
The Business and Human Rights Review

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Subsidiaries and Supply Chains Under Scrutiny

Subsidiaries and supply chains under scrutiny

Matthew Townsend and Claudia Watkins

Driving the sustainability of food production systems: a new approach

An interview with Darian McBain of Thai Union

Case Study: Going digital to advance the rights of workers at sea

Vattenfall's journey towards greater supply chain transparency

Annika Ramsköld and Esther Rodriguez of Vattenfall

Leveraging expertise to trigger social change

An interview with Monique Villa of Thompson Reuters Foundation and TrustLaw

Modern slavery regulation in Asia Pacific

Caroline Marshall and Nathan Colless

Foreword

Suzanne Spears
Partner, Allen & Overy LLP



In this edition of the Business and Human Rights Review we are delighted to introduce Suzanne Spears, who has just joined us as a partner specialising in Business and Human Rights, public international law and international dispute resolution. Given her extensive experience in these areas, she is particularly well placed to introduce this edition, which considers regulatory developments and steps taken by businesses to address human rights risks and head of disputes, arising from increasing scrutiny of businesses' supply chains and global operations by shareholders, courts, financial institutions, politicians, NGOs and members of the public.

In any increasingly connected and global marketplace, many corporations' supply chains are extensive, complex, and transnational. Indeed, the protracted negotiations around the withdrawal agreement between the United Kingdom and the European Union – let alone any subsequent trade agreement – are underpinned by a desire broadly shared on both sides to maintain the far-reaching, multinational supply chain arrangements which criss-cross Europe and often extend much further afield.

These international supply chains are under the spotlight. Against a backdrop of heightened scrutiny in relation to human rights issues from the media, NGOs, shareholders, banks and the general public, States are developing more stringent corporate transparency and national due diligence regimes and national courts are entertaining transnational civil and criminal claims against corporations in relation to their commercial relationships or activities overseas. These developments pose new challenges for businesses. However, for corporations which are proactive and well-prepared, there are opportunities to step up and stand out for the right reasons. At **page 6**, my colleagues Matthew Townsend and Claudia Watkins reflect on recent

legislative developments, the key trends in corporate human rights due diligence, and the steps which businesses should be taking to manage human rights risks.

Corporations are not only concerned about potential legal penalties for breaching human rights legislation – they are acutely aware of the impact which negative publicity around human rights practices (whether or not this results in legal action) can have on their business. Dr Darian McBain, Global Director for Sustainable Development at Thai Union, explains at **page 12** how such publicity can act as a catalyst for change within an organisation and the importance of working with a range of stakeholders when strengthening human rights protections. A case study at **page 18** demonstrates how Thai Union and others are using technology to improve product traceability and provide workers in the fishing industry with a means of reporting human rights concerns.

Before any meaningful action can be taken to improve the human rights protections across a corporation's supply chain, a vital pre-requisite is a thorough assessment of the risk areas and the policies and



procedures in place to address them. Industry insight into how such an assessment can be conducted, is provided at **page 20** by Annika Ramsköld and Esther Rodriguez of Vattenfall, which has carried out an enhanced due diligence assessment to identify possible human rights risks arising out of its coal procurement activities in Colombia.

One of the key reasons why such due diligence assessments are conducted is to allow a business to understand whether poor human rights practices exist within its supply chains. Exposure of such practices by the media or NGOs can have a devastating impact on the reputation of a corporation, with a corresponding impact on consumer opinion and increased litigation risk. The interface between journalists, consumers, and corporations in relation to human rights is discussed at **page 24** by Monique Villa, CEO of the Thomson

Reuters Foundation, in an interview which also discusses the responsibilities and benefits of businesses engaging with human rights. The same interview highlights the steps taken by Apple and Adidas to address modern slavery risks within their respective supply chains. This edition of the Business and Human Rights Review concludes with updates on modern slavery legislation in Australia at **page 28** and Hong Kong at **page 32**.

A common theme which runs through each of the contributions to this edition is the importance of dialogue and cooperation between different stakeholders and engaged observers – whether they are affected individuals and communities, NGOs, consumers, legislators or corporations and their shareholders and bankers. We hope this publication contributes to, and provides a platform for, this continuing dialogue.

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Subsidiaries and supply chains under scrutiny

Matthew Townsend, Partner, and Claudia Watkins,
Senior Practice Support Lawyer, Allen & Overy LLP



For some time now, companies have been under the spotlight to articulate how they ensure respect for human rights through their supply chains and business relationships.

Governments, civil society and communities, particularly in Australia, Europe and the U.S., are pushing for increased corporate transparency and accountability on human rights.

*At last year's United Nations Forum on Business and Human Rights (the **UN Forum**) in Geneva, the focus was on remedies for business-related breaches of human rights.*

This year's UN Forum in November will take the theme of business respect for human rights, drilling down on emerging practice in corporate human rights due diligence.



Here we reflect on recent developments and key trends ahead of the UN Forum, and suggest steps you should be taking now to manage your human rights-related risks.



Increased corporate transparency and national due diligence regimes

The theme of this year's UN Forum follows a push over the last few years for greater supply chain transparency by large businesses operating in Europe and the U.S.

This has been motivated in part by national legislation which has introduced new and far-reaching diligence and reporting obligations on human rights issues such as slavery and human trafficking, child labour, and environmental harm.

In the UK, for example, certain companies have been required since 2015 to prepare a slavery and human trafficking statement for each financial year under the Modern Slavery Act 2015 (the **MSA**). These companies must report on the steps, or absence of steps, taken to ensure there is no slavery or human trafficking taking place in their business or any of their supply chains.

The MSA was modelled on the 2010 California Transparency in Supply Chains Act (**CTSCA**). CTSCA requires retail sellers and manufacturers to report on their efforts to eradicate slavery and human trafficking from their direct supply chains.

The recent 2017 French Corporate Vigilance Law has gone a step further than CTSCA and the MSA. It requires that certain large French companies, in addition to assessing the human

rights and environmental impacts of their business, also publish a plan to address those impacts.

The latest update is that in June the Australian Government introduced a Modern Slavery Bill into the Federal Parliament. If it passes, Australian entities, or entities carrying on business in Australia, with at least AUD100 million global consolidated revenue will be required to submit a statement on the risks of modern slavery in their operations and supply chains. This follows the passing on 21 June 2018 of the New South Wales (**NSW**) Modern Slavery Bill 2018, which applies to entities that are not required to report under the federal law and have at least AUD50m annual turnover and at least one employee in NSW.

There is political momentum in other parts of the world for similar legislation. A new Dutch Child Labour Due Diligence Act (the **DDA**) contains provisions on child labour. Companies will be required to examine the risk of child labour in their supply chains and, if a "reasonable suspicion" of child labour exists, take action to address the issue. The DDA is currently before the Senate for approval. If successful, it will be effective from 1 January 2020.

In Germany, the 2017 National Action Plan stated that, if 50% of large German companies do not have processes in place to conduct human rights due diligence by 2020, the Government

will consider legislation on mandatory due diligence.

The introduction of these hard law diligence and disclosure regimes marks a shift from soft law principles such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (**UNGPs**). In effect, these national laws make mandatory the voluntary due diligence provisions set out in the UN best practice standards. They reflect a normalisation of the expectation that companies will carry out human rights due diligence. However, the fragmented nature of the transition from soft to hard law can represent a challenge for businesses whose value chains touch on the relevant jurisdictions.

Accompanying increase in sanctions

The movement towards State-level regulation has been accompanied by an increased potential for corporate liability.

The MSA relies primarily on NGO scrutiny to enforce its reporting requirements. However, from 1 January 2017 certain large public interest entities across the EU have been required to include similar information on respect for human rights in their annual strategic reports under the Non-Financial Reporting Directive.¹ Unlike the MSA there are penalties, and failure to comply

The background image shows a large industrial port facility. On the left, the bow of a large grey and red ship is visible. In the center and right, there are tall metal structures, cranes, and stacks of colorful shipping containers (red, green, blue, orange). The scene is illuminated by a bright, low sun, creating a warm, orange glow. In the foreground, a yellow forklift is positioned next to a yellow truck, and a blue container is being loaded onto a trailer.

“In effect, these national laws make mandatory the voluntary due diligence provisions set out in the UN best practice standards... However, the fragmented nature of the transition from soft to hard law can represent a challenge for businesses whose value chains touch on the relevant jurisdictions.”

is a criminal offence resulting in a fine or imprisonment.

The UK Criminal Finances Act 2017 has expanded civil recovery powers under money laundering legislation to capture property obtained from gross human rights abuse which is committed outside the UK and which would be an offence if committed in the UK.

In addition, the UK Joint Committee on Human Rights recommended to the UK Government in April this year that a duty be imposed on all companies to prevent human rights abuses, with a failure to do so becoming an offence along the lines of section 7 of the Bribery Act 2010.

The proposed DDA penalties for companies that repeatedly fail to comply include imprisonment and substantial fines.

Consolidation at the international level

These national-level measures must be seen in a wider international context.

Following concerns from civil society actors and certain States as to the effectiveness of voluntary principles such as the UNGPs, in 2014 a UN working group was formed to develop a binding treaty on transnational corporate activities with respect to human rights. The working group's mandate is to negotiate the terms of a regulatory framework to fill the so-called "accountability gap".

The most recent draft of the treaty was published in July 2018. The draft relies on ratifying States to take legislative and other measures to make business legally accountable and for victims to have access to remedies. In particular, State parties must commit to require companies to carry out human rights due diligence.² This diligence must include (for example) monitoring and preventing the adverse human rights impacts of a company's activities and those of its subsidiaries and entities it controls or to which it is directly linked,

identifying and assessing actual or potential violations, and reporting publicly and periodically. Failure to comply with due diligence duties "shall result in commensurate liability and compensation" in accordance with the treaty.³ The conditions and extent of such liability will be the subject of negotiations. The draft proposes the imposition of civil liability on companies in connection with the actions of their subsidiaries and business partners.⁴

Companies may welcome the opportunity for a "level playing field" established by this kind of international regulation. For certain organisations, more consistent rules that apply across the industry may be welcome as a means of driving more widespread changes in behaviour.

