



31 January 2020

Submission to the Australian Law Reform Commission's Review into Australia's corporate criminal responsibility regime

We welcome the opportunity to make a submission to the ALRC regarding Australia's corporate criminal responsibility regime.

Our submission addresses Chapter 12 Question L: Should the due diligence obligations of Australian corporations in relation to extraterritorial offences be expanded?

We strongly support the development of new positive human rights due diligence obligations, particularly for large Australian companies and those operating in high risk sectors or locations. We note that the ALRC focuses specifically on due diligence in respect of conduct already criminalised under Commonwealth law. We support this, however would also further argue for mandatory due diligence in respect of all extraterritorial human rights impacts of Australian corporations.

1. Context – the value of human rights due diligence, prevention is key

Human rights due diligence - an integral component of the UN Guiding Principles on Business and Human Rights (the Guiding Principles)¹ – is increasingly seen as the primary tool to address corporate human rights abuses and if done well, could be a useful preventative mechanism. A key feature that distinguishes human rights due diligence from traditional corporate due diligence, is that human rights due diligence focuses primarily on detecting the risks that the company may impose on others, as opposed to risks to the company. As such, human rights due diligence is designed to be an ongoing interactive mechanism that keeps the company apprised of its impact on workers, the community and a broader set of stakeholders. It is designed as a preventative mechanism to allow for the identification of potential issues that can then be addressed by the company.

2. The need for new mandatory human rights due diligence obligations for companies

¹ Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/17/31 (21 March 2011) (Guiding Principles).

In recent years there has been an increased interest in encouraging greater corporate transparency both by voluntary and mandatory mechanisms. Australia's *Modern Slavery Act 2018* (Cth) mandates reporting, but not the act of due diligence itself.

Under this law, a company could technically fulfil its reporting obligations while having undertaken only cosmetic actions, or without having implemented any significant diligence measures at all. The Australian law is similar to earlier disclosure laws in the UK (*Modern Slavery Act 2015* (UK) and California (*California Transparency in Supply Chains Act* of 2010).² None of these laws impose a requirement on companies to undertake due diligence. Rather, companies must simply report on the extent to which they have done so, and clearly indicate if they have not. A principal design assumption in such models is that the reporting obligations will stimulate internal processes, such as human rights due diligence, so that human rights risks become an integral part of corporate decision-making. However, the UK and Californian experiences to date show that a majority of companies are still grappling with meaningful reporting and reporting is more likely to result in cosmetic, shallow or narrow self-legitimizing compliance-oriented responses by companies.³

Human rights due diligence is a process whose significance is likely to only increase over the coming years. As noted by the ALRC, laws in France⁴ and the Netherlands⁵ have now taken the step to formally mandate human rights due diligence. European discussions are continuing, with Germany, Finland and Switzerland actively considering mandatory approaches to human rights due diligence. At the international level, a UN intergovernmental working group is currently facilitating negotiations in respect of a treaty to regulate the activities of transnational corporations (and other businesses). The most recent draft contemplates the imposition of an obligation on states to adopt measures to ensure that businesses within their jurisdiction undertake human rights due diligence.⁶

² *Modern Slavery Act 2015* (c.30) (UK), s.54 and *California Transparency in Supply Chains Act*, Ca. Civ. Code § 1714.43.

³ M. Narine, 'Disclosing disclosure's defects: corporate responsibility for human rights impact' 47 (2015) *Columbia Human Rts. LRev* 84; I. Landau 'Human rights due diligence and the risk of cosmetic compliance' *Melbourne Journal of International Law* (2019) Vol 20 222-247; Ergon Associates, 'Reporting on Modern Slavery: The current state of disclosure' (May 2016), 1: <<http://www.ergonassociates.net/images/stories/articles/ergonmsastatement2.pdf>> cited in House of Lords, House of Commons Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, Sixth Report of Session 2016–17 HL PAPER 153, HC 443 (5 April 2017) <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf> (UK Joint Committee Report), 37-38.

⁴ *Law No 2017-399 of March 27, 2017 on the Duty of Vigilance of parent companies and instructing companies*, JORF No 0074 of 28 March 2017, text No 1.

⁵ *Child Labour Due Diligence Law 2017* (Netherlands).

⁶ Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other*

The Australian Government should encourage companies to act in accordance with global standards and meet their human rights due diligence expectations. There is an opportunity now for the Government to build on the leadership it has demonstrated with the Modern Slavery Act by introducing new mandatory positive human rights due diligence obligations and promoting responsible business practices.

3. Regulatory guidance

Since the advent of the Guiding Principles in 2011, there have been significant advances in further defining and refining the concept, and in some select cases, legally mandating companies to conduct such assessments. The OECD has been particularly active in this space and in 2016 and 2017 released updated sector specific guidelines for conducting due diligence for responsible supply chain management of conflict minerals, for the garment and footwear sectors and another for agricultural supply chains.⁷ The OECD guidelines set up a best practice standard for corporate initiated due diligence and one of the benefits of the guidance documents is the specificity and detail they provide for implementing due diligence in specific sectors.

Most recently, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises issued further guidance (UN Guidance), with a view to highlighting the key components of due diligence, as well as emerging practice.⁸ It also refers to the emergence of additional guidelines developed by civil society, such as the Ethical Trading Initiative's Human Rights Due Diligence Framework, the Danish Institute for Human Rights' Human Rights Impact and Assessment Guidance and Toolbox and Shift's UN Guiding Principles Reporting Framework.⁹ As such, we

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<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>

⁷ OECD (2016), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, (OECD Mining Guidance) OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264252479-en>; OECD (2017), *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (OECD Apparel Guidance); and OECD/FAO (2016), *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264251052-en> (OECD Agricultural Guidance). The OECD has also published a due diligence guide for the financial sector: OECD (2017), *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, <https://mneguidelines.oecd.org/rbc-financial-sector.htm>.

⁸ United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises* (16 July 2018), UN Doc A/73/163 (UN Guidance) at para. 15.

⁹ United Nations General Assembly, *Companion note II to the Working Group's 2018 report to the General Assembly (A/73/163) Corporate human rights due diligence – Getting started, emerging practices, tools and resources*, Version 16.10.2018 (UN Guidance Companion Note II), Annex. See also: <http://www.ethicaltrade.org/issues/due-diligence>; https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_too



agree with the ALRC that there is not an immediate need for further general guidance to be issued.

However, as noted by the ALRC, the Australian *Illegal Logging Prohibition Act (2012)* (Cth) does include provisions that provide very specific guidance on mandated due diligence steps. Further studies would be useful to examine the efficacy of this sector specific approach and whether a general law mandating positive human rights due diligence obligations should include sector specific guidance. In addition, further research is required to examine what sanctions for non-compliance will be most effective so that companies are held to account for failure to meet their legislative requirements.

Thank you for your consideration of this submission.

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[ibox/introduction/welcome and introduction final may2016.pdf 223791 1 1.pdf](#); and Shift, *Respecting Human Rights Through Global Supply Chains* (Shift Workshop Report No. 2, October 2012), https://www.shiftproject.org/media/resources/docs/Shift_UNGPssupplychain2012.pdf.