia.⁴¹ The Act is directed to organisations with an annual turnover in excess of \$AU100 million, approximating the same catchment of the UK legislation. It is estimated that 3000 business entities fall within the purview of the Act.⁴² The target is principally the supply chain. The statutory obligation is to publish annual statements that detail the modern slavery risk in their operations and supply chains and the action they have taken to assess and address those risks and the effectiveness of their response.⁴³

[39] The Commonwealth Criminal Code has an entire division of slavery and slavery-like offences. These include what is commonly understood as slavery, being the possession of another person, evidence of exercising over another person powers that attach to a right of ownership,⁴⁴ as well as offences that can be understood as modern conceptions of slavery, namely:

⁴⁰ James Frost, James Evers and Aleks Vickovich, 'Westpac's dirty money horror', *Australian Financial Review*, (Thursday 21 November 2019).

⁴¹ *Modern Slavery Act 2018* (Cth) s 5.

⁴² Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 136.

⁴³ *Modern Slavery Act 2018* (Cth) ss 3, 5, 11, 12-15.

⁴⁴ *Criminal Code Act 1995* (Cth) 270.3. ('CC')

- servitude offences, where a person is coerced, threatened or deceived into providing labour or services,⁴⁵
- forced labour offences,⁴⁶
- deceptive recruiting for labour or services,⁴⁷
- forced marriage offences,⁴⁸
- debt bondage offences,⁴⁹ and
- both standard and aggravated offences of trafficking in persons, the severity of the charge being determined by the treatment the trafficked person is subjected to over the course of their trafficking.⁵⁰

The maximum penalty listed in this Division of the Code is up to 25 years imprisonment.

[40] Under the Criminal Code, coercion of another human being includes the use of force, duress, detention, psychological oppression, abuse of power or taking advantage of a person's vulnerability.⁵¹ The forced labour offences in this Division prescribe that any person who takes any part in the management of a business, exercises control or direction over a business, or provides financing for a business which conducts any business that involves the forced labour of another person, commits an offence bearing a penalty of up to 9 years imprisonment, or if aggravated, up to 12 years.⁵²

[41] In New South Wales, the *Modern Slavery Act 2018* was passed by the state legislature on 21 June 2018. That Act has not yet come into force and is presently subject to review because of potential constitutional issues. The Act will create an obligation on entities with an annual consolidated revenue of more than \$50 million to lodge

⁴⁵ CC 270.5

⁴⁶ CC 270.6A

⁴⁷ CC 270.7.

⁴⁸ CC 270.7B.

⁴⁹ CC 270.7C.

⁵⁰ CC 271.3 – 271.7.

⁵¹ CC 270.1A.

⁵² CC 270.6A.

annual Modern Slavery Statements with the NSW Anti-Slavery Commissioner,⁵³ an office created by the Act. The effect of this will be that entities operating in New South Wales with a revenue between \$50 - \$100 million annually will be required to report to the NSW Anti-Slavery Commissioner, and those exceeding \$100 million bound by the Commonwealth Act already in force. As the Act has not yet been proclaimed, Prof Jennifer Burns has been appointed in an Acting Position.

[42] The Act amends the *Crimes Act*, inserting new slavery and slavery-like offences into the state legislation, mirroring those present in the Commonwealth Criminal Code. And, it introduces a *Modern Slavery Risk Order*, providing that a court may make an order if they are satisfied on the balance of probabilities, that a person convicted of a slavery or slavery like offence listed in the Act, poses a risk of engaging in conduct constituting modern slavery. The order can be made if the court is satisfied that it will reduce a risk of further engagement in such conduct, protecting persons from the risk of physical or psychological harm likely to be caused.⁵⁴

[43] The offences listed in the NSW *Modern Slavery Act* are:

- causing sexual servitude,⁵⁵
- conducting business involving sexual servitude,⁵⁶
- the production, dissemination or possession of child abuse material, and use of children in the production of such material,⁵⁷ and
- the administering of a digital platform used to deal with child abuse material and slavery and slavery-like offences,⁵⁸ as well as
- all offences listed in the Commonwealth Criminal Code

⁵³ *Modern Slavery Act 2018* (NSW) s 6 (not in force).

⁵⁴ *Modern Slavery Act 2018* (NSW) s 29 (not in force).

⁵⁵ *Crimes Act 1900* (NSW) s 80D

⁵⁶ *Crimes Act 1900* (NSW) s 80E

⁵⁷ *Crimes Act 1900* (NSW) s 91G(1)-(2) – 91H

⁵⁸ *Crimes Act 1900* (NSW) s 91HAA

- [44] In terms of where one can source available information, there are a variety of accessible sources of public information on Modern Slavery and how close to home it really is. The 'Made in a Free World' survey is one.⁵⁹ That organisation has estimated that a family unit based in the US comprising parents and one child living in rented, furnished accommodation with reasonable amenity uses 73 slaves in sustaining their lifestyle.⁶⁰ Those slaves, presumably, are 'shared' with those with the same economic profile, but that does not diminish the reality of what is occurring in supply chains in modern global business activity.
- [45] In Australia, the Forrest family established the global anti-slavery organisation Walk Free, which produces the Global Slavery Index, measuring the government responses and actions being taken to combat modern slavery within individual jurisdictions.
- [46] You may ask why the focus of contemporary Anti-Slavery legislation is on the supply chains of large entities. The answer is simple. There is barely an industry left untouched. Take the medical industry, for example. There are 150 billion pairs of medical rubber gloves produced annually. One producer, Ansell, an Australian company, has a Malaysian production site where it was reported that workers were required to pay up to 3 months wages by way of labour hire company fees and had their passports confiscated.⁶¹
- [47] Both aspects of that conduct fall within the definition of modern slavery. Part of the remedy is transparency. In this regard, Nestlé's experience is worthy of note. In the 1970s, the company's marketing tactics promoted the use of formula over breastfeeding. Activists argued that the direct effect of this was a dependence on formula in the developing world, to the detriment of babies health. Nestlé, labelled a 'baby killer' sued for libel in an attempt to salvage its reputation, which in turn lead to a US Senate public hearing into the promotion of breastmilk subsidies in developing companies.