Emerging case law on parent company liability

In the meantime, claimants are pushing to establish liability against parent companies whose subsidiaries are alleged to have committed breaches of human rights (including health-related breaches). This dynamic has been apparent in the UK and Canada, as well as in France and Germany.

The backdrop for these claims is perceived weaknesses in non-judicial grievance mechanisms that exist currently for victims. These include the OECD National Contact Points, which arguably suffer from a lack of enforceability and consistency, low profile and poor funding. Claimants often wish to establish jurisdiction in the parent company home state, where the legal system may offer improved opportunities for access to justice compared to the local courts. For example, the British Columbia Court of Appeal has held that a Canadian parent company can face claims in the Canadian courts for alleged violations of human rights against workers at its Eritrean subsidiary on the basis that the claims concern fundamental principles of international law – namely the *jus cogens* prohibition on torture – and the claimants would be unlikely to receive a

fair hearing in Eritrea.⁵ This decision is currently being appealed to the Canadian Supreme Court.

To date, the claims in the English courts have sought to use the civil law of negligence to establish a direct duty of care owed by the parent company to stakeholders affected by the subsidiary's actions. There is English case law that a parent company may, in certain circumstances, owe a duty of care to employees of its subsidiary as a result of the parent's "superior knowledge or expertise".⁶ Elsewhere, the emerging claimant groups argue that this duty of care should be extended to third parties such as communities. The tendency for parties to settle means that there is little established case law in this area.

The most recent development is that, on 13 October 2017, the English Court of Appeal held that Zambian claimants could bring a claim in the English courts against the UK-incorporated Vedanta Resources plc in the context of the copper mining operations of its subsidiary.⁷ This decision is currently on appeal to the UK Supreme Court. If the Vedanta decision stands, it has the potential to open the way for claims to be brought against parent companies by third parties, such as local residents, affected by the operations of a subsidiary (as opposed merely to employees of the companies concerned).

These cases are fact-specific and frequently rely on the disclosure of documents for claimants to establish how much control the UK-incorporated parent had over the foreign subsidiary. Claimants are seeking to use companies' stated adherence to voluntary standards to establish that the parent company had sufficient control over operations to give rise to a duty of care – this is one of the arguments being made by the claimants in the Canadian case of *Garcia v Tahoe Resources Inc.*⁸

Much has been made of obiter comments by Mr Justice Foskett in last year’s interim hearing in *Vilca & Ors v Xstrata Limited* in the English High Court.⁹ The case concerned the request for disclosure in a claim brought against the owners of a Peruvian mine. The Judge stated that “the defendants subscribe to the Voluntary Principles to which I have referred and (not his words, but mine) something more than lip-service to those principles is demanded”.

The documents being sought by the claimants to evidence their claim in that case included sustainable development documents, risk audit documentation, and monthly HSE reports.

Nevertheless, it looks to be an uphill path for claimants to establish liability against a parent company, particularly in relation to actions for damages by third parties. Two recent appeals from first instance on the issue of jurisdiction in tort claims issued by claimants against the English parent company were each dismissed on the facts.⁹

Given the complex nature of the impacts, it may also be difficult for claimants to prove the causation needed to establish damage.

In this sense there is a parallel to be drawn with the climate change actions that are pushing at court doors, such as the claim issued in Germany against RWE in relation to damage alleged to have been caused by climate change.

Growing public scrutiny and expectation

These legislative developments are accompanied by an increasing demand from stakeholders for greater transparency and reporting of businesses’ human rights records.

Technology is assisting in this process. Transparency and accountability are made possible in part by the accessibility of information on the internet and social media. NGOs are compiling reported data and publishing it online; for example, the Business and Human Rights Resource Centre runs an online “registry” of company’s MSA statements, accompanied by analysis and rankings, while the Corporate Human Rights Benchmark is an online ranking of public companies’ human rights performance.

Benchmarking of companies’ reported behaviour places competitive pressure on business to change.

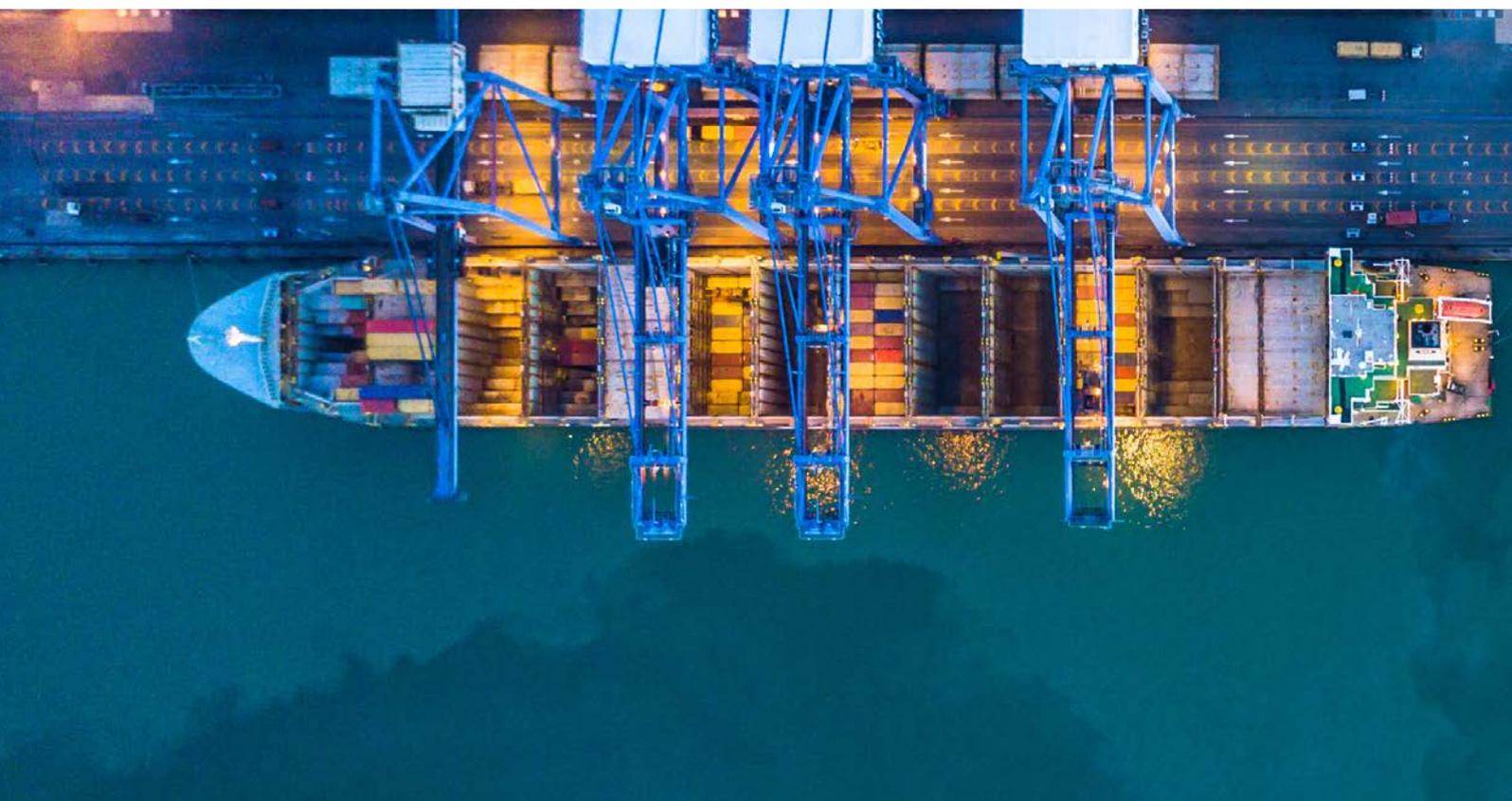
New technologies such as blockchain have been mooted as a means of allowing customers to audit the supply chain of goods they purchase. This remains early days but new technology clearly has the potential to drive further change.

What should you be doing?

In response to these trends, an increasing number of companies are producing stand-alone human rights reports which align with voluntary principles such as the UNGPs. Some companies are using the 2015 UNGP Reporting Framework as part of this process.

In addition, the financial sector has begun to apply pressure on companies to resolve human rights-related issues.

Your response to these developments will be driven by a variety of factors including the sector, geographical location(s) and risk profile of the business.



