



International Learning Lab
on Public Procurement and Human Rights

Inquiry into establishing a Modern Slavery Act in Australia

Joint Standing Committee on Foreign Affairs, Defence and Trade

Written Evidence Submitted by the International Learning Lab on Public Procurement and Human Rights:

The case for extending modern slavery obligations to public buyers

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1. Introduction

This written evidence is submitted by the *International Learning Lab on Public Procurement and Human Rights* ('the Lab') in support of the establishment of a Modern Slavery Act in Australia. In particular, this submission supports the inclusion of a 'Transparency in Supply Chains' provision which applies both to corporations and public bodies. It builds upon the experience, practice and research of the authors regarding the first year of implementation of the UK Modern Slavery Act 2015 by UK public buyers.

The Lab, created in 2015, is a global network of procurement stakeholders comprising procurement agencies and purchasing officers, regional and international organisations, members of procurement professional associations, non-governmental organizations (NGOs), national human rights institutions (NHRIs), and academics. The Lab is intended to serve as a platform and mechanism for:

- i. Experience-sharing among procurement actors on approaches to integrating respect for human rights into public purchasing;
- ii. Generating knowledge about public procurement law and policy and human rights;
- iii. Producing and disseminating tools and guidance to build capacity to integrate human rights issues among procurement professionals; and
- iv. Promoting coherence between procurement and human rights in international and regional policy frameworks and initiatives.¹

The Lab was established by the Danish Institute for Human Rights (Denmark's national human rights institution), the International Corporate Accountability Roundtable, and the Harrison



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Institute for Public Law at Georgetown University (USA), along with individuals from the University of Nottingham (UK), Business Human Rights and the Environment Research Group (BHRE) at the University of Greenwich (UK), and the UK's London Universities Purchasing Consortium (LUPC), amongst others.

As part of its activities, members of the Lab: Dr. Olga Martin-Ortega, who leads the BHRE, and Andy Davies, Director of LUPC, have worked with public buyers, especially in the UK higher education sector to implement the UK Modern Slavery Act Transparency in Supply Chains provision (Section 54, MSA 2015) by: providing training and capacity building; developing tools and guidance; and directly interacting with buyers and suppliers. This has allowed them to build a sound knowledge of how the public sector approaches modern slavery in its supply chain, the challenges and opportunities presented by modern slavery legislation and lessons learnt, which can valuably inform the Australian legislative process.

The Lab has also submitted evidence to the Australian Joint Select Committee on Government Procurement in the context of the [Inquiry into the Commonwealth Procurement Framework](#) (March 2017) and the UK Joint Committee on Business and Human Rights (June 2016), which referred to our submissions in making a number of recommendations on public procurement in its final report, [Business and Human Rights 2017: Promoting Responsibility and Ensuring Accountability](#) (April 2017).

2. Business and human rights: new legal and policy frameworks

In recent decades, public awareness of human rights abuses in corporate supply chains has greatly increased and demands for businesses to behave responsibly, in order to prevent such abuses, have become prominent.

In one response to this development, the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) established a 'three-pillar' framework on business and human rights comprising:

- the *state duty to protect* the human rights of those within their jurisdiction;
- the *corporate responsibility to respect* the human rights of those affected by their activities and business relationships; and
- the right of victims of corporate related human rights abuses to access *effective remedies*.²

The *corporate responsibility to respect* human rights is best implemented by companies, according to the UNGPs, via the exercise of human rights due diligence, including over their supply chains, to identify, prevent, mitigate and remediate risks of human rights abuses.³

This approach is echoed by recent policy statements by the G7, G20, OECD, EU, and ILO are promoting a renewed focus on "responsible global value chains" to support sustainable and



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inclusive global growth, with a strong emphasis on the contribution to be made to these goals by the private sector, through “responsible business conduct” and the Decent Work Agenda.⁴

At the national level, new legislation such as the US Dodd Frank Section 1502 (on conflict minerals), the California Transparency in the Supply Chain Act, the UK Modern Slavery Act 2015 (Section 54 Transparency in the Supply Chains), and the EU Non-Financial Reporting Directive, all of which provide for disclosure by businesses of information on due diligence efforts across their supply chains, give effect to the corporate responsibility to respect.