⁵⁹ <https://slaveryfootprint.org/>

⁶⁰ Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 36.

⁶¹ M Boersma, 'Do no harm? Procurement of medical goods by Australian companies and government' *Australian Nursing and Midwifery Federation Institute* (2017) http://www.anmf.org.au/documents/Do_No_Harm_Report.pdf

- [48] The result of all of this was a call for a universal marketing code to safeguard infant health, which was published by the World Health Organisation in 1981.
- [49] Nestlé's response to these allegations was slow and defensive. 30 years later, its response to the allegation in 2014 connecting the company to brutal working conditions in the harvesting of seafood for their Purina pet food brand could not have been more different. Nestlé opened its doors to an independent not-for-profit Verité, who over a year-long investigation, uncovered a number of atrocious working conditions in Nestlé's supply chain. Nestlé made the report public in 2015.
- [50] Publication of the report and the consequent transparency allowed the problems that were found, which were not isolated to Nestlé products, to be publicly acknowledged and placed on the agenda for other entities to address. The result? The investigation found virtually all US and European companies buying seafood from Thailand were at the same risk of slavery in their supply chains.⁶²
- [51] Nestlé's transparency and ownership of the problem thus paved the way for substantive change in solving and addressing modern slavery in their production lines. They've called this creating a 'shared value' for shareholders and society, having 'a positive impact on society while we grow our business.'⁶³

⁶² Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (University of New South Wales Press, 2019), 75-78.

⁶³ Nestle, *Nestle in society: Creating Shared Value and meeting our commitments 2017'* (2017) https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate_social_responsibility/nestle-in-society-summary-report-2016-en.pdf

Conclusion

- [52] The underlying concept of the various legislative and other initiatives relating to modern slavery is twofold: due diligence and transparency. The intent is that that this two-pronged approach will incentivise businesses to stand tall as socially responsible citizens. The UK Home Office Independent Review of the UK Act published this year, stated, *'companies need to feel an equal pressure to report slavery as they do equality'*, a reference to corporate responsibilities under its Equal Pay Act, 1970.⁶⁴ The review continued: *'Failure to comply with modern slavery obligations should be viewed on the same level as failure to file accurate accounts or prevent bribery and corruption'*.⁶⁵
- [53] It would be an indictment on the socially responsible citizen if the most that could be said was that 'hope springs eternal'. There are, of course, always critics of the intrusion of the state into commercial affairs. However, it is apparent that corporations, internationally, have acknowledged there is a problem and many are actively engaged in the remedy.
- [54] Interestingly, there are critics of the toothless reporting requirements of most of the legislative regimes around the world. Those critics refer, for example, to the UK experience where in 2017, 43% of companies on the London Stock Exchange did not submit a report as required by the UK Act. 42% of the top 100 companies that were awarded government contracts failed to report.⁶⁶
- [55] In 2018, a number of UK corporations including Marks & Spencer, Tesco and the Co-Op called on the UK government to strengthen the law, citing the absence of enforcement mechanisms as the reason for the low level of compliance. What is happening here of course, is that those who are compliant are seeking ways to ensure that their competitors comply and that non-compliance doesn't give those companies a competitive advantage.

⁶⁴ Home Office, 'Independent review of the Modern Slavery Act 2015' (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf); *Equal Pay Act 1970* (UK) c.41

⁶⁵ Quoted in *Addressing Modern Slavery*, Nolan and Boersma, UNSW Press 2019

⁶⁶ *Inquiry into Modern Slavery Act 2018*, Nolan and Boersma, Submission No 53, 4 October 2019.

[56] However, there is also a recognition that the task of chasing down supply chains and ensuring their integrity is not straightforward. The British Academy has launched a research funding call, entitled 'Tackling Slavery, Human Trafficking and Child Labour in Modern Business'.⁶⁷ The project is being undertaken in partnership with the UK's Department of International Development, aimed at addressing the UN's Sustainable Development Goals and advancing the UK's Aid Strategy, with its focus on effective means to eradicate forced labour, modern slavery, human trafficking and the worst forms of child labour.⁶⁸ There is also the vexed question of economic enablement and advancement of underdeveloped economies as against the consumer demand for 'reasonably priced' goods.

[57] As I trust is apparent, it is not possible to ignore the existence and indeed the prevalence of modern slavery in the 21st century world. I also trust that this brief examination demonstrates that the presence of slavery in the supply chain, which the research tells us is too often an integral part of all aspects of trade, domestic and international, is never removed from our own consumption. It is also necessary to acknowledge that the elimination of modern slavery is a difficult, multi-faceted and long-term task. As the Australian Government has said '*there is no silver bullet to end modern slavery. Government, business and civil society all have a role to play and we need to work collaboratively*'.⁶⁹

⁶⁷ British Academy for the Humanities and Social Sciences, *Tackling Slavery, Human Trafficking and Child Labour in Modern Business: Guidance notes for challenge-led applications*, in Brad Blitz 'Tackling modern slavery in a modern business' (2018) 32 *British Academy Review*.

⁶⁸ UK's Aid Strategy: Sustainable Goal 8.7.

⁶⁹ Australian Government, Department of Home Affairs: *Modern Slavery Supply Chains Reporting Requirement Public Consultation Paper*, 2017, p 3