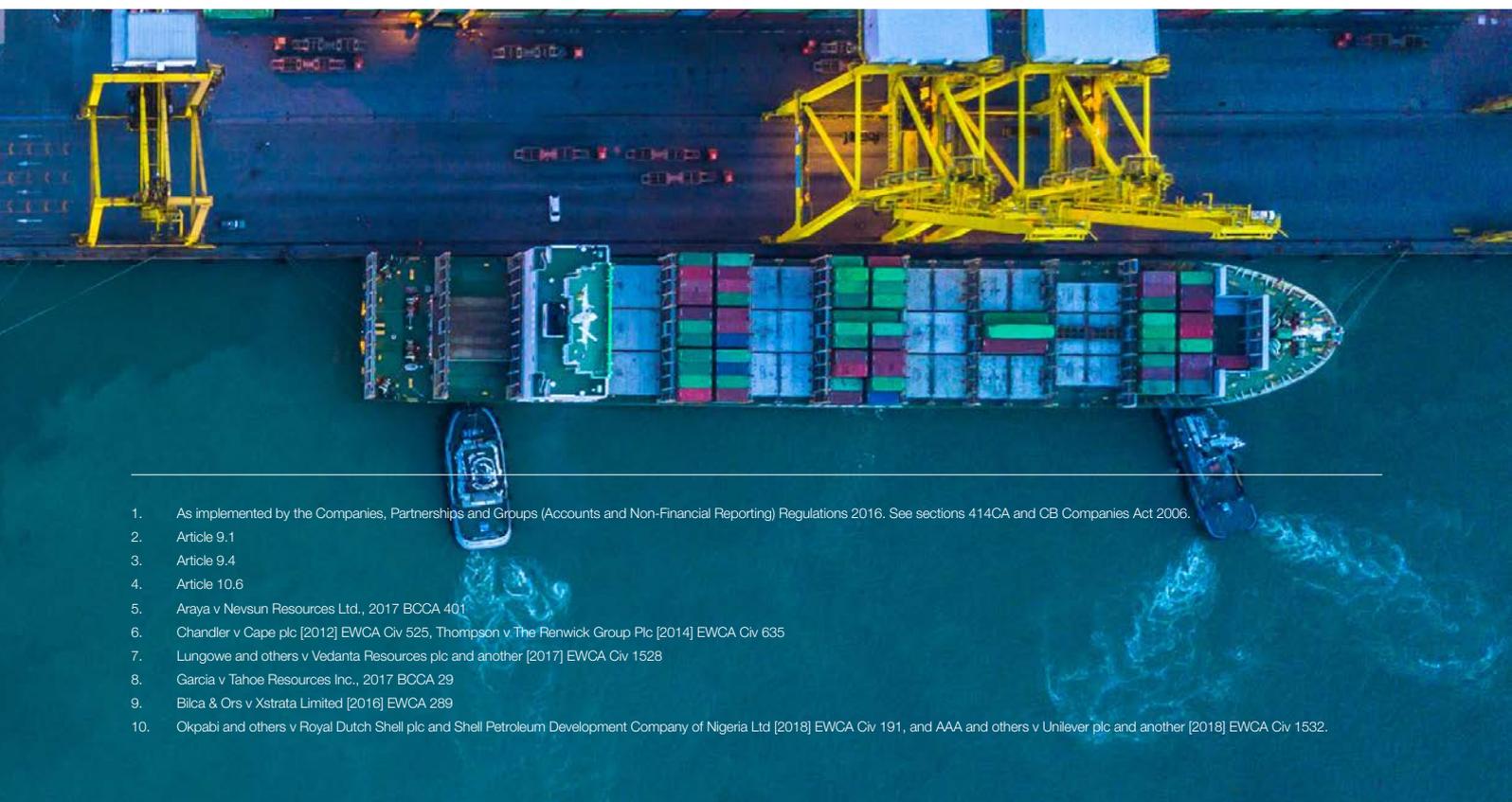
However, any effective assessment of the impacts and the necessary next steps is likely to include the following:

- Map supply chains, investments and investor expectations to determine where gaps in your human rights diligence may exist.
- Consider relevant published guidance on the scope of any due diligence exercise, such as sector specific OECD guidance.
- Engage interest in human rights diligence across the company as a cross-disciplinary exercise, seeking input from the legal, compliance, human resources and CSR teams.
- Begin to approach human rights from a risk perspective as you would anti-bribery and corruption. As such, develop appropriate training and seek management buy-in.
- Consider what you already do, such as existing policies and procedures on environmental protection, workplace equality, and the minimum wage.
- Develop the company’s Code of Conduct as the foundation by which to bring suppliers into line if necessary.
- Apportion risk by incorporating into commercial contracts terms requiring compliance with best practice guidance and policies.
- Consider where else leverage exists to implement change along the supply chain or in your business relationships.
- If relevant, use audits as a tool to focus on capability building. Where possible, engage in industry conversation about the standards to which suppliers should be adhering.
- Examine information flows within your business relationships – engage with suppliers to ensure they understand contractual provisions and will communicate issues as they arise.
- Consider the extent to which you could use operational level mechanisms to stop potential grievances from aggregating over time into litigation.

- Review the extent to which existing industry-wide standards and procedures are appropriate for the current climate and into the future.

Conclusion

The overall direction of travel as regards corporate transparency and accountability is clear. Companies are increasingly expected to know the human rights impacts of their business and show the steps taken to remedy adverse effects. Implementing measures in line with voluntary principles such as UNGPs is one way in which you can seek to future-proof your business against the move towards mandatory diligence and disclosure requirements.



1. As implemented by the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016. See sections 414CA and CB Companies Act 2006.
2. Article 9.1
3. Article 9.4
4. Article 10.6
5. *Araya v Nevsun Resources Ltd.*, 2017 BCCA 401
6. *Chandler v Cape plc* [2012] EWCA Civ 525, *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635
7. *Lungowe and others v Vedanta Resources plc and another* [2017] EWCA Civ 1528
8. *Garcia v Tahoe Resources Inc.*, 2017 BCCA 29
9. *Bilca & Ors v Xstrata Limited* [2016] EWCA 289
10. *Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191, and *AAA and others v Unilever plc and another* [2018] EWCA Civ 1532.

Driving the sustainability of food production systems: a new approach

An interview with Dr. Darian McBain of Thai Union



Dr Darian McBain is the Global Director for Sustainable Development at Thai Union, one of the world's largest producers and exporters of seafood products.

She speaks to us about Thai Union's work to manage the social impacts of the seafood industry, in partnership with a range of governments and NGOs – and how it is using technological innovation to protect human rights.

You took up the role of Global Director for Sustainable Development at Thai Union about three years ago, shortly before the international media highlighted some examples of human rights breaches and labour exploitation in the Thai seafood industry.

In your view, did this publicity serve as a catalyst for change? What have you been focusing on at Thai Union since this time, and what actions have you taken?

Having worked on sustainable supply chains for many years, it is clear that as uncomfortable as the international spotlight can be, it does bring focus.

As awful and as heart-breaking as the situation appeared, I knew these crises could serve as a catalyst for a sea change in the global fishing industry.

And, to achieve that, Thai Union would need to be at the forefront of the movement; a leading agent of positive change. So, in 2016, we launched SeaChange®, our sustainability strategy with a focus on ensuring that: the seas are sustainable now and for future generations; our workers are safe, legally employed and empowered; and the vessels we buy from are legally and responsibly operated.

SeaChange® formally positioned sustainability at the heart of our business. Thai Union does this not only because it is the right thing to do ethically, but because it is the right thing to do for the business.

Companies and governments that ignore sustainable development or use it as window dressing and green washing, do so, in my view, at their own peril. They risk the long-term viability of their products and workforce, as well as the potential loss of access to global markets.

More recently, Thai Union was nominated for the 2016 Thomson Reuters Foundations' Stop Slavery Award, which suggests that a great deal of progress has been made.

How is Thai Union addressing the human rights challenges in its supply chain and networks now? Do you think it is important to be open about this work?

Starting with the second part of your question first, the simple fact is that to be effective in rooting out modern slavery from supply chains, you have to first accept that the risks are real and present. If we, as a society, are to genuinely eradicate modern slavery then we need to take a deep look at what we are doing. Regulations and the media need to start rewarding transparency and openness; otherwise modern slavery will continue to proliferate in dark corners



where no one is shining a light. In terms of addressing the human rights challenges now, transparency is absolutely key. Thai Union, like several other leading companies, has been transparent about the human rights challenges in its supply chains, and the solutions it is putting in place to counteract those.

In line with SeaChange®, our mission is to be the seafood industry's leading agent of positive change. We recognise that we alone can't resolve global challenges like those surrounding the protection of human rights, which is why we work with many partners to generate real and lasting change.

At Thai Union, we believe traceability is the backbone of sustainability. Complete traceability enables us to track every product from catch to consumption; it brings transparency to the entire system and benefits producers and consumers alike. When traceability is made digital, you can start to introduce

a whole new level of transparency to the fishing and seafood industry. With estimates that the number of people now affected by modern day slavery is 40.3 million worldwide (with 24.9 million of those subject to forced labour according to the 2017 Global Estimates of Modern Slavery prepared by the ILO), the information that comes with supply chain transparency, is invaluable. It can be used to shine a light on the issues and aid in offering solutions.

Since 2014, the Thai government has implemented a series of broad legal and policy reforms aimed at tackling the issues of labour exploitation and illegal fishing in the seafood industry.

Can you give some examples of how Thai Union works with governments, both in Thailand and beyond? Have the UN Sustainable Development Goals played a role in these discussions?

Thailand's Department of Fisheries was incredibly supportive of an innovative digital traceability pilot project which Thai Union implemented in 2017, utilising mobile applications and satellite connectivity on Thai fishing vessels. The work is guided by Thai Union's commitment to the UN Sustainable Development Goals (SDGs); in particular to SDG 14 "Life Below Water", as well as more specific work to collaborate on SDG 8.7 to end modern slavery.

Indicative of how significant connectivity at sea is, the Thai Government has recently announced a provision in new regulations mandating that Thai vessel owners operating outside of national waters must now provide a satellite communication system and device onboard for workers at sea.

Thai Union is obviously supportive of the Government's effort to more formally protect workers in the fisheries sector in this manner.



Thailand is involved in the Bali Process, a platform for governments to engage the private sector on how to best combat human trafficking, forced labour and related exploitation. Thai Union has been honoured to represent Thailand's business community in this ongoing process for the past year. It has provided an excellent opportunity for us to share our experiences on these issues with participating governments on an international stage. Obviously, we need to remedy these issues if the world is going to achieve the UN SDGs, and Thai Union is committed to helping contribute to this.

Can you tell us about Thai Union's partnerships, including with the Issara Institute, an NGO tackling issues of human trafficking and forced labour, and Greenpeace?

What is the benefit of collaborating with a range of different stakeholders to combat global issues? Is there scope for more collaborations like this?

