

Government Purchasing and the Implementation of Modern Slavery Legislation

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Abstract

Under the *Modern Slavery Act 2018* (Cth), the Australian Government is required to report annually on how it is managing modern slavery risks in its own operations and supply chains. While underexamined in the literature to date, this feature of the Act is significant for its potential impact on Federal Government procurement processes and, through these, on business practice. In this article we examine the Australian Government's recent efforts to integrate modern slavery considerations into its public procurement framework from a labour regulation and compliance perspective. We begin by contextualising these developments within the broader literature on government purchasing, labour standards and human rights. We identify two sets of regulatory challenges that arise when seeking to use public procurement to advance labour rights globally, and we provide a preliminary assessment of the Australian Government's modern-slavery-related procurement initiatives in light of these challenges.

Please cite this article as:

Ingrid Landau and John Howe, 'Government Purchasing and the Implementation of Modern Slavery Legislation' (2022) 44(3) *Sydney Law Review* 347.



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I Introduction

The Australian Government has committed to a global leadership role in combating modern slavery.¹ The mainstay of these efforts, the *Modern Slavery Act 2018* (Cth) (*Modern Slavery Act*), requires large Australian organisations to report annually on measures they have taken to identify and address risks of modern slavery in their operations and supply chains. While modelled on a similar legislative initiative in the United Kingdom ('UK'), the Australian statute goes further in several respects. Among its innovative features is its application to the Australian Government itself, with the Act being 'the first and only legislation of its kind in the world to require a government to report on modern slavery risks across its procurement and investment activities'.² While underexamined in the literature to date, this feature of the *Modern Slavery Act* is significant for its potential impact on Federal Government procurement processes and, through these, on business practice. The Australian Government is the largest procurer in the Australian market, entering over 84,050 contracts in the 2020–21 financial year, with a total value of \$69.8 billion.³ The application of the *Modern Slavery Act* to the Australian Government may also prompt innovation and reflection with respect to the use of public procurement as a means through which to promote respect for a broader set of labour and human rights.

In this article we contextualise, and engage in a preliminary assessment of, the Australian Government's efforts to use its purchasing power to address modern slavery from the standpoint of labour regulation and compliance. We also consider what this approach reveals to us about how the Federal Government conceptualises its regulatory role within the context of public procurement and labour governance. We argue that the Government's approach to integrating modern slavery

¹ See, eg, Jason Wood MP, Assistant Minister for Customs, Community Safety and Multicultural Affairs, 'Australian Government a World Leader in Eradicating Modern Slavery' (Media Release, 1 June 2020) <<https://minister.homeaffairs.gov.au/jasonwood/Pages/australian-government-world-leader-eradicating-modern-slavery.aspx>>.

² Australian Government, *Commonwealth Modern Slavery Statement 2019–20* (Commonwealth of Australia, 2020) 3 ('*Commonwealth Modern Slavery Statement 2019–20*'). The *Modern Slavery Act* (2015) (UK), on which the Australian Act was modelled, does not apply to public procurement. However, the United Kingdom ('UK') Government voluntarily published its own Modern Slavery Statement in March 2020 and from 2021, UK ministerial departments are required to publish their own annual statements: Home Office (UK), *Home Office Modern Slavery Statement 1 April 2020–31 March 2021* (August 2021) 3. The *Modern Slavery Act 2018* (NSW) imposes modern slavery reporting requirements on government agencies (including local councils) and state-owned corporations. This Act commenced operation on 1 January 2022 (following the passage of the *Modern Slavery Amendment Act 2021* (NSW)). Australian state and territory procurement regimes are not examined in this article. For a discussion of the potential application of Western Australia's new procurement debarment regime to human rights, see Fiona McGaughey, Rebecca Faugno, Elise Bant and Holly Cullen, 'Public Procurement for Protecting Human Rights' (2022) 47(2) *Alternative Law Journal* 143.

³ Australian Government, *Commonwealth Modern Slavery Statement 2020–21* (Commonwealth of Australia, 2021) 14 ('*Commonwealth Modern Slavery Statement 2020–21*'). State and territory governments are excluded from the reporting requirement: *Modern Slavery Act 2018* (Cth) s 8 ('*Modern Slavery Act*'). Local government authorities are not required to report, but the Australian Border Force encourages local government entities to voluntarily comply with the Act where they have the capacity to do so: Australian Government Department of Home Affairs, *Modern Slavery* (Web Page) <<https://www.homeaffairs.gov.au/criminal-justice/Pages/modern-slavery.aspx>>.

considerations into its purchasing practices, largely by way of its modern slavery ‘*Procurement Toolkit*’,⁴ may open up opportunities for procurement officers within various departments and agencies to adopt innovative approaches to managing modern-slavery-related risks in goods and services they procure. However, it is unclear to what extent such opportunities will be taken up given countervailing pressures within the broader organisational and regulatory frameworks in which these officers operate. More broadly, we argue that the Australian Government’s approach appears to underestimate two regulatory challenges associated with the integration of social considerations into government purchasing practices within the context of a highly decentralised procurement system. The first of these challenges goes to the regulation of procurement officers’ decision-making. Specifically, we question the extent to which procurement officers will exercise their discretion to effectively integrate modern slavery considerations into procurement decision-making given the emphasis within government procurement on cost minimisation, and time and resource constraints. The second regulatory challenge goes to what is needed to influence business practices within global supply chains. To be effective, business compliance with modern-slavery-related performance obligations in government contracts needs to be monitored and cases of non-compliance appropriately responded to and, where necessary, sanctioned. We suggest that when considered in light of previous studies of regulatory design and effectiveness, the Government’s approach risks relying too heavily on self-evaluation and self-reporting to secure broad, meaningful and sustained change in business behaviour.