While the UNGPs explicitly address public authorities’ commercial relationships, whether through public procurement or the contracting-out of public services (UNGP 5 and 6), legal measures articulating such expectations towards states’ own supply chains have been, to date, far more limited.

2.2 Public procurement and modern slavery: risks

This is despite the fact that, like other consumers, governments currently procure goods and services via supply chains in which modern slavery and human trafficking, and other human rights violations risks, are widespread. For example:

- Forced labour and child labour have been found in Thai factories supplying [Finnish health authorities](#) with rubber gloves, alongside a range of other labour abuses including denial of legally required breaks and public holidays, discrimination against migrant workers, and unlawfully docking workers’ pay for work permits and accommodation.⁵
- In 2010, the U.S. Department of State’s [Trafficking in Persons Report](#) found that government subcontractors tasked with filling logistics positions on U.S. military bases in Iraq and Afghanistan were involved in human trafficking, forced labour, and sexual exploitation.⁶
- Forced labour was discovered in factories producing [servers for Danish universities](#),⁷ and minerals needed for technology production such as cassiterite, coltan, and wolframite from the Democratic Republic of Congo appear on the U.S. Department of Labor [“List of Goods”](#) produced by forced labour.⁸
- Human trafficking and slavery have been discovered on a large scale amongst suppliers of everyday foodstuffs consumed by governments, such as fish and prawns, in countries from [Ireland](#)⁹ to [Thailand](#).¹⁰
- In the UK several individuals have been prosecuted and convicted for offenses related to modern slavery and human trafficking. In January 2016 the owner of the bed factory, Kozee Sleep, a popular supplier for major retailers in the country, was jailed for people trafficking after forcing a group of vulnerable Hungarian men to live in deplorable conditions



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and work for hardly any pay. In January 2017, two brothers who trafficked eighteen people from Poland to the UK and coerced them to work in the warehouse of the retailer 'Sports Direct' were jailed.¹¹

- Labour organisers in facilities supplying governments are frequently subjected to harassment and abuse: in Bangladesh, a [labour advocate at a factory making clothing for the U.S. General Services Administration](#) was arrested and tortured by police in 2010 then found dead with clear signs of foul play in 2012.¹²

2.2 Public procurement and modern slavery: a missed opportunity

Yet public procurement offers states an enormous opportunity to promote corporate efforts to eliminate modern slavery.¹³ Public procurement represents a significant share of the total economy. Across OECD countries it accounts for 12% of GDP, and on average, governments in EU member states spend on average just above 19% of their GDP on public procurement.¹⁴ Public buyers therefore have the potential to exercise substantial leverage over the conduct of their suppliers and market practices, especially in relation to products or services where they are predominant customers, for example, of electronics equipment, surgical and laboratory equipment, construction materials and services, cleaning and security services. Other important sectors where public authorities are major buyers are defence equipment, construction, municipal refuse collection and waste disposal, healthcare goods and services, highways maintenance services, rail equipment and services, consultancy and financial services.

But while public procurement has often been used to pursue social goals, such as promoting labour market integration of particular vulnerable groups, including people with disabilities,¹⁵ only recently have governments started recognising the potential of procurement as a driver of responsible business conduct, and in tackling modern slavery, human trafficking and human rights violations, in particular.¹⁶ For example, public procurement has been included in the *2030 Agenda for Sustainable Development*, adopted by UN Member States in September 2016, where sustainable Development Goal 12.7 calls on all countries to promote sustainable public procurement practices and to implement sustainable public procurement policies and action plans.¹⁷

Yet, as noted, the vast majority of governments have yet to seize on the opportunities presented by public procurement to demonstrate their commitment via high level policy commitments such as the SDGs, or those already mentioned on global value chains. This not only represents negligence towards victims of modern slavery, but also sends the wrong message to businesses. The UK Parliament has expressed it very clearly recently:



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“If the Government expects business to take human rights issues in their supply chains seriously, it must demonstrate at least the same level of commitment in its own procurement supply chains.”