No single entity can do it alone. Collaboration is key. In Thailand, we partner with a lot of local NGOs, such as the Migrant Workers Rights Network (MWRN), Labor Rights Promotion Network and the Issara Institute, to continue to enhance labour

and migrant rights, among other things. Building upon SeaChange®, Thai Union last year entered into a joint agreement with Greenpeace to commit to more sustainable, socially responsible seafood – acknowledging a shared vision for healthy seas now and for future generations.

I truly believe there is, at this precise moment, a once-in-a-generation chance to influence the sustainable development priorities of our world and our future. By working together, governments, NGOs and the private sector can make an incredible impact. As we move forward, it is incumbent upon all of us to lead the world in this fight. We do this, in part, through genuine political will, multi-party collaboration, and resolute, uncompromising determination.



"I truly believe there is, at this precise moment, a once-in-a-generation chance to influence the sustainable development priorities of our world and our future."

If we work together, we can create the future we all envision – for every man, woman and child.

Thai Union has a huge workforce with over 49,000 employees, and migrant workers form an important part of this. How do you deal with situations where national or international standards conflict with local customs? How has Thai Union engaged with their workers and suppliers at a local scale?

With a global workforce that welcomes legal economic migrants, Thai Union is focused on reducing the potential for abuses against these workers.

For instance, in Thailand, not only are migrant workers susceptible to discrimination, but they can also be coerced into paying exorbitant recruitment fees on the way from their home country to Thailand in order to secure a job. This means that migrants seeking lawful employment might find themselves deeply in debt before even arriving on the job.

Debt bondage has no place in our operations. Thai Union has eliminated recruitment fees for all workers in our factories and processing plants, effective for all future recruitment of workers both from within Thailand and overseas. The elimination of recruitment fees follows Thai Union's continued development of an ethical migrant worker recruitment policy, which was

welcomed by the MWRN, whose mapping of all Thai Union's factories and processing plants during 2016 highlighted challenges in recruitment as requiring an urgent response. Thai Union also works with the Issara Institute, which provides a hotline for hearing any concerns from workers in multiple languages and has also supplied a case study for their Slavery Free Recruitment Systems issue brief.

By committing significant resources and time to dealing directly and building stronger relationships with recruitment agents and NGOs in Myanmar, and now Cambodia, Thai Union has been able to map out recruitment processes more effectively, with MWRN providing oversight and supervision, thereby reducing costs and complexities.

Technology has the potential to play a positive role in protecting human rights, and Thai Union has been exploring some innovative ways to use it. Can you explain more about Thai Union’s digital traceability pilot? Do you have any other ideas or examples of using technology to protect human rights?

Thai Union, along with our partners, including Inmarsat, implemented an innovative digital traceability pilot project in 2017 to help boost human rights compliance in the seafood industry.

It utilises mobile applications and satellite connectivity on Thai fishing vessels. The results demonstrated true electronic end-to-end traceability and supply chain management and, importantly for human rights, the pilot also brought with it the ability for workers on vessels to use a chat application to communicate with loved ones back on shore or raise the flag with authorities in the event of a problem. Enabling crew members, captains and fleet owners to connect with families and peers around the world while at sea is an industry first for Thai fisheries.

In regard to other examples of technology to promote human rights, Thai Union transitioned workers across our global operations to electronic payments two years ago – including 100 per cent of our workforce in Thailand. From our experiences, digital payments not only promote inclusive finance (ie finance that everyone can access: giving people a bank account – often for the first time in their lives – and enabling them to participate in the digital economy), but also provide women with more control over family finances. This, in turn, increases their personal security and economic empowerment.

There is not one global and enforceable standard of ethical practice in the seafood industry. However, a number of countries are introducing legislation which deals with particular issues, such as the Modern Slavery Act in the UK, and potentially similar legislation in Australia and Hong Kong. Some of these apply beyond national boundaries.

What impact have these standards had on business’ concerns for human rights?

Thai Union welcomes regulation both of the seafood industry specifically and also of standards of ethical practice globally. Regulation will not constrain the leaders in any industry, but will support bringing change to all those participating and provide a more level playing field.

Thai Union was an early reporter of the seafood industry under the UK Modern Slavery Act, as well through our U.S. brand “Chicken of the Sea” under the California Transparency in Supply Chains Act. In addition, we are strong proponents of transparency in reporting, publishing details of our human rights practices in our annual Sustainability Report as well as issuing regular updates on our SeaChange® website.

It is possible to achieve reform, but there has to be agreement on the priority areas as well as intergovernmental cooperation. Many businesses operate across multiple jurisdictions, whether through their customers, suppliers or their own operations. International standards of good practice, such as those set out in International Labour Organisation Conventions, help to navigate what international best practice should look like.

When John Ruggie, the Secretary-General’s Special Rapporteur, presented the Guiding Principles on Business and Human Rights for endorsement at the UN Human Rights Council, he called it the “end of the beginning”. Seven years later, access to effective remedy for victims of human rights breaches remains a contentious issue.

Have the UN Guiding Principles, in your view, contributed to progress on business respect for human rights? How do you think the field of business and human rights will further develop?

The UN Guiding Principles have certainly helped to make human rights a key topic for business, and one that can no longer be ignored. The framework has been established, and businesses are starting to implement the changes. John Ruggie was correct to call it “the end of the beginning”.

However, effective remedies for victims of human rights breaches are still lacking. Five years after the Rana Plaza garment factory collapse in Bangladesh, questions remain as to whether justice was truly achieved for the victims and their families. From my experience in Thailand in the seafood sector, millions of dollars have flowed into the country in the name of promoting human rights; yet almost none of that has been seen by the fishers and the victims of human trafficking or human rights abuses. Most of this money has funded consultants (often not from locally based organisations), meetings, workshops, studies and reports. I think remediation, how it is paid for and how it is provided, has to be the next frontier of the Protect, Respect, Remedy framework.



*“It is possible to achieve reform,
but there has to be agreement
on the priority areas as well as
intergovernmental cooperation.”*

Case Study

Going digital to advance the rights of workers at sea

Thai Union is taking steps to bring full transparency and digital traceability into its supply chain – something it believes the entire seafood industry must work towards a sustainable future.

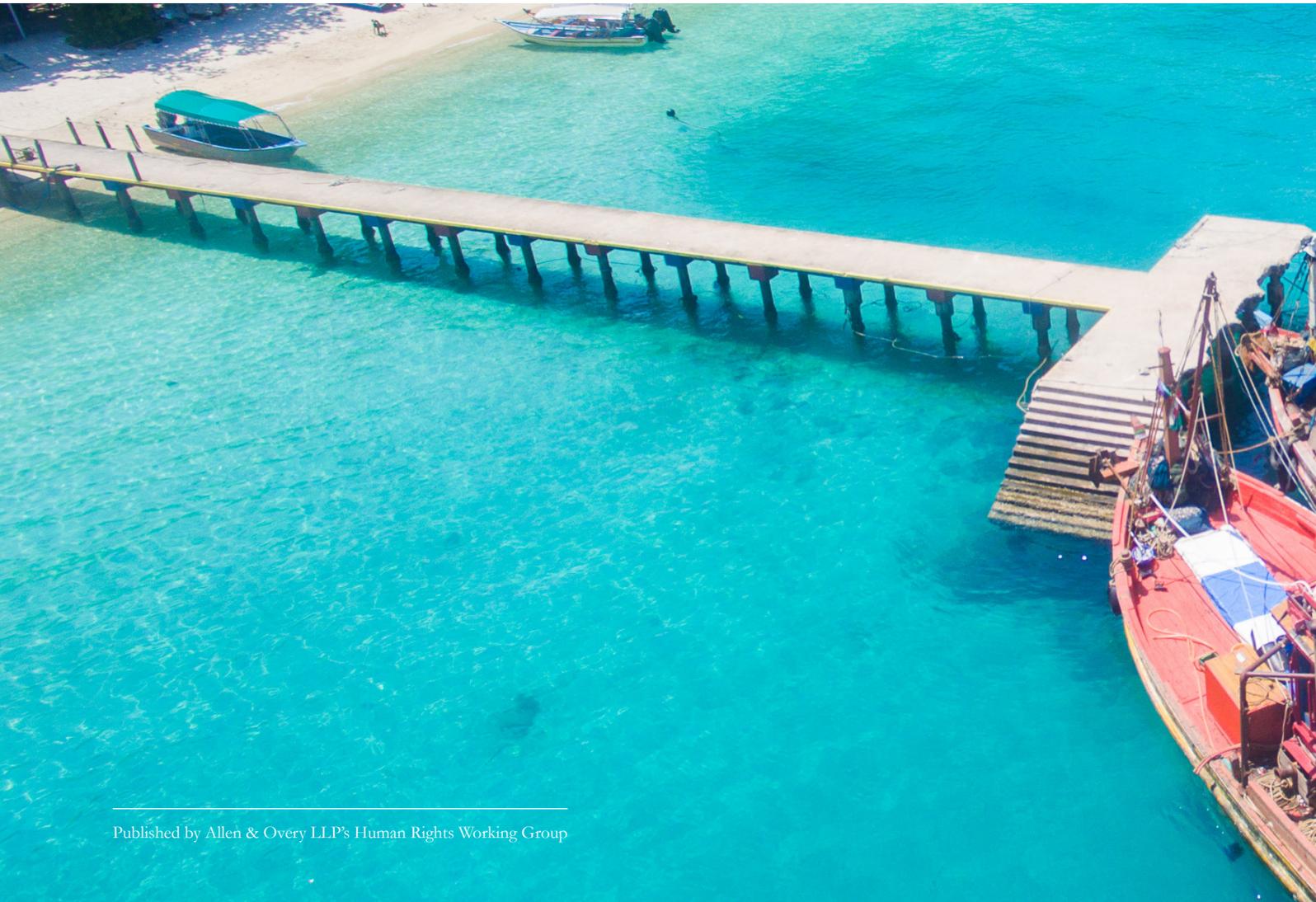
Digital traceability means the ability to electronically track a product along the supply chain – from its place of origin all the way to the consumer. This benefits both producers and consumers as it introduces a whole new level of transparency to the fishing and seafood industry.