In Part II of this article, we locate the Australian Government’s recent modern slavery procurement initiatives within the broader literature on government purchasing, labour standards and human rights. We also position these efforts within the context of growing global momentum towards socially responsible public procurement. Drawing on insights from the regulatory governance literature, in Part III we identify two distinct sets of regulatory challenges that, we argue, are often overlooked and/or conflated in academic and policy discourse on the use of public procurement to advance labour rights globally. In Part IV we describe how the Australian Government has integrated modern slavery considerations into its procurement processes. In Part V we critically assess this approach, drawing on our discussion in Part III. We also suggest how the Government’s approach could be adjusted and developed to encourage greater accountability for modern slavery risks by its suppliers. In Part V, we summarise our conclusions and identify areas for further research.

⁴ Australian Government, *Addressing Modern Slavery in Government Supply Chains: A Toolkit of Resources for Government Procurement Officers* <<https://modernslaveryregister.gov.au/resources/>> (*‘Procurement Toolkit’*).

II Public Procurement, Labour Standards and Human Rights

Public procurement is the purchasing by government from private sector contractors of goods and services that government needs.⁵ These goods and services are diverse: ranging from large infrastructure and defence projects through to the purchasing of information and communication technology ('ICT') equipment, vehicles, office stationery, uniforms and facilities and property management services. Public procurement has long been recognised as a means through which to promote and achieve social objectives. In the realm of labour standards, it has been used as a regulatory tool to support compliance with existing obligations imposed by labour law, as well as a means through which to promote desired labour practices above minimal standards.⁶ Rationales for the integration of labour considerations into government purchasing decision-making include recognition of government's responsibility to ensure public money is spent in a way that maximises public benefit and policy coherence. As significant purchasers, governments can use their substantial economic power to leverage change in corporate behaviour, an approach that can be more politically palatable and feasible than the use of law to impose universally applicable standards.⁷ Attaching labour-related criteria to public procurement is also consistent with the notion of public authorities as 'model employers'.⁸ While the use of state purchasing power to pursue social objectives via public procurement is not without its critics,⁹ it is widely recognised as a legitimate means through which governments may seek to bring about greater organisational commitment to the realisation of certain labour standards.

Although the attachment of labour-related objectives to public procurement contracts has a long history, most political and legal efforts in this regard have focused on effecting change in working conditions in domestic jurisdictions.¹⁰ An example of such an initiative in Australia is the former Howard Coalition Government's linkage of building and construction funding to a sector-specific code

⁵ Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press, 2007) 3.

⁶ See, eg, Catherine Barnard, 'To Boldly Go: Social Clauses in Public Procurement' (2017) 46(2) *Industrial Law Journal* 208, 211–12; McCrudden (n 5); John Howe, "'Money and Favours": Government Deployment of Public Wealth as an Instrument of Labour Regulation' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006) 167.

⁷ John Howe, 'The Regulatory Impact of using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains' in Kate Macdonald and Shelley Marshall (eds) *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice* (Ashgate, 2010) 329, 330.

⁸ McCrudden (n 5); John Howe, 'Government as Industrial Relations Role Model: Promotion of Collective Bargaining by Non-legislative Measures' in Breen Creighton and Anthony Forsyth (eds) *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 182.

⁹ See, eg, Sasha Holley, Glenda Maconachie and Miles Goodwin, 'Government Procurement Contracts and Minimum Labour Standards Enforcement: Rhetoric, Duplication and Distraction?' (2015) 26(1) *Economic and Labour Relations Review* 43; Albert Sanchez-Graells, 'Regulatory Substitution between Labour and Public Procurement Law: The EU's Shifting Approach to Enforcing Labour Standards in Public Contracts' (2018) 24(2) *European Public Law* 229.

¹⁰ Olga Martin-Ortega and Claire Methven O'Brien, 'Advancing Respect for Labour Rights Globally through Public Procurement' (2017) 5(4) *Politics and Governance* 69, 70.

of workplace practice.¹¹ Between 2009 and 2014, the former Rudd Labour Government also used procurement to promote labour-related objectives, with the Fair Work Principles tying Federal Government procurement decisions to compliance with the main federal labour law (the *Fair Work Act 2009* (Cth)) and requiring additional minimum requirements for cleaning services, and clothing, textile and footwear manufacturers.¹² Scholarly analysis (in Australia and internationally) has similarly tended to focus on the use of procurement to pursue labour objectives at the national or local level.¹³

However, several developments are prompting activists, scholars and policymakers to pay closer attention to the question of how national governments can use their purchasing power to influence working conditions abroad, as well as at home. The first of these is the increasingly globalised economy in which government purchasing takes place. Governments, like private entities, purchase many goods and services that are produced by way of global supply chains. Particularly where these chains extend into so-called ‘developing’ countries, there is a significant risk of labour rights abuses taking place in the production or delivery of these goods and services. In recent years, media reports have exposed linkages between public contracts, and serious labour and human rights abuses in a range of sectors, including electronics and ICT, textiles and apparel, healthcare, infrastructure and agriculture.¹⁴

At the global level, the United Nations (‘UN’) Human Rights Council’s adoption of the *UN Guiding Principles on Business and Human Rights* (‘*UNGP*’)¹⁵ in 2011 has prompted a resurgence of interest in the concept of socially responsible procurement. These authoritative principles have become the global standard on the expected roles of states and businesses in relation to human rights. Guiding Principles 4–6 address the ‘state-business nexus’: that is, the requirements on States to ensure protection and respect of human rights in their roles as economic actors.¹⁶ Guiding Principle 6 of the *UNGP* provides that, in fulfilling their duty to protect

¹¹ *Building and Construction Industry Improvement Act 2005* (Cth). This approach is continued in the current *Building and Construction Industry (Improving Productivity) Act 2016* (Cth).

¹² These principles were repealed by the Abbott Coalition Government on 1 July 2014: Joint Select Committee on Government Procurement, Parliament of Australia, *Buying into Our Future: Review of Amendments to the Commonwealth Procurement Rules* (Report, June 2017) 36–7 [4.3]–[4.7] (‘*Buying into Our Future Report*’); Senate Finance and Public Administration References Committee, Parliament of Australia, *Commonwealth Procurement Procedures* (Report, July 2014) 71 [5.51].