Human Rights and Business 2017: Promoting responsibility and ensuring accountability,
House of Lords House of Commons Joint Committee on Human Rights, April 2017¹⁸

Now the Commonwealth of Australia has the opportunity to lead in the response to this challenge by including obligations for public buyers within its prospective modern slavery legislation.

3. The application of the UK Modern Slavery Act (2015) to public buyers

The UK MSA 2015 establishes a framework to combat slavery, servitude and forced or compulsory labour and human trafficking and for the protection of victims. It also contains an obligation for commercial organisations to report on their efforts to identify, prevent and mitigate modern slavery and human trafficking (Section 54). This requirement also applies to a limited number of public buyers, primarily Higher Education Institutions. However, as will be described below, a number of public buyers who are not obliged to report have voluntarily chose to do so. Equally, there is strong movement in the UK to extend the obligation contained in Section 54 to all public buyers. It may only be a matter of time before public bodies find themselves compulsorily reporting on their efforts to fight modern slavery and human trafficking.

3.1. Scope: Inclusion of public buyers

Section 54 MSA requires commercial entities to report annually on their efforts to identify and prevent modern slavery in their supply chain through producing a *Slavery and Human Trafficking Statement*.

Section 54: TRANSPARENCY IN SUPPLY CHAINS (1)

(1) A commercial organisation [...] must prepare a slavery and human trafficking statement for each financial year of the organisation.

(4) A slavery and human trafficking statement for a financial year is—

(a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—

(i) in any of its supply chains, and

(ii) in any part of its own business, or

(b) a statement that the organisation has taken no such steps.



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This provision thus seeks to use transparency as a tool for commercial organisations to take informed business and purchasing decisions, and for consumers to have the correct information available when making their choices.

The MSA defines commercial organisations as suppliers of goods or services which have a total annual turnover of the threshold established by the Government, currently set at £36 million or more.¹⁹

Whilst this provision was intended for private commercial organisations the definition clearly includes certain public bodies, which although regulated by the public procurement regime, the Public Contracts Regulations 2015, are also considered commercial organisations.

Amongst these are over one hundred universities and Higher Education providers, twofold organisations who receive public funding from the Government, and at the same time, act as commercial entities, charging fees for the services they deliver. The MSA 2015 thus obliges universities to devise policies, procedures and actions to ensure that they are not contributing to the exploitation of human beings through slavery, forced labour and human trafficking and are more importantly taking steps to prevent it.

During 2016 Universities have had to undertake their first round of reporting under the MSA and should publish, from a direct link on their homepage, their *Slavery and Human Trafficking Statement*. According to the UK Government Guidance on section 54,²⁰ the report is expected to be published in the 6 months after the end of an organisation's financial year. This means that by 31st January 2017 all universities' statements should have been made public. The BHRE's analysis of public buyer's statements has collected 73 universities' statements, including university hospitals. Interestingly, eleven local authorities, who are not covered by Section 54, have chosen to also publish their statements, together with other public buyers, such as the City of London Corporation and Transport for London.²¹

The first collaborative procurement organisation to produce a report was the London Universities Purchasing Consortium (LUPC),²² a professional buying organisation in the higher education sector whose members include most London universities as well as several colleges, museums, galleries and cultural institutions. Even though LUPC's turnover is nowhere near that prescribed, doing so has provided guidance and encouragement to academic institutions. It has also reinforced the idea that beyond a compliance process, the MSA has brought an opportunity for institutions to reflect on their social impact.



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3.2. Section 54: Reporting and due diligence requirements

The MSA 2015 does not prescribe the elements which reports must contain. Rather it suggests six information categories that could be included in statements. These relate to: the structure and policies of the organisation, due diligence procedures, risks and responses, measuring mechanisms and staff training. There is also the possibility, which is compliant with Section 54, to report that the organisation has taken no steps toward the identification and prevention of modern slavery in its supply chain.