However, tracing seafood is challenging, since activities that take place at sea can be difficult to monitor or supervise. All too often, only those on the boats understand the conditions faced and the type of fishing being conducted. This lack of monitoring can lead to unacceptable labour and fishing violations, resulting in human rights abuses along with illegal, unreported and unregulated (IUU) fishing.

Further, the fishing industry often relies on paper-based systems to track their supply chains, which are inefficient and susceptible to human error.

To tackle the problem, in 2017, Thai Union and Inmarsat, along with a coalition of other industry and government groups, launched a digital traceability pilot programme.

Inmarsat’s “Fleet One” terminals were successfully installed on fishing vessels in Thailand.



The pilot programme tested scalable platforms for electronic catch data and traceability (eCDT) systems that utilise mobile applications and satellite connectivity, making it possible to demonstrate true electronic end-to-end traceability and supply chain management.

Captains, crew members, and fleet owners were trained on “Fish Talk” chat applications developed by Xsense, which enable workers at sea to connect with families

and peers around the world – an industry first for Thai fisheries.

The success of this pilot project could mean a significant transformation in the working conditions across the seafood supply chain. For the first time there was connectivity at sea, enabling not only real-time catch data, but also giving workers at sea an opportunity to connect with their families on land and possibly peers on other boats. This ultimately gives workers

a voice at sea. For Thai Union and the other seafood companies involved, it also reduces supply chain risks.

As the fishing industry continues to evolve, Thai Union hopes this pilot project has the ability to improve traceability and transparency – the backbone of Thai Union’s SeaChange® sustainability strategy – not only in Thai waters, but across the global fishing industry.



Vattenfall's journey towards greater supply chain transparency

Annika Ramsköld, Vice President Corporate Sustainability, and
Esther Rodriguez, Sustainability Supply Chain and Strategic Director, Vattenfall.



Vattenfall is one of Europe's largest producers and retailers of electricity and heat. Vattenfall is 100% owned by the Swedish state and its main markets are Sweden, Germany, the Netherlands, UK, Denmark and Finland. Vattenfall aims to make fossil fuel-free living possible within one generation.

Over 2016 and 2017, Vattenfall conducted an enhanced due diligence assessment to identify possible human rights risks arising out of its coal procurement activities in Colombia. The results of this assessment, recommendations and lessons learned, were made publicly available, in accordance with the transparency requirements set out in the UN Guiding Principles for Business and Human Rights (UNGPs)¹.



Annika and Esther talk to us about the Vattenfall team's experience of carrying out a hands-on investigation into the company's supply chain and what they have learned about striving towards transparency.

“Mitigating human rights impacts or risks has to go beyond checking if companies have a policy and a management system. Those elements are easy to meet.”



Vattenfall's journey towards greater supply chain transparency

Why is it important for Vattenfall to carry out supply chain due diligence? Why particularly in Colombia?

Vattenfall is a state-owned company with public stakeholders, who expect us to operate responsibly. While Vattenfall is a signatory to the UNGPs, we recognise that this alone is not enough. In order to be a responsible company, it is important that we understand and mitigate human rights impacts within our supply chain.

We began our project for establishing supply chain transparency in Colombia for three primary reasons. Firstly, fuel sourcing from high-risk countries is identified as the area where Vattenfall has its highest risk to impact human rights. Secondly, we received a great deal of external pressure from NGOs in the Netherlands, Germany and Sweden, requesting that we stop sourcing coal from Colombia because of the human rights and environmental impacts publicised by civil society organisations. Thirdly, it also made sense to us to begin our investigation into the environmental

and human impact of Vattenfall's activities in Colombia, as it is the country with the highest biodiversity value in the world and which until 2016 was engaged in a decades-long civil war.

Please could you talk us through what, if any, obstacles you as a team faced in carrying out this assessment and publishing the report?

As the global coal market is dominated by only a few players, disclosing insights into our supply chain is a commercially sensitive matter, and could provide competitors with an advantage. Nevertheless, our senior management very swiftly recognised that supply chain transparency was an issue that we should prioritise, so we did not face any hurdles internally.

We did, however, find it challenging to delineate the scope of our due diligence exercise in Colombia from an industry collaboration that we are involved with, the Bettercoal initiative. Bettercoal is established by a number of international utilities (including Vattenfall) to independently assess the human and environmental impact of suppliers of coal mining operations against ten guiding principles.

At the time that we started our due diligence process in Colombia, only one coal mining company in Colombia had passed the Bettercoal process.

This company was nonetheless subject to public criticism and the other players in the market had not committed to undergo the Bettercoal process.

For Vattenfall, it was clear that we could not wait until all coal companies had been through the process, but rather we needed to take action immediately. We saw the Bettercoal process as one element of our due diligence process, rather than a complete answer. As it is important for us to understand the complex realities in Colombia, we decided to perform enhanced due diligence ourselves, to get a fuller picture. Nevertheless, we were criticised for this approach.

Since publishing our report, we have managed to make more progress within the Bettercoal initiative and work more closely with some of the member companies. For example, we have committed to the creation of working groups for priority countries so that we can work together in addressing some of the most pressing challenges.

The role of business in protecting human rights

Have you seen a culture change in recent years towards incorporating guidelines such as the UN Guiding Principles on Business and Human Rights (UNGPs) into business practice as more of a priority (internally at Vattenfall and more generally in the industry, eg your partners in the Bettercoal initiative)?

Yes, definitely. We also welcome the launch of the OECD Due Diligence Guidance for Responsible Business Conduct in May 2018, which addresses many questions that had arisen regarding the implementation of the UNGPs.

For us it was especially important that the OECD stated that being part of an industry initiative, such as Bettercoal, does not mean that you should not do your own due diligence. In our opinion, many companies that are part of industry initiatives are just relying on the results of audits to take action.

We would like to see companies adopting a more holistic and integrated approach to due diligence.

Mitigating human rights impacts or risks has to go beyond checking if companies have a policy and a management system. Those elements are easy to meet. The reality is that, in many cases, conflict with local communities and environmental impacts exist even if a company can demonstrate all of its policies and systems are in order. Where did they go wrong?

In many cases, the challenges are systemic. If you combine company activities with the lack of government presence, poor enforcement and disempowered communities, you often have a challenging mix. Does it really help on the ground if a company can demonstrate to its auditors that it has a resettlement action plan – if in practice the communities allege that this will worsen their living conditions or the resettlement has taken ten years to implement due to local or regional conflict? That's why our project focused on trying to understand the root cause of any problems, and identifying bespoke solutions.

What do you see as the main ways in which companies can address human rights issues in their supply chain?

Companies need to go beyond the traditional boundaries of an audit, which realistically only covers the operational matters. In most cases, there are a variety of contributing factors, including corporate and geo-political. As a company you cannot take a position unless you have a good understanding of the reality.

As we do not have a physical presence in the countries from which we source coal, forming successful collaborations with government bodies and independent institutions was an important step. Following our project in Colombia, we have engaged with a number of public organisations in countries where we operate, that can help push for our recommendations. For example, we see the embassies and ministries of foreign affairs in Sweden, Germany and the Netherlands playing an important role in advocating for our recommendations.



Lessons learnt and next steps

What role do you think legislation has to play in creating more robust safeguards against human rights abuses in supply chains?

We would like to see the development of further regulation for the protection of human rights. The UK Modern Slavery Act, for instance, is just a reporting obligation. However the French Loi de Vigilance adopted in September 2017, which imposes a mandatory obligation on multinationals to carry out human rights-related due diligence is an interesting development.

What are Vattenfall's next steps in its journey towards greater supply chain transparency? Does it have other similar projects in the pipeline?

We are starting this year to look into our supply chains in Russia as well as in Asia. In our experience, Russia is more challenging than our project in Colombia, as we have found it to be less transparent and in some cases even moving away

from regulation for the protection of human rights.

Having gone through the process of assessing the human rights risks in Vattenfall's supply chain, what are the key lessons that you have learnt? Do you have any advice for corporates seeking to undertake a similar initiative?

For us, it was important to have a report that was transparent and which genuinely addressed the issues we identified.

We have seen many examples of reports by companies where the results are so generic that you cannot do much with the information shared.

What was very valuable to us was and that we recommend others to do is:

- (i) go and see the situation with your own eyes, as we did in Colombia;
- (ii) talk to as many stakeholders as possible, albeit understanding and being mindful of their own agendas;
- (iii) arrange your meetings with stakeholders independently from the companies you are reviewing;

- (iv) validate any information received yourselves and do not take any of it for granted;
- (v) remember that human rights impacts cannot be offset; and
- (vi) take the chance to build more positive relationships with companies and stakeholders on the ground, but make sure to listen to the most critical voices, and focus on the actual negative human rights impacts.

Some challenges, of course, remain. For example, we encountered allegations from local community members about certain unethical practices that were not possible to prove or deny. This does not necessarily mean they do not exist. What should be done then?

On the other hand, the companies we reviewed felt that we did not give due regard to their positive actions and developments. Unfortunately, this is a common criticism of human rights assessments: as their purpose is to identify adverse impacts, they are predisposed not to address or identify examples of positive developments or behaviour.

1. Vattenfall, A Human Rights Risk Assessment in Colombia: "Vattenfall's efforts on coal supply chain responsibility", November 2017, available at <https://corporate.vattenfall.com/globalassets/corporate/sustainability/doc/A-human-rights-risk-assessment-in-Colombia.pdf>.