¹³ See, eg, Barnard (n 6); McCrudden (n 5); Holley, Maconachie and Goodwin (n 9); John Howe and Ingrid Landau, ‘Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design’ (2009) 51(4) *Journal of Industrial Relations* 574.

¹⁴ See, eg, Martijn Boersma, *Do No Harm? Procurement of Medical Goods by Australian Companies and Government* (Report, Australian Nursing and Midwifery Federation and the Australia Institute, March 2017); Claire Methven O’Brien, Nicole Vander Meulen and Amol Mehra, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (Report, International Learning Lab on Public Procurement and Human Rights, July 2016).

¹⁵ United Nations (‘UN’) Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (HR/PUB/11/04, 2011) (‘*UNGP*’) endorsed by UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, 17th sess, 33rd mtg, Agenda Item 3, A/HRC/RES/17/4 (6 July 2011).

¹⁶ *Ibid* 6–8 (Guiding Principles 4–6).

against human rights abuses by third parties, ‘States should promote respect for human rights by business enterprises with which they conduct commercial transactions’.¹⁷ ‘States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies ... including, where appropriate, by requiring human rights due diligence.’¹⁸ They should also ‘exercise adequate oversight in order to meet their human rights obligations’ where they have privatised the delivery of public services (whether by way of contract or legislation).¹⁹ Finally, States should ensure policy coherence across all governmental departments, agencies and other state-based institutions that ‘shape business practices’.²⁰ There has been, to draw on the words of the UN Working Group on Business and Human Rights in 2018, ‘slow progress’ by States in integrating human rights concerns into public procurement.²¹ Nonetheless, civil society organisations around the world are increasingly using the *UNGP* as a launching pad from which to call for state action in this regard.²²

Political support for the integration of social considerations into public procurement at the global level has also come by way of the global community’s adoption of the 2030 Sustainable Development Goals in 2015. Goal 12.7 specifically calls for the implementation of sustainable public procurement policies and action plans.²³ In addition, global leadership groups such as the G7 and the G20 have emphasised the joint responsibilities of government and business to foster the implementation of labour, social and environmental standards in supply chains and encourage best practice.²⁴

The low-profile, but highly influential, Organisation for Economic Co-operation and Development (‘OECD’) is also emphasising ‘the growing expectation that governments uphold RBC [responsible business conduct] commitments in their role as an economic actor’.²⁵ In 2017, then Secretary-General of the OECD, Angel Gurría, observed:

Until only a few years ago, public procurement was perceived as an administrative, back-office function. Today however, it is seen as a crucial

¹⁷ *Ibid* 8 (Guiding Principle 6).

¹⁸ *Ibid* 6 (Guiding Principle 4).

¹⁹ *Ibid* 8 (Guiding Principle 5).

²⁰ *Ibid* 10 (Guiding Principle 8).

²¹ UN Secretary-General, *The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 73rd sess, Agenda Item 74(b), UN Doc A/73/163 (16 July 2018) 21 [82] <<https://digitallibrary.un.org/record/1639520>>.

²² See, eg, Australian Human Rights Commission, *Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement* (August 2016).

²³ *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, 70th sess, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015) <<https://digitallibrary.un.org/record/3976972>>.

²⁴ G7 Summit, ‘Leaders’ Declaration’ (7–8 June 2015) 4–5 <https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf>; G20 Summit, ‘Leaders’ Declaration: Shaping an Interconnected World (7–8 July 2017) 4–5 <<https://www.consilium.europa.eu/en/press/press-releases/2017/07/08/g20-hamburg-communique/>>.

²⁵ Organisation for Economic Co-operation and Development (‘OECD’), *Integrating Responsible Business Conduct into Public Procurement* (22 December 2020) 16 (citations omitted) <<https://doi.org/10.1787/02682b01-en>>.

pillar of services delivery for governments and a strategic tool for achieving key policy objectives: from budget accountability ... to tackling global challenges such as climate change, and promoting socially responsible suppliers into the global value chain.²⁶

Adopted in 2015, the *OECD Recommendation of the Council on Public Procurement* focuses on the strategic and holistic use of public procurement.²⁷ This instrument acknowledges the validity of ‘secondary policy objectives’, and calls on adhering States to recognise that the pursuit of such objectives should be balanced against the primary procurement objective of ‘delivering goods and services necessary to accomplish government mission in a timely, economical and effective manner’.²⁸ In 2019, the OECD launched a new programme focusing on the integration of responsible business conduct into public procurement policies and processes.²⁹ Drawing on the concept of risk-based due diligence in the *OECD Guidelines for Multinational Enterprises*,³⁰ this programme focuses on implementing due diligence in public procurement to ensure that purchasing decisions are not linked to adverse impacts on human rights, labour rights and the environment, and extending due diligence actions along the supply chain.³¹

III Public Procurement as Regulation

Despite growing interest in leveraging State purchasing power to augment existing efforts to address labour and human rights violations in global production networks, most academic scholarship on the subject focuses on the desirability or legality of such measures within national, regional or global frameworks.³² Regulatory frameworks in the European Union (‘EU’) have received particular attention, in light of revisions to EU directives in 2014 that have broadened the scope for inclusion of social considerations in state purchasing.³³ Efforts have also been made to map

²⁶ Angel Gurría, ‘Strategic Public Procurement: Procuring Sustainable, Innovative and Socially Responsible Solutions’ (Opening Remarks at the Joint OECD–European Commission Conference on Strategic Public Procurement, 2 June 2017) <<https://www.oecd.org/about/secretary-general/strategic-public-procurement-procuring-sustainable-innovative-and-socially-responsible-solutions.htm>>.

²⁷ OECD Directorate for Public Governance and Territorial Development, *OECD Recommendation of the Council on Public Procurement* (2015) <<https://www.oecd.org/gov/public-procurement/recommendation/>>.

²⁸ *Ibid* arts I, V.

²⁹ OECD, *Public Procurement and Responsible Business Conduct* (Web Page) <<https://www.oecd.org/gov/public-procurement/procurement-and-rbc/>>.