Section 54: TRANSPARENCY IN SUPPLY CHAINS (II)

(5) An organisation's [...] statement may include information about—

- (a) the organisation's structure, its business and its supply chains;*
 - (b) its policies in relation to slavery and human trafficking;*
 - (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;*
 - (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;*
 - (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;*
 - (f) the training about slavery and human trafficking available to its staff.*
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As mentioned, the UK Government published a Guidance in 2015 on how to comply with Section 54, which reporting organisations, and public buyers in particular, have not found particularly helpful.²³ There is an overall lack of support and guidance existing for public buyers on how to develop their own due diligence to identify, prevent and mitigate modern slavery, human trafficking and human rights risks in their supply chains.

3.3. Section 54 MSA 2015: Implementation in practice

The analysis of the 80+ public buyers undertaken by BHRE demonstrate that the first year of reporting by public authorities has been an important learning process which has served to raise awareness over the urgency of the matter and the roles and responsibilities of public buyers towards their supply chain.²⁴ On the whole, the first year of reporting has been successful in raising awareness over the shared responsibility public authorities have regarding prevention and mitigation of human rights violations in global supply chains. Whilst the reporting public buyers are yet to take significant steps to develop human rights due diligence procedures and act on risks and



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potential violations, it is encouraging to see such level of organisational commitment, both of those entities who are obliged by law to report and those who have chosen to do so voluntarily.

Statements have been rather inconsistent and not all institutions have undertaken a serious review process whilst drafting their Modern Slavery and Human Trafficking Statements. However, many of the reporting universities and local authorities have started putting in place specific policies relating to modern slavery in their supply chain or trying to link their existing ethical and/or sustainable procurement processes to the obligations under the Modern Slavery Act. The fact that statements need to be signed and approved by the persons at the highest level of management (subsection 6), has been particularly relevant when raising awareness over the importance of the topic and the need for overall institutional commitment. However, much of the responsibility for the statement has fallen on procurement practitioners within reporting public authorities, who in many cases are not trained to or do not have the capacity to undertake human rights risks assessments.

Procurement departments need support and commitment from senior management to perform this task and to foster a new culture within institutions. Developing human rights policies and drafting the Modern Slavery and Human Trafficking statement to reflect them is not a one person, or one department even, task: it is a whole institution commitment and challenge to raise up to this responsibility what reporting public authorities are faced with.

In the statements produced, the first year references to due diligence processes are poor and so are attempts to identify risk sectors in public supply chains, let alone pointing at specific instances of violations found in their business relations and suppliers. Some interesting initiatives have been reporting, mainly regarding the use of tools for engagement with suppliers, from the tender process to contract management, and partnering with external organisations – such as Electronics Watch and the Ethical Trading Initiative- which provide support in monitoring supply chains and responding to instances of human rights violations.

All institutions are used to developing due diligence, but invariably this is based on the risks posed to them. In order to comply with the MSA public buyers need to change their conception of what risk is and perform more effective human rights due diligence: that is, to think of the risk their activities pose to the human rights of people impacted by such activities.²⁵ Once those are identified, they must be acted upon. Public buyers in general are less used than private institutions to exercise their leverage through buying power. Such leverage goes beyond the purchasing capacity and category spend. Partnerships and collaborations to enhance and maximise this leverage are key.

Slavery and Human Trafficking Statements are intended to be a live document, based on a process of discovery, commitment and acknowledgement of responsibility within each institution. It is an organic document which should be a reflection of a process of due diligence which deepens every year. The statement is not the outcome, the statement is the vehicle to commence, strengthen and own a sound due diligence process which allows institutions to know the risks their activities pose



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on human rights, modify their practices to prevent such risks, establish procedures to react to violations, mitigate their impact and when possible, remediate them. The first year of reporting has mostly consisted of institutions understanding this and we are expecting that in the years to come, public buyers can build on their own due diligence procedures and ways to measure their effectiveness. However, without effective guidance, this threatens to be a longer and less meaningful process.

The coming years will be crucial in demonstrating the effectiveness of the policies, procedures and engagement processes, both with suppliers and external organisations, which are currently being designed. We expect the quality of the reports to improve as capacity building increases and the know-how and best practices are shared both among public buyers but also from the private sector.

4. Recommendations

The establishment of an Australian Modern Slavery Act is a very significant step in the fulfilment of its human rights obligations and commitments and is greatly welcomed. Introducing this kind of legislation would place the Commonwealth of Australia at the forefront of the combat of modern slavery and human trafficking and confirm its commitment to the protection of human rights. If this ground-breaking piece of legislation is passed it should include a Transparency in Supply Chain provision, mirroring, but improving the UK Modern Slavery Act Section 54 one. Public buyers are key elements in the combat against modern slavery, human trafficking and human rights abuses in global supply chains. While their role and obligations in this realm cannot change overnight, it is important that the necessary steps are taken by providing a legal basis for their engagement, commitment and responsibilities. The Learning Lab, and the authors of this submission on its behalf, offers the Joint Standing Committee on Foreign Affairs, Defence and Trade the following recommendations:

- i. Aligning the new Modern Slavery regulation with Australia's international responsibilities to respect, promote and protect human rights, in all spheres of government activity, including when purchasing goods and contracting services and the international trends to compel due diligence reporting and transparency in the supply chain. It is our recommendation that the new Modern Slavery regulation **contains a Transparency in Supply Chains provision**, modelled but improved, on Section 54 of the UK Modern Slavery Act.
- ii. A Transparency in Supply Chains provision included in new Modern Slavery regulation should contain **prescriptive transparency requirements**, rather than suggested ones as the UK MSA, in order to guarantee that reports are inconsistent in quality and content.
- iii. A Transparency in Supply Chains provision included in new Modern Slavery regulation should make it **compulsory to all public bodies over a threshold size** to publish an annual



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Slavery and Human Trafficking Statement or equivalent statement on supply chain transparency reporting on their efforts to identify, prevent and mitigate risks of modern slavery in their supply chains.

- iv. A Transparency in Supply Chains provision included in new Modern Slavery regulation should not be restricted to modern slavery and human trafficking but be **comprehensive to encompass the wide range of violations to human rights** which occur in global supply chains.
- v. A Transparency in Supply Chains provision included in new Modern Slavery regulation **should expressively and undoubtedly address public buyers** and their obligations to report on their own due diligence efforts to combat modern slavery, human trafficking and human rights in the supply chain.
- vi. A Transparency in Supply Chains provision included in new Modern Slavery regulation should also include **mandatory exclusions** by which public buyers can exclude suppliers who fail to uphold their human rights in the supply chain obligations from tendering processes.
- vii. The government should **develop additional practical guidance** for public buyers to address their obligations under the new Modern Slavery regulation, and specifically: how to integrate respect for human rights into the public procurement process, in line with national and international standards. Public buyers will need significant support to develop due diligence effectively and become key players in the fight against modern slavery, human trafficking and human rights violations in global supply chains. Australia should learn from the UK experience and commit to properly supporting its public buyers by backing the legislation with proper guidance, training and support for public buyers working at municipal, state and federal levels.
- viii. It is our recommendation that guidance focuses on how to develop human rights due diligence procedures during the **contract management stage**, allowing public buyers to be involved in monitoring and remediation processes. The Electronics Watch Model of due diligence in the supply chain provides good practice in this regard. Guidance should also address how grounds for exclusion from eligibility for public contracts when suppliers do not respect human rights or develop appropriate due diligence in their supply chain.
- ix. The government should **support knowledge and capacity development** of public sector procurement professionals on human rights risks and measures to address them, e.g. by supporting online tools to identify higher risk product categories and countries of origin; e-learning courses; and/or an **online hub or portal for Australian public buyers** to share good practices and experiences on human rights.
- x. A process of **assessment of current knowledge, needs, challenges and opportunities** amongst central government public buyers in relation to integration of modern slavery,



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human trafficking and human rights in supply chains safeguards in public procurement should be undertaken; a similar exercise should be undertaken in relation to local government procurement functions.

- xi. A public procurement, modern slavery, human trafficking and human rights in supply chains **Working Group** should be established to include the relevant public administration departments, procurement professional associations, buyers from large public bodies, representatives of relevant sustainable procurement initiatives and civil society organisations, and procurement law professionals, to develop the assessment recommended above and proposals for relevant and practical initiatives as part of a work plan on procurement and human rights on an ongoing basis. Support can be sought from regional bodies such as the [Chartered Institute of Procurement and Supply \(CIPS\) Australasia](#) or international networks such as the [International Learning Lab on Procurement and Human Rights](#);
- xii. The current **initiative to amend the Commonwealth Procurement Framework** should be an opportunity to strengthen the human rights dimensions of procurement by **coordinating it and making it coherent** with the obligation to report under a new Transparency in Supply Chains provision for public buyers.

NOTES

¹ INTERNATIONAL LEARNING LAB ON PUBLIC PROCUREMENT AND HUMAN RIGHTS, <http://www.hrprocurementlab.org/>.

² UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

³ MARTIN-ORTEGA, O., "Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?", *Netherlands Quarterly of Human Rights*, 32:1, 2014, pp. 44-74.

⁴ G-7 LEADERS' Declaration, Schloss Elmau, Germany (June 8, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>; OECD, *Ministerial Communiqué on Responsible Business Conduct*, (June 26, 2014), <https://mneguidelines.oecd.org/2014-informal-ministerial-on-rbc.htm>; OECD, *Public Procurement for Sustainable and Inclusive Growth: Enabling Reform through Evidence and Peer Reviews*, <http://www.oecd.org/gov/ethics/PublicProcurementRev9.pdf>; COUNCIL OF THE EUROPEAN UNION, *The EU and Responsible Global Value Chains – Council Conclusions*, (May 12, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/05/12-conclusions-on-responsible-global-value-chains/>; *Europe 2020: A European Strategy for Smart, Sustainable and Inclusive growth* COM (2010) 2020 final (Apr. 3, 2010), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC2020&from=EN>; ILO, *Agenda of the 105th Session of the International Labour Conference*, (April 22, 2016), http://www.ilo.org/ilc/ILCSessions/105/reports/reports-to-the-conference/WCMS_473699/lang-en/index.htm; Judy Gearhart, *Global Supply Chains: Time for a Convention on Decent Work*, HUFFINGTON POST (June 2016), http://www.huffingtonpost.com/judy-gearhart/global-supply-chains-time_b_10228772.html

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- ⁷ DANWATCH, *Servants of Servers* (October 2015), <https://www.danwatch.dk/en/undersogelse/servants-of-servers/>.
- ⁸ U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, *List of Goods Produced by Child Labour* (2013), <http://www.dol.gov/ILAB/reports/child-labor/list-of-goods>.
- ⁹ LAWRENCE, F. et. al., *Revealed: Trafficked Migrant Workers Abused in Irish Fishing Industry*, THE GUARDIAN (2 November, 2015), <https://www.theguardian.com/global-development/2015/nov/02/revealed-trafficked-migrant-workers-abused-in-irish-fishing-industry>.
- ¹⁰ HODAL, K. et al., *Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK*, THE GUARDIAN (1- June, 2014), <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour>.
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- ¹⁶ MARTIN-ORTEGA, *supra* note 13; OUTHWAITE AND MARTIN-ORTEGA, *supra* note 15 and METHVEN O'BRIEN et. al, *supra* note 13.
- ¹⁷ G.A. Res. 70/1, *Transforming our World: the 2030 Agenda for Sustainable Development* (Sept. 25, 2015), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1.
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- ¹⁹ THE MODERN SLAVERY ACT 2015 (Transparency in Supply Chains) Regulations (2015), <http://www.legislation.gov.uk/ukdsi/2015/9780111138847>.
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- ²⁴ MARTIN-ORTEGA, and ISLAM, *supra* note 21.
- ²⁵ MARTIN-ORTEGA, *supra* note 13.