Leveraging expertise to trigger social change

An interview with Monique Villa of Thomson Reuters Foundation and TrustLaw



Monique Villa is CEO of the Thomson Reuters Foundation¹ and Founder of TrustLaw² and Trust Conference³.

Since her appointment in 2008, she has transformed the Foundation, launching a number of programmes that leverage the expertise of Thomson Reuters to trigger change and empower people across the world. These include TrustLaw, the Foundation's global pro bono programme dedicated to spreading the practice of pro bono, and Trust Conference, a fast-growing movement to fight slavery and empower women worldwide.

We speak to Monique about the need for transparency, cooperation and courage to make real progress on human rights.

What drives your work on protecting and promoting human rights? Was there a particular incident which motivated you?

Human rights is at the core of democracy. It's not a separate issue, so it's core to the Thomson Reuters Foundation. When I took over in 2008 to expand the remit of the Thomson Reuters Foundation, the focus was on training journalists and on humanitarian issues. I brought in my experience as a journalist and as a business leader and looked at what Thomson Reuters was good at: information, news and connections. My goal was to help the world's most vulnerable and the millions of people who are voiceless.

At the time it was relatively clear how to create the programmes that would have an impact. The idea of TrustLaw, for example, came to me following a conversation I had with a lawyer in Washington DC who told me about the pro bono institute that he'd created 30 years before in the U.S. I discovered the power of pro bono and immediately wanted to create a global service. Today we have 4,500 members, 800 of which are law firms working pro bono around the world to help the best social entrepreneurs and NGOs in 175 countries. I'm really proud of this achievement – and we have big ambitions to continue this growth.

Journalists and the media play a crucial role in drawing international attention to human rights issues, particularly during times of crisis. As part of the Thomson Reuters Foundation's work, you explicitly focus on under-reported stories. Can you identify an issue which is still not getting enough attention?

Do you know that women only own 20% of the land in the world? In India they own only 10%. There is a huge issue of access to property. We decided to cover the issue⁴ of access to land and property three years ago, thanks to a grant from Omidyar Network.

Since then, major newspapers all over the world have started to publish our stories – we are distributed on the Reuters wires, and reach most media outlets globally.

I hope that property rights will soon become a topic as well-known as slavery, which we started to cover seven years ago. When we began reporting on human trafficking, it was largely unknown that this was a business of USD150 billion worth of pure profit a year. Now, it is more widely covered, but many people remain ignorant of how widespread slavery is, of where their food or clothes come from – or even that slaves walk amongst us unnoticed. The stories on which we shed light put some pressure on governments, businesses and consumers.⁵

You have been ranked as one of the 100 most influential people in business ethics by Ethisphere. What strategies do you use in influencing businesses to take human rights issues seriously? Has your approach changed over time?

Business is always part of the solution. So my approach to engaging businesses in the work we do to advance human rights has remained consistent since I took over ten years ago. The value of collaboration is immense: convening key players and encouraging them to work together to tackle some of the gravest problems the world has ever faced is key. I started with the Banks Alliance⁶ to fight human trafficking using data, which I launched with Cyrus Vance, the Manhattan District Attorney, in 2013.

Businesses can act very quickly, especially if they fear damage to their brand. Where governments take years to design a law, have it voted, and then implemented, businesses can make an impact very quickly. Our Stop Slavery Award is testament to this.

Most of the candidates gained some attention from media before starting to take action to clean their supply chains. So we shed light on issues with our investigative journalism and we honour the corporations who do a

great job and pioneer methods of fighting slavery: we think it's a good mix.

Consumers care about business ethics, and businesses care about their reputation. Where great businesses lead, others will follow.

Through the Stop Slavery Award, you recognise businesses which are taking effective steps to stop slavery. What are some examples of effective initiatives that you have seen? What more could be done?

The award has really highlighted some extraordinary work from global corporations, whose pioneering approach to tackling the issue has set the bar high for others to follow – which is of course why we launched the initiative with artist Anish Kapoor.

At last year's Trust Conference, we heard from Adidas – who employ 1.3 million workers and were the overall winner of the Thomson Reuters Foundation's Stop Slavery Award 2017⁷ – on how they established strict responsible sourcing guidelines tracing risks of forced labour right down to the raw materials used in their supply chains. This is exceptionally hard to do. The company has also established worker hotlines across South East Asia allowing people to anonymously report concerns.

Take Apple, a candidate for the award in 2016 and winner in 2018. The company has established a 'supplier's code of conduct', and spent significant resources – millions of dollars – to assess the risk of forced labour at all levels of its supply chain. This has triggered hundreds of in-depth investigations, some lasting entire weeks.

Apple educates its suppliers about responsible business, and has trained 11.5 million workers in their native languages to understand their rights, to recognise if, and when, these are being abused, and how to take action.

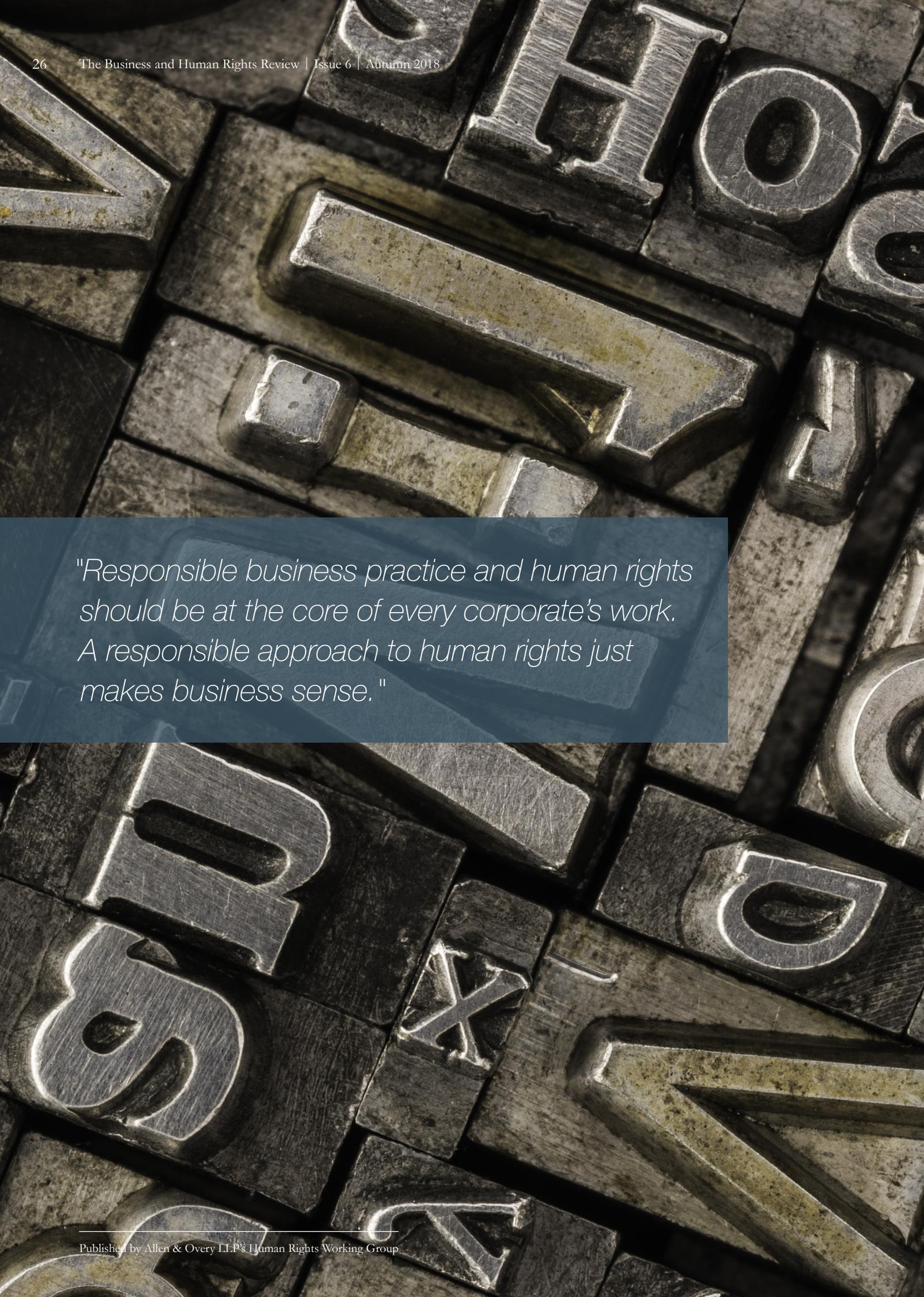
There is always more that can and should be done. Recent changes in the law – whilst welcome – are often not enough

to ensure businesses step up to the plate. As always, real commitment from business has to come from within – and from the top down.

This year, modern slavery was discussed at the World Economic Forum in Davos, as part of a panel event which you organised. Why did you want to focus attention on this issue at Davos? What were the highlights of the discussion?

Our strategy is to bring business and society together to trigger social change at scale. The Thomson Reuters Foundation addresses the issue in a holistic manner: we bring this story to the general public – who read our stories in their millions every day – but also to powerful audiences of policy-makers, business leaders and activists, such as those who attend the World Economic Forum. We have hosted panel discussions in Davos for the last three years; last year Hollywood actress Gillian Anderson – who starred in a film about a girl trafficked for sex from Nepal – gave a keynote speech⁸ at the event. This year's keynote speech was given by Nobel Peace Prize winner and human rights activist Kailash Satyarthi, and we had a particularly lively discussion on a panel with Ken Roth, the director of Human Rights Watch; Nick Kristof, columnist for the New York Times; John Studzinski, Vice-Chairman of Blackstone; and Rick Goings, the CEO of Tupperware.