³⁰ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) <<http://mneguidelines.oecd.org/guidelines/>>.

³¹ OECD, *Public Procurement and Responsible Business Conduct* (n 29).

³² See, eg, Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments on Public Procurement* (Hart Publishing, 2017); Olga Martin-Ortega and Claire Methven O’Brien (eds) *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, 2019).

³³ See, eg, Albert Sánchez Graells (ed) *Smart Public Procurement and Labour Standards: Pushing the Discussion after RegioPost* (Bloomsbury, 2018); Laurens Ankersmit, ‘The Contribution of EU Public Procurement Law to Corporate Social Responsibility’ (2020) 26(1) *European Law Journal* 9; Gale Raj-Reichert, Cornelia Staritz and Leonhard Plank, ‘Conceptualizing the Regulator-Buyer State in the European Union for the Exercise of Socially Responsible Public Procurement in Global Production Networks’ (2022) 60(3) *Journal of Common Market Studies* 759.

existing initiatives,³⁴ and to present policy options for using procurement to protect and promote labour standards and human rights, largely based on what are perceived to be best practice initiatives.³⁵ Questions of optimal regulatory design to ensure the effective implementation of procurement criteria remain underexamined in both the domestic or international context.³⁶

In giving greater focus to the issue of regulatory design in procurement, we draw on scholarship from the field of regulatory governance. More specifically, we adopt a labour regulation and compliance perspective that conceives of regulation broadly, as involving

the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information gathering and behaviour modification.³⁷

Such a perspective recognises that a range of public and private actors have the capacity to influence labour standards and that such influence may be exerted through various modes of intervention.³⁸ These modes include, for example, law, but also self-regulation, private agreement, financial incentives, and the implementation of non-government standards and accreditation schemes. The inclusion of the term ‘compliance’ indicates that our focus is not only on the regulators and the nature of the regulation, but also on the challenges of securing compliance (that is, achieving the policy outcomes at which the regulation is directed), on the efforts made by regulatory authorities to elicit compliance, and on how the regulation is responded to and implemented by those individuals and organisations to which it is directed.³⁹ Viewed from this perspective, the linking of public procurement with the goals of the *Modern Slavery Act* is a form of state-based regulation. The OECD’s growing interest in the use of public procurement as a means of promoting secondary policy objectives, as noted above, also reinforces this view of social procurement as a distinctive form of public regulation.

We suggest that, in considering the potential or actual regulatory impact of these types of initiatives, there are two distinct sets of regulated actors and entities that merit attention. The first of these is public procurement officers and agencies, and the second is businesses looking to provide goods or services to the government

³⁴ See, eg, Methven O’Brien, Vander Meulen and Mehra (n 14); National Agency for Public Procurement, *Mapping Initiatives for Ethical Public Procurement in Europe* (Report 2017:6, November 2017).

³⁵ See, eg, Robert Stumberg, Anita Ramasastry and Meg Roggensack, *Turning a Blind Eye? Respecting Human Rights in Government Purchasing* (Report, International Corporate Accountability Roundtable, September 2014).

³⁶ Cf Isabelle Glimcher, *Purchasing Power: How the US Government can use Federal Procurement to Uphold Human Rights* (Report, NYU Stern Center for Business and Human Rights, September 2020); Howe and Landau (n 13).

³⁷ Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1, 26.

³⁸ Peter Drahos and Martin Krygier, ‘Regulation, Institutions and Networks’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 1, 18. See also Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O’Donnell (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006).

³⁹ See generally Christine Parker and Vibeke Lehmann Nielsen (eds) *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

and relevant intermediaries. Below, we elaborate on the different challenges associated with regulation of these two sets of actors in the Australian context.

A *Regulating Public Procurement Decision-Making*

Discussion and analysis of the attachment of labour and human rights standards to public procurement overwhelmingly considers the issue as one of government regulation of the private sector. This overlooks the significant challenges associated with regulation *inside* government.⁴⁰ These challenges, which we outline briefly below, go largely to the question of regulating the exercise of discretion within the context of a highly decentralised procurement system that promotes a range of potentially competing values and objectives.

Since the late 1980s, the Australian Government has adopted a decentralised approach to government purchasing. Whole-of-government coordinated procurement arrangements remain in certain areas: such as accommodation, cleaning, security services, and stationery and office supplies.⁴¹ It is also possible for entities to enter into ‘cooperative procurements’.⁴² Beyond these limited areas, individual non-corporate Commonwealth entities (‘NCCEs’) are responsible for developing their own procurement policies, procedures and systems and conducting individual procurements. NCCEs, of which there are around 100, may have a central procurement team that manages all procurement activities for the NCCE however they may also devolve procurement to specialist subject matter procurement teams. According to the Government, this high degree of decentralisation distinguishes its procurement activities from many large businesses where centralised procurement teams are used to manage purchases and supplier relationships across all elements of the business. It also means that the ‘processes, relationships and timeframes involved in procurements ... vary considerably between NCCEs with limited formal avenues for coordination or collaboration’.⁴³

Decentralisation does not mean deregulation. Regulatory scholars have documented and examined the exponential growth in regulation by government of government itself that has accompanied processes of decentralisation and outsourcing in recent decades.⁴⁴ In the realm of public procurement, devolution of responsibility for the production and delivery of public services has been accompanied by a proliferation of standards to govern the decision-making and conduct of public entities and officers, and mechanisms to monitor and secure compliance.

⁴⁰ Christopher Hood, Oliver James, George Jones, Colin Scott and Tony Travers, *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleazebusters* (Oxford University Press, 2003); Martin Lodge and Christopher Hood, ‘Regulation Inside Government: Retro-Theory Vindicated or Outdated?’ in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 590.

⁴¹ Non-corporate Commonwealth entities (‘NCCEs’) must use coordinated procurements unless they have been granted an exemption: see *Public Governance, Performance and Accountability Act 2013* (Cth) s 8 (‘PGPA Act’); *Commonwealth Procurement Rules 1 July 2022 (No 2)* (Cth) rr 4.11–4.12 (‘CPR’).