Our event at Davos is in line with what we do all year long: bringing together key players in this space, allowing them to share their expertise, so we ensure that slavery and trafficking remains high on the news agenda, and on the radar of those people best placed to drive change. Action for impact is our goal.



"Responsible business practice and human rights should be at the core of every corporate's work. A responsible approach to human rights just makes business sense."

You mentioned earlier that you are the Founder of TrustLaw, which connects pro bono lawyers to NGOs and social enterprises needing legal advice. How is TrustLaw supporting social enterprises globally?

What metrics do you use to measure its impact in facilitating pro bono advice?

TrustLaw supports social entrepreneurship in a number of different ways.

It facilitates direct legal support for social enterprises to help them with their commercial and operational legal issues. This ensures they are more sustainable and better able to devote resources to their social mission. A great example of this is Bempu, an Indian healthcare enterprise which designed an innovative temperature monitoring bracelet to detect neonatal hypothermia and reduce child mortality in India. Through TrustLaw, it received support to navigate intellectual property frameworks in India and to patent the product. Bempu was therefore able to focus its resources on ensuring hospitals and communities across India received this life-saving bracelet.

TrustLaw also works towards building a strong and sympathetic environment in which social entrepreneurship can flourish. This includes producing guides and resources for both social entrepreneurs and social enterprises, empowering them to better navigate the commercial and legal frameworks in which they operate. These resources range from guides on how to structure social enterprises in Argentina and South Africa, to crowdfunding in the UK and making Programme Related Investments

in the U.S. It also runs training courses for professional service providers to guide them on how to tailor their advice to the needs of the impact economy.

Finally, it provides the tools to help the wider community understand how the changing legal and political climate impacts social enterprises. For example, TrustLaw has produced tools on how social enterprises can best respond to Brexit.

The Foundation has also carried out a perception poll on the best places to be a social entrepreneur, specifically designed to help the sector advocate for improvements in local markets.

The mission of TrustLaw is to spread the practice of pro bono worldwide to drive social change. Our metrics to assess impacts are pretty sophisticated and we review them monthly. I'm very happy that we now have 40% social enterprises versus 60% NGOs in our network: my goal is 50/50. Each year, the law firms in our network assess how much they would have spent on our projects if they were fee-earning. In the first seven years of existence it has amounted to USD109m. It is impossible to put a monetary value on what the beneficiaries could do with the lawyers' help – but it is certainly at least the same amount, if not a lot more.

Recently, reporting on the gender pay gap in the UK has revealed the ongoing different treatment of women in the workplace, even amongst leading companies. What do you hope to see change over the next five years?

What we saw this year in the UK was an unprecedented level of scrutiny and

coverage of the gender pay gap – which is a good thing, even if the analysis shows just how far there is to go before the gap closes. As ever, bigger businesses should be taking the lead in setting a precedent for others to follow. Recognition that business – and in fact the wider economy – suffers when women are not empowered to lead, is the first step. As a business woman now working in philanthropy, I know businesses can and should be a tremendous force for good, with the power to work towards a more equitable society. To close the gender gap will take years and should not happen to the detriment of men. It is a conversation that men need to have with women, in a dispassionate manner.

What advice do you have for people who are interested in developing their careers in responsible business practice and human rights?

Choose carefully where you go to develop your career. Don't join companies where the CEO or the Board is not interested in these issues; it would be a living hell.

I am a great believer in breaking down silos; for real progress to be made in advancing human rights, we need transparency, co-operation and courage. I say courage because sometimes the issues can seem insurmountable. But you can, and will, make a difference if you aren't put off by the challenge. Responsible business practice and human rights should be at the core of every corporate's work. A responsible approach to human rights just makes business sense.

1. <http://www.trust.org/>
2. <http://www.trust.org/trustlaw/>
3. <http://www.trustconference.com/>
4. <http://www.thisisplace.org/>
5. <http://www.trust.org/under-reported-stories/>
6. <https://www.trust.org/i/?id=928ac731-8e74-40db-985a-5e5a4464a86b>
7. <http://www.stopslaveryaward.com/http://>
8. https://www.youtube.com/watch?v=6N_57toyBM
9. <http://poll2016.trust.org/>

Modern slavery regulation in Asia Pacific

Preparing for greater supply chain transparency in Australia



Caroline Marshall, Allen & Overy Sydney, and Hayley Jones, Allen & Overy London alumni

Australia has become the latest jurisdiction to target modern slavery, with the Modern Slavery Act 2018 (Cth) (**Act**) passed by the Federal Parliament on 29 November 2018. Modelled on the UK Modern Slavery Act 2015 (**UK Act**), the Act introduces significant reporting obligations on entities carrying out business in Australia regarding the presence of slavery, human trafficking and child labour in their global supply chains and operations.

Separately, Parliament in the Australian state of New South Wales has been the first to pass its own Modern Slavery Act 2018 that introduces specific penalties for non-compliance with the legislation. With similar legislation being discussed in Hong Kong, the web of soft and hard law touching on business and human rights issues is becoming increasingly complex for transnational corporations.

Who will be affected?

The Act requires Australian entities and foreign entities carrying on business in Australia to publish a Modern Slavery Statement on the steps they have taken to address modern slavery in their supply chains and operations for every twelve month period that they have annual consolidated revenue of at least 100 million Australian dollars (AUD).¹ It is estimated that approximately 3,000 entities will be required to produce Modern Slavery Statements in Australia.

Key elements of the Act to consider in determining whether an entity will be caught by the reporting requirement include:

1. Whether the entity is an **'Australian entity'** which includes Australian based companies, partnerships and trusts and is not limited to entities that are Australian residents for tax purposes.²

2. Whether the entity **'carries on business in Australia'** at any time in the reporting period.

3. If the entity's **'consolidated revenue'** meets the threshold – 'consolidated revenue' is defined as the total revenue of the reporting entity plus the revenue of any other entities it **controls**, when these entities are considered as a group in accordance with the Australian Accounting Standards.³ This would include downstream revenue of the entity, including revenue earned in Australia and overseas.

What will need to be included in a Modern Slavery Statement?

Reporting entities will be required to provide an annual Modern Slavery Statement to the responsible Minister for publishing online on a central register run by Government.⁴

Entities that are not required to report can voluntarily provide an annual public Modern Slavery Statement. It is intended that a Modern Slavery Statement will describe:

- the entity’s structure, operations and supply chains;
- the potential modern slavery risks in the entity’s global operations and supply chains, including those of its subsidiaries;
- actions the entity has taken to assess and address those risks, including due diligence and remediation processes; and
- how the entity assesses the effectiveness of those actions.⁵

Joint Modern Slavery Statements may be given on behalf of one or more reporting entities.⁶

Modern slavery is defined broadly and includes human trafficking, servitude, forced labour, child labour and forced marriage. Formal administrative guidance will be issued by the Government to define key terms including ‘risks’, ‘operations’, ‘supply chains’, ‘due diligence’ and ‘remediation processes’ and is expected to be released shortly.⁷ At present, it is clear that entities will be encouraged to make use of the UN Guiding Principles on Business and Human Rights and other relevant frameworks to help identify, prioritise and respond to modern slavery risks.⁸

How far into their supply chain will entities need to go?

*Reporting entities will need to consider modern slavery risks in their **global** operations and supply chains, not only their operations and supply chains in Australia. Australian entities are also required to describe the modern slavery risks of any subsidiaries and entities ‘owned or*

controlled’ by the Australian entity, even if the entity’s subsidiaries operate abroad.

Therefore entities with foreign subsidiaries in countries prone to slavery risks should take particular care when reviewing their operations and supply chain. The Act (similarly to the UK act) does not distinguish between upstream and downstream supply chains.⁹

Following the UK approach, it is anticipated that the obligations will only apply upstream, in respect of goods and services being supplied to the entity.

The Act also does not make clear how far into a supply chain an entity needs to go. Should it, for instance, trace back to the extractive phase? Given the Act is expressly intended to cover entities which have ‘the market influence to effect change in their supply chains’ this is possible and would potentially widen the obligations significantly.¹⁰

Implications of the Act

While the Act requires reporting on global supply chains of the Australian entity and seeks to encourage a ‘race to the top’, similarly to the UK Act, it does not impose a legally binding requirement on an entity to conduct due diligence on its supply chains.¹¹

The Act’s mandatory requirements are limited to the publication of a modern slavery statement, describing the entity and the modern slavery risks in its supply chain and operations, or an explanation for a failure to give such a statement.

Significantly, the Act does not incorporate any penalties for non-compliance with the Act’s reporting requirements. However, the Minister of Home Affairs can require an entity to provide an explanation for non-compliance with the reporting requirements and to undertake specific remedial action. Where an entity has failed to comply with the Minister’s request, he/she may publish details of the entity and its failure to comply.

The fact that the Act has no penalty provisions has been the subject of criticism,¹³ and may still result in changes to the Act after its three year review. A national compensation scheme for survivors of slavery has also been proposed and was recommended in the 2018 U.S. Trafficking in Persons Report on Australia.¹⁴

Differences between the Federal Act and the NSW Modern Slavery Act

The Federal Government is slightly lagging behind the efforts taken at a state level in New South Wales. The NSW Parliament has taken the lead on modern slavery in Australia and has been the first State to pass modern slavery legislation. Under the NSW Modern Slavery Act 2018 (**NSW Act**), commercial organisations with at least one employee in NSW and that have a total turnover of not less than USD50m are required to publish an annual Modern Slavery Statement. This is substantially lower than the revenue threshold contained in the federal Act, although the reporting requirements are likely to be similar.

Although the NSW Act is not in force yet, it envisions that regulations will be published that will detail the reporting requirements under the NSW Act.

The NSW Act provides that the regulations may require that an annual modern slavery statement should cover:

- the organisation’s structure, its business and supply chains;
- due diligence processes in relation to modern slavery in its business and supply chains;
- the parts of the business and supply chains where there is a risk of modern slavery taking place and the steps taken to manage that risk; and
- the organisation’s training practices in respect of modern slavery.

The NSW Act provides for a range of penalties not contained in the federal Act that penalise failure to prepare a modern slavery statement or to publish it in accordance with regulations, or knowingly providing false and misleading information in a modern slavery statement.¹⁵

Penalties of up to 10,000 penalty units (the equivalent of AUD1.1m) will apply to companies for such violations.

Unlike the Federal Act, the NSW Act also provides for the appointment of an Anti-Slavery Commissioner, who will oversee a register of such statements, as well as monitor reporting concerning modern slavery risks.

Companies that meet the reporting thresholds and comply with the federal reporting requirements will be exempt from the requirements under the NSW Act.¹⁶

What should you be doing now?

With the Act having passed, we anticipate that the first reporting year for Australian corporations will be 1 July 2019-30 June 2020. Entities with a different financial year may have to report sooner. Steps that entities should look at now to prepare for the reporting requirements in upcoming modern

slavery legislation at both State and federal level, include:

- assessing whether your business is likely to be within the scope of the Act’s reporting requirements. If you are an entity operating or with employees in NSW, assess whether you fall within the scope of the NSW Act;
- if you are likely to be caught, considering the type of statement you may wish to make in the initial reporting years. This will help you define the scope of your due diligence;
- assessing the current level of information on your supply chains. What additional information do you need and how reliable is the existing data? As necessary, prepare to start engaging with your direct and indirect suppliers, and consider commencing anti-slavery due diligence;



- considering the most effective ways of obtaining information from your suppliers. This could be through written Q&A and/or certifications. Consider the need to audit suppliers’ facilities, and introduce contractual warranties and representations in your supplier contracts;
- assessing the need for training within the organisation and your supply chains on best practice in human rights compliance; and
- reviewing how these obligations fit within any wider mandatory or voluntary reporting undertaken by the business

Given the increasing focus from NGOs and stakeholders on human rights compliance issues, pressure is likely to be brought to bear on those organisations which report that no or limited action has been taken. The proposed public registry of modern slavery statements

in the Act will also make any such deficiencies more visible than under the UK Act, where statements are only required to be published on company websites. Investors and shareholders are also increasingly looking at corporate social responsibility requirements and likely to monitor such statements closely. Reporting entities may therefore need to consider committing resources to conduct due diligence at a level which satisfies stakeholders and customers.

Going forward, one of the immediate issues for businesses may be the relative difficulty of obtaining reliable and comprehensive information from suppliers in order to complete their Modern Slavery Statement. This is particularly so when dealing with suppliers in jurisdictions which do not have equivalent obligations.

Australian companies operating in the Asia-Pacific region, where slavery risks are particularly high, may find that they are more exposed to suppliers with forced labour issues and their due diligence might require a more thorough approach. In the early years in Australia, as in the UK, we may see Modern Slavery Statements reporting on the actions that have been taken rather than a complete picture.

Entities should pay careful attention to guidance to be published by the Government on the reporting requirements, and heed the recommendations in that guidance. At the very minimum, entities are advised to commence a review of their suppliers, particularly if they operate in a geographical location with heightened slavery risks.

1. Modern Slavery Act 2018 (Cth) s. 5.
2. *Ibid* s. 4, “Australian entity”.
3. *Ibid* s. 4 “consolidated revenue”.
4. *Ibid* s. 12-16.
5. *Ibid* s. 16.
6. *Ibid* s. 14.
7. Explanatory Memorandum, Modern Slavery Bill 2018, page 19.
8. Explanatory Memorandum, Modern Slavery Bill 2018, page 20.
9. Upstream supply chains are those in which materials are being supplied to the organisation. Downstream supply chains are those in which materials, mostly in the form of finished products, are delivered from the organisation to its customers.
10. Explanatory Memorandum, Modern Slavery Bill 2018, page 11.
11. Explanatory Memorandum, Modern Slavery Bill 2018, page 2.
12. Modern Slavery Act 2018 (Cth), s. 16A(1).
13. *Ibid*, s. 16A(4).
14. See comments from the Shadow Minister for Justice, Oxfam and the Human Rights Law Centre, as reported in Gareth Hutchens and Ben Doherty, “Modern Slavery Bill welcomed, but no penalties for breaching Act” *The Guardian* (28 June 2018) <https://www.theguardian.com/australia-news/2018/jun/28/modern-slavery-bill-welcomed-but-no-penalties-for-breaching-act>
15. Available at <https://www.state.gov/j/tip/rls/tiprt/countries/2018/282604.htm> NSW Modern Slavery Act, s.24(2) and (6).
16. *Ibid*. s.14(9).

Recent Developments in Hong Kong



Nathan Colless, Senior Associate,
Allen & Overy Hong Kong

Australia is not the only jurisdiction in which there have been recent attempts to introduce modern slavery legislation.

In Hong Kong, two lawmakers recently proposed that the territory pass a UK-style Modern Slavery Act to address perceived deficiencies in the existing legislative framework to combat human trafficking. The territory currently adopts a ‘multiple-legislation’ approach, in which provisions set out in distinct pieces of legislation (dealing with subjects such as prostitution, immigration, employment, and unlawful custody of personal valuables) are relied upon by the authorities to address trafficking in persons-related crime.¹

The passage of comprehensive anti-human trafficking legislation would represent a change of approach.

Who will be affected?

The Modern Slavery Bill (the **Bill**) proposed by Dennis Kwok and Kenneth Leung would:²

- criminalise (i) human trafficking, (ii) slavery, servitude, and forced or compulsory labour, (iii) forced marriage, and (iv) sex tourism (each of which would also become predicate offences for the bringing of a money laundering charge);
- establish an independent anti-slavery commission to “enhance and promote the measures to combat and prevent slavery and human trafficking, and to provide assistance and support to the victims”;
- introduce an annual requirement for sizable commercial organisations to publish a slavery and human trafficking statement; and

- create a civil cause of action that would be available to victims for use against persons or entities that have engaged in, or knowingly benefitted from, human trafficking.

The government’s position, as expressed by the Secretary for Security at a recent Legislative Council panel discussion on the Bill, is that the existing framework is adequate and provides law enforcement agencies with the necessary flexibility to combat trafficking in persons-related crime.³

In contrast, Kwok and Leung have expressed the view that “Hong Kong currently does not meet the minimum global standard of addressing this tremendous problem in our laws.”⁴

The scale of the human trafficking problem in Hong Kong is the subject of disagreement.



The 2016 Global Slavery Index published by the Walk Free Foundation estimated there were 29,500 victims of human trafficking in Hong Kong in 2016; 2018 was also the third consecutive year in which Hong Kong was given the second-lowest ranking by the U.S. Department of State in its annual Trafficking in Persons report.⁵

In contrast, the HKSAR Government's March 2018 'Action Plan to Tackle Trafficking in Persons and to Enhance Protection of Foreign Domestic Helpers in Hong Kong' stated that:

“[T]here is no sign that Hong Kong is being actively used by transnational syndicates as a destination or transit point for [trafficking in persons], or that [trafficking in persons] is a widespread or prevalent problem in Hong Kong”.⁶

Without government support, the Bill appears unlikely to become law. However, Hong Kong remains a jurisdiction to watch when considering legislative responses to this significant human rights issue.

Hong Kong companies carrying out business in the UK should also be aware that they may already be required to publish a slavery and human trafficking statement under the UK Modern Slavery Act. The Australian legislation takes a similar approach, and would result in a requirement to comply with a similar reporting requirement if it becomes law as expected.

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1. Security Bureau/Labour and Welfare Bureau, “Existing Legislation to Combat Trafficking in Persons” (LC Paper No. CB(2)1480/17-18(06), available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180605cb2-1480-6-e.pdf>), pp. 1, 7; U.S. Department of State, 2018 Trafficking in Persons Report (available at: <https://www.state.gov/documents/organization/282798.pdf>), p. 215.
 2. Dennis Kwok and Kenneth Leung, “A brief overview of the Modern Slavery Bill 2017” (LC Paper No. CB(2)1480/17-18(05), available at: <https://www.legco.gov.hk/yr17-18/chinese/panels/se/papers/se20180605cb2-1480-5-ec.pdf>), p.1.
 3. Minutes of the 5 June 2018 meeting of the Panel on Security (LC Paper No. CB(2)1851/17-18, available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/minutes/se20180605.pdf>), pp. 10, 12.
 4. Kenneth Leung and Dennis Kwok, Letter to the Chairman of the Panel on Security dated 11 January 2018 (LC Paper No. CB(2)765/17-18(01), available at: <https://www.legco.gov.hk/yr17-18/chinese/panels/se/papers/secb2-765-1-ec.pdf>), p. 2.
 5. Available at: <https://www.state.gov/documents/organization/282798.pdf>, p.215.
 6. Available at: <https://www.sb.gov.hk/eng/special/pdfs/Action%20Plan%20to%20Tackle%20TIP%20and%20to%20Protection%20FDHs.pdf>, p.6.
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FOR MORE INFORMATION, PLEASE CONTACT:

BHRR Editorial Board

BHRR@allenoverly.com

Andrew Denny

Tel +44 20 3088 1489
andrew.denny@allenoverly.com

Matthew Townsend

Tel +44 20 3088 3174
matthew.townsend@allenoverly.com

Suzanne Spears

Tel +44 20 3088 2490
suzanne.spears@allenoverly.com

Kenneth Rivlin

Tel +1 212 610 6460
ken.rivlin@allenoverly.com

Gauthier van Thuyne

Tel +32 2 780 2575
gauthier.vanthuyne@allenoverly.com

Olga Owczarek

Tel +44 20 3088 1824
olga.owczarek@allenoverly.com

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