⁴² CPR (n 41) rr 4.13–4.15.

⁴³ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 13.

⁴⁴ Hood et al (n 40) 3–4.

At the Commonwealth level, government procurement is governed by the *Public Governance, Performance and Accountability Act 2013* (Cth). The main source of official guidance, issued under the Act by the Australian Government Department of Finance, is found in the *Commonwealth Procurement Rules 1 July 2022 (No 2)* (Cth) ('CPR')⁴⁵ and the *Public Governance, Performance and Accountability Rule 2014* (Cth). Officials⁴⁶ from relevant entities (NCCEs and prescribed corporate Commonwealth entities) must comply with the CPR, and with five 'procurement-connected policies'.⁴⁷ 'Accountable authorities' must establish their own appropriate internal control systems consistent with the framework offered in the CPR.⁴⁸ These frameworks should provide primary operational instructions to relevant entity officers in carrying out their procurement-related duties, in a way that is tailored to the entity's specific circumstances and needs.⁴⁹

The CPR are divided into two parts, supplemented by appendices. Division 1 sets out the rules that apply to all procurements undertaken by relevant entities.⁵⁰ The core objective of the CPR is to ensure relevant entities achieve 'value for money' in the conduct of procurement activity.⁵¹ Procurement officers must be satisfied, after reasonable enquiries, that the procurement achieves this outcome.⁵² The CPR make clear that price is not the sole factor when assessing value for money,⁵³ and require procurement officers to consider 'relevant financial and non-financial costs and benefits'.⁵⁴ Where the procurement is above \$4 million (or \$7.5 million for construction services),⁵⁵ officers are also required to consider the economic benefit of the procurement to the Australian economy.⁵⁶ Procurement officers should ensure that procurements 'encourage competition and be non-discriminatory', 'use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth'; 'facilitate accountable and transparent decision making'; 'encourage appropriate engagement with risk'; and 'be commensurate with the scale and scope of the business requirement'.⁵⁷

Division 2 lists additional rules that apply when the expected value of procurement is at or above one of three thresholds: \$80,000 for general procurement by a non-corporate Commonwealth agency; \$400,000 for the procurement of construction services by a prescribed corporate Commonwealth agency; or

⁴⁵ The CPR are a non-disallowable legislative instrument issued by the Finance Minister under s 105B(1) of the *PGPA Act* (n 41).

⁴⁶ As defined in s 13 of the *PGPA Act* (n 41).

⁴⁷ CPR (n 41) r 2.2. An 'official' is defined in s 13 of the *PGPA Act* (n 41). Procurement-connected policies, of which there are currently five, are explicitly intended to use the Government's economic influence to drive policy outcomes by placing additional requirements on Commonwealth agencies' procurement activities.

⁴⁸ *PGPA Act* (n 41) s 16.

⁴⁹ CPR (n 41) r 2.13.

⁵⁰ *Ibid* r 3.5.

⁵¹ *Ibid* r 4.4.

⁵² *Ibid*.

⁵³ *Ibid* r 4.5.

⁵⁴ *Ibid*. A non-exhaustive list of costs and benefits is enumerated in rr 4.5(a)–(f).

⁵⁵ Except procurements covered by Appendix A and procurements from standing offers: *ibid* r 4.7.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* r 4.4.

\$7.5 million for the procurement of construction services by a prescribed non-corporate Commonwealth agency.⁵⁸ Broadly speaking, Division 2 requires that procurements must be conducted by ‘an open approach to the market’, except under specific circumstances and imposes additional requirements.⁵⁹ Procurements that are subject to the rules in both Divisions are referred to as ‘covered procurements’.⁶⁰ Procurements with an estimated value above a reporting threshold must be publicly reported via AusTender, the Australian Government’s procurement information system.⁶¹

Monitoring and enforcement of Commonwealth public procurement legislation and policy is overseen by several different authorities. The *Government Procurement (Judicial Review) Act 2018* (Cth) establishes an independent complaint mechanism for certain government procurement processes. It vests the Federal Court of Australia and the Federal Circuit Court of Australia with jurisdiction to consider applications, grant injunctions and/or order the payment of compensation in relation to contravention of the relevant *CPR*, so far as they relate to covered procurements. A complaint must be initially lodged with the ‘accountable authority’ of the relevant Commonwealth entity,⁶² who is responsible for investigating the complaint and preparing a report of the investigation.⁶³ Certain complaints concerning the procurement process may be lodged with the Procurement Coordinator⁶⁴ and the Commonwealth Ombudsman.⁶⁵ For officers undertaking procurement-related activities, non-compliance with legislative and policy requirements in relation to procurement may result in the imposition of criminal, civil and/or administrative sanctions under the *Criminal Code Act 1995* (Cth), the *Crimes Act 1914* (Cth) and the *Public Service Act 1999* (Cth).⁶⁶ The National Auditor-General also plays a role in overseeing Commonwealth public procurement processes by way of conducting performance audits of Australian Government programs and entities, and reporting to the Australian Parliament.⁶⁷

As noted above, the principal source of regulatory standards for procurement officers — the *CPR* — promote a range of objectives, predominant of which is achieving value for money. While compliance with the *CPR* is mandatory for procurement officers, many terms within the *CPR* are broadly defined, and the rules are a mix of steps and criteria officers *must* take or apply, and those they *should* take. Moreover, procurement officers are often required to make ‘reasonable enquiries’ to satisfy themselves as to whether specified criteria have been met, some of which are

⁵⁸ *Ibid* rr 3.5–3.6.

⁵⁹ *Ibid* r 10.3.

⁶⁰ *Government Procurement (Judicial Review) Act 2018* (Cth) s 5.

⁶¹ *CPR* (n 41) r 7.18.

⁶² *Government Procurement (Judicial Review) Act 2018* (Cth) s 18. The ‘accountable authority’ has the same meaning as in the *PGPA Act* (n 41) s 12.

⁶³ *Government Procurement (Judicial Review) Act 2018* (Cth) s 19. The *CPR* make clear that relevant entities should aim to resolve complaints internally, when possible, through communication and conciliation: *CPR* (n 41) r 6.8.

⁶⁴ See generally Department of Finance (Cth), *Procurement Coordinator* (Web Page, 28 January 2020) <<https://www.finance.gov.au/government/procurement/procurement-coordinator>>.

⁶⁵ *Ombudsman Act 1976* (Cth) ss 5, 7.

⁶⁶ *CPR* (n 41) r 2.14.

⁶⁷ *Auditor-General Act 1997* (Cth) ss 17–19.

expressed in non-exclusive terms. For example, under the *CPR* eligibility requirements, or ‘conditions for participation’, r 10.19 provides:

Officials **must** make *reasonable enquiries* that the procurement is carried out considering relevant regulations and/or regulatory frameworks, *including but not limited to* tenderers’ practices regarding:

- a. labour regulations, including *ethical employment practices*;
- b. workplace health and safety; and
- c. environmental impacts.⁶⁸

The language used in the *CPR* leaves procurement officers with significant discretion in their decision-making: that is, they are free to make a choice among a range of possible courses of action or inaction,⁶⁹ and certain phrases — such as ‘ethical employment practices’ in r 10.19 — are open to interpretation. Discretion is present not only regarding the ultimate choice of which business is chosen as the successful tender, but also to issues such as the specific requirements for the tender and the relative weighting of criteria.⁷⁰ It is well-established in legal, regulatory and sociological scholarship that such discretion is not exercised in a vacuum. It is influenced by bureaucratic and organisational cultures,⁷¹ with regulatory institutions providing incentives and disincentives for people to act in certain ways.⁷² Broader political and economic pressures, moral and social norms and officials’ own attitudes to their powers also all play a role.⁷³ In addition, ‘the manner in which the decisions of officials are scrutinised shapes discretion’.⁷⁴ It is also the case that discretion may not be exercised in practice, and that ‘what may be discretionary from an external, legal point of view, may be anything but discretionary from the internal point of view of officials within the system’.⁷⁵

While empirical studies on public procurement decision-making remain rare, it has been widely and consistently observed in recent years that the overall effect of the Federal Government’s regulatory framework on public procurement, along with consistent pressure on departmental and agency budgets, has been to foster a procurement culture that prioritises cost and risk minimisation. While, in theory, the paramount objective of value for money considers both financial and non-financial considerations, in practice this requirement is interpreted narrowly with price being

⁶⁸ *CPR* (n 41) r 10.19 (emphasis in bold in original; emphasis in italics added).

⁶⁹ Vijaya Nagarajan, *Discretion and Public Benefit in a Regulatory Agency: The Australian Authorisation Process* (ANU Press, 2013) 130, citing Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969).

⁷⁰ For a discussion of the challenges that the discretionary nature of decision-making in public procurement processes poses for anti-corruption efforts, see Olivia Dixon, ‘The Efficacy of Australia Adopting a Debarment Regime in Public Procurement’ (2021) 49(1) *Federal Law Review* 122.

⁷¹ Julia Black, ‘Managing Discretion’ (Conference Paper, Australian Law Reform Commission Conference, June 2001) 2.

⁷² Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from Law and Social Science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 2001) 11–46.

⁷³ DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford University Press, 1986) 12–13.

⁷⁴ Nagarajan (n 69) 160.

⁷⁵ Galligan (n 73) 13.

the primary determinant of procurement decisions.⁷⁶ Studies on strategic procurement in Australia also support this conclusion. Thurbon, for example, reports of ‘strong attitudinal barriers’ to more strategic approaches to public procurement in Australia, including a high level of risk aversion.⁷⁷ This risk aversion manifests itself in a privileging of procedure over outcome in tendering processes, and a tendency for officials to avoid early discussions with potential suppliers on innovative ways to meet the Government’s needs due to considerations around probity, fairness, transparency and even allegations of corruption.⁷⁸ These challenges are not confined to Australia, with the OECD recently observing the need for cultural change if ‘traditionally risk-averse’ officials are to be expected to effectively integrate social considerations into public procurement.⁷⁹

B Regulating Business

A government may include labour-related performance standards in their public procurement for symbolic reasons. They may also do so to encourage businesses to behave responsibly without imposing any requirements on them to do so. Most commonly, however, such regulatory interventions are intended to influence conduct. The Australian Government’s modern-slavery-related procurement initiatives are intended ‘to leverage the Government’s unique position to influence the conduct of suppliers and market practices to drive positive change’.⁸⁰ This raises the important question of regulatory effectiveness: that is, the extent to which the intervention impacts upon the conduct of regulatory targets in the intended way. Below, we elaborate briefly on these challenges, which we organise according to the three basic elements of an effective regulatory regime: standard setting, monitoring and enforcement.⁸¹

In seeking to promote respect for labour and human rights through public procurement, a government may attach prescriptive, principles-based, or process-based performance standards. Prescriptive standards involve regulatory specification of the required outcomes: for example, requiring a supplier to demonstrate compliance with certain laws setting minimum standards in the *Fair Work Act 2009* (Cth). A principles-based approach articulates outcomes to be achieved, but at a higher, more generalised level than prescriptive rules, thus providing greater regulatory flexibility:⁸² for example, a requirement that a regulated entity adopt ‘ethical employment practices’. Process-based standards involve

⁷⁶ See, eg, *Buying into Our Future Report* (n 12) 36–7 [4.3]–[4.7]; Senate Finance and Public Administration References Committee, Parliament of Australia, *Commonwealth Procurement Procedures* (Report, July 2014) 32–40 [4.7]–[4.39].

⁷⁷ Elizabeth Thurbon, ‘Public Purchasing and Innovation: The Australian Case’ in Veiko Lember, Rainer Kattel and Tarmo Kalvet (eds) *Public Procurement, Innovation and Policy: International Perspectives* (Springer, 2014) 35, 41.

⁷⁸ *Ibid* 48.

⁷⁹ OECD, *Responsible Business Conduct in Government Procurement Practices* (Concept Note, June 2017) 6 <<https://mneguidelines.oecd.org/Responsible-business-conduct-in-government-procurement-practices.pdf>>.

⁸⁰ *Commonwealth Modern Slavery Statement 2019–20* (n 2) 6.

⁸¹ Black, ‘Managing Discretion’ (n 71) 23.

⁸² Julia Black, Martyn Hopper and Christa Band, ‘Making a Success of Principles-Based Regulation’ (2007) 1(3) *Law and Financial Markets* 191, 191.

requiring regulated entities ‘to tailor regulation to their individual circumstances’ by way of adopting suitable processes and systems, ‘while holding them accountable for the adequacy and efficacy of their internal control systems’.⁸³ For example, a company may be required to put in place processes to identify and act upon actual and potential risks to workers in its operations, supply chains and the services it uses, and to report on how it is doing so. This ‘meta-regulatory’ approach, in which suppliers are required to provide evidence of their own self-monitoring processes, is a common method of promoting compliance with human rights-related performance criteria in public contracts in EU member-states.⁸⁴ It is also used by the United States (‘US’) Federal Government to prevent human trafficking and forced labour in relation to federal contracts.⁸⁵

Having set relevant standards, a government authority must then monitor supplier performance and respond to non-compliance, including by way of sanctions. There must be processes in place for obtaining credible and accurate information about the nature and extent of compliance or non-compliance and for feeding that information back into the overall regulatory regime.⁸⁶ In the absence of appropriate monitoring and enforcement mechanisms, businesses will respond by engaging in only superficial changes.⁸⁷ This basic proposition is supported by decades of research into business compliance behaviour.⁸⁸ It also finds support in the rich multidisciplinary literature on transnational private regulation.⁸⁹ The latter scholarship is highly relevant to this discussion because of the similarities it shares with socially responsible public procurement: that is, both involve the use of contractual mechanisms as a means to push standards through supply chains, and similar dynamics of enforcement: namely, rewarding compliance and withdrawing orders from recalcitrant suppliers.

With respect to monitoring of supplier compliance with performance standards attached to a public contract, there are two broad issues that must be addressed: how monitoring is undertaken and by whom. Compliance with prescriptive rules can be assessed by a regulator analysing the congruence between the performance standard and the regulated entity’s outputs.⁹⁰ With process-oriented regulation, where businesses are given significant latitude to determine the way in which regulatory goals are achieved, the task of assessing compliance is something quite different. The task for regulators is to assess and evaluate the validity and

⁸³ Sharon Gilad, ‘It Runs in the Family: Meta-Regulation and Its Siblings’ (2010) 4(4) *Regulation and Governance* 485, 485.

⁸⁴ National Agency for Public Procurement (n 34).

⁸⁵ See below Part V.

⁸⁶ Colin Scott, ‘Analysing Regulatory Space: Fragmented Resources and Institutional Design’ (2001) (Summer) *Public Law* 329, 330–1.

⁸⁷ See, eg, John Braithwaite, ‘Rewards and Regulation’ (2002) 29(1) *Journal of Law and Society* 12; Robert Howse, ‘Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State’ (1993) 31(3) *Alberta Law Review* 455.

⁸⁸ See generally Parker and Lehmann Nielsen (n 39).

⁸⁹ ‘Transnational private regulation’ refers to the ‘structure of oversight in which non-state actors (for profit companies, non-profit organisations or a mix of the two) adopt and to some degree enforce rules for other organisations, such as their suppliers or clients across national borders’: Tim Bartley, *Rules without Rights: Land, Labour and Private Authority in the Global Economy* (Oxford University Press, 2018) 7.

⁹⁰ Gilad (n 83) 487–8.

effectiveness of systems companies have in place.⁹¹ It is important to recognise that this approach requires regulators to do much more than simply review paper systems. It involves a regulator ‘actively challenging the enterprise to demonstrate that its systems work in practice, scrutinising its risk management measures and judging if the company has the leadership, staff, systems and procedures to meet its regulatory obligations’.⁹² Monitoring of supplier compliance with stipulated requirements can be undertaken directly by the State, but it can also be undertaken by way of ‘enrolling’ or collaborating with non-State actors who possess various forms of regulatory capacity.⁹³ In the context of labour regulation, such third parties include, for example, trade unions, commercial auditors and non-governmental organisations (‘NGOs’).

The final element in the effective regulation of public procurement criteria is enforcement. It is generally accepted in the regulatory governance literature that to achieve the desired outcomes, regulatory systems need to include processes by which regulated entities and actors are held accountable to norms, standards, or principles.⁹⁴ Acknowledging the nature of government procurement, enforcement should be cooperative and responsive. But the threat of sanction for failure to meet stipulated conditions is necessary to ensure that businesses take their obligations seriously and do not simply respond to the attraction of government business by engaging in ‘cosmetic’ or ‘creative’ compliance.⁹⁵ The regulatory enforcement pyramid, presented by Ayres and Braithwaite, best illustrates this approach.⁹⁶ The pyramid represents the gradual escalation of enforcement activity in response to non-compliance. Most non-compliance is amendable to resolution by way of negotiation, persuasion and problem-solving. Persistent non-compliance, however, attracts increasingly severe regulatory responses, culminating in the most extreme form of sanction. In the public procurement context, the application of this model would mean that there must be a set of enforcement measures that can be used to hold contractors accountable to the standards required under an existing contract. These enforcement measures may start with negotiations between the parties, but should progress to warnings and then to more extreme forms of sanction such as cancellation of the contract and/or disbarment from the public procurement regime. There should also be a process governing the exercise of discretion by public

⁹¹ Ibid.

⁹² Neil Gunningham ‘Strategizing Compliance and Enforcement: Responsive Regulation and Beyond’ in Christine Parker and Vibeke Lehmann Nielsen (eds) *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 199, 212. See also Gilad (n 83).

⁹³ Julia Black, ‘Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation’ (2003) (Spring) *Public Law* 63; Peter Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995) 8(4) *Governance* 527. On the enrolment of third parties in labour regulation specifically, see, eg, Janice Fine and Jennifer Gordon, ‘Strengthening Labor Standards Enforcement through Partnerships with Workers’ Organisations’ (2010) 38(4) *Politics & Society* 552.

⁹⁴ Scott (n 86) 331.

⁹⁵ Christine Parker and John Howe, ‘Ruggie’s Diplomatic Project and its Missing Regulatory Architecture’ in Radu Mares (ed) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Koninklijke Brill, 2012) 273, 286–9.

⁹⁶ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35–36.

procurement authorities concerning what action should be taken in relation to supplier non-compliance with stipulated requirements and in what circumstances.

IV Leveraging Public Procurement to Address Modern Slavery – The Australian Government’s Approach

This section examines how the Australian Government has introduced modern slavery considerations into its procurement functions. Following a brief overview of the first two Modern Slavery Statements published by the Australian Government, we explain how it has relied on the existing *CPR* to integrate modern slavery concerns. We also discuss the suite of resources produced by the Australian Government to assist Commonwealth procurement officers identify and respond to modern slavery risks in existing and future procurements.

A The Australian Government’s Modern Slavery Statements

The *Modern Slavery Act* has been the key driver for the Australian Government’s integration of modern slavery concerns into its procurement activities. This statute requires large businesses and other entities operating in the Australian market with an annual consolidated revenue of AU\$100 million or above to produce an annual statement outlining actions they have taken to identify and address risks of modern slavery in their operations and supply chains (‘a Modern Slavery Statement’).⁹⁷ The Minister is also required to submit a Modern Slavery Statement on behalf of the Australian Government.⁹⁸

Modern slavery is defined in the *Modern Slavery Act* to include trafficking in persons, slavery, servitude, forced marriage, forced labour, debt bondage, the worst forms of child labour, and deceptive recruiting for labour or services.⁹⁹ Modern Slavery Statements must address seven mandatory criteria. A statement must:

- ‘identify the reporting entity’ and
- describe its ‘structure, operations and supply chains’;
- ‘describe the risks of modern slavery practices in the operations and supply chains’;
- describe actions taken ‘to assess and address those risks’;
- describe how the entity assesses the effectiveness of its actions;
- ‘describe the process of consultation with any entities that the reporting entity owns or controls’; and
- provide any other relevant information.¹⁰⁰

⁹⁷ *Modern Slavery Act* (n 3) s 13.

⁹⁸ *Ibid* s 15.

⁹⁹ *Ibid* s 4.

¹⁰⁰ *Ibid* s 16(1)(a)–(g).

The reporting requirements in the *Modern Slavery Act* are heavily influenced by the concept of human rights due diligence in the *UNGP*. Human rights due diligence involves businesses taking a risk-based approach to identifying and managing actual and potential adverse impacts on all internationally-recognised human rights.¹⁰¹ However, the scope of the *Modern Slavery Act* has the effect of significantly narrowing this concept to apply only to practices that constitute modern slavery under the Act.

The *Modern Slavery Act* is a disclosure-based form of regulation. It does not mandate certain minimum standards of performance. Rather, it requires entities to produce and report information on their management of modern slavery risks. It is assumed that this process will stimulate internal processes within firms to identify and address risks of modern slavery in their own operations and supply chains. It is also assumed that the information disclosed will be used by the market, consumers and other actors.¹⁰²

The Australian Government has published two Modern Slavery Statements (2019–20 and 2020–21). In both statements, the Government expresses its commitment to ‘lead by example’ in addressing modern slavery risks in its global operations and supply chains.¹⁰³ Both statements are structured according to the *Modern Slavery Act*’s seven reporting criteria. The *Commonwealth Modern Slavery Statement 2019–20* details the initial risk scoping exercise undertaken by the Government in line with its own guidance to reporting entities,¹⁰⁴ and identifies four areas of procurement considered to have a high risk of modern slavery. These high risk areas are textiles, construction, cleaning and security services, and Australian Government investments.¹⁰⁵ The Statement discusses these risks at a general level. It also identifies five areas in which the Government has taken action:

- building a whole-of-government framework to guide and coordinate the Government’s response and foster information sharing and collaboration;
- raising awareness of modern slavery risks among key government officials, including through tailored training;
- establishing plans and processes to ensure the Government can effectively respond to modern slavery cases;

¹⁰¹ See *UNGP* (n 15) 17–24 (Guiding Principles 17–21).

¹⁰² For a discussion of the regulatory approach underpinning the *Modern Slavery Act* (n 3), see Jolyon Ford and Justine Nolan, ‘Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy between Human Rights Due Diligence and the Social Audit’ (2020) 26(1) *Australian Journal of Human Rights* 27, 30–32; Ingrid Landau and Shelley Marshall, ‘Should Australia be Embracing the Modern Slavery Model of Regulation?’ (2018) 46(2) *Federal Law Review* 313.

¹⁰³ The Hon Jason Wood MP, ‘Assistant Minister for Customs, Community Safety and Multicultural Affairs’ Foreword’ in *Commonwealth Modern Slavery Statement 2019–20* (n 2) 3; The Hon Jason Wood MP, ‘Foreword: Assistant Minister for Customs, Community Safety and Multicultural Affairs’ in *Commonwealth Modern Slavery Statement 2020–21* (n 3) 7.

¹⁰⁴ See Department of Home Affairs (Cth), *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* <<https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>>.

¹⁰⁵ *Commonwealth Modern Slavery Statement 2019–20* (n 2) 16.

- embedding modern slavery considerations within existing procurement and contracting practices; and
- equipping procurement officers to assess and address modern slavery risks and engage with suppliers.¹⁰⁶

In its *Commonwealth Modern Slavery Statement 2020–21*, the Government elaborates on the modern slavery risks within its four priority sectors. It also considers modern slavery risks in the procurement of ICT hardware. The Government outlines the actions it has taken to address these risks during the relevant reporting period, including by way of agency-specific initiatives. According to the Statement, the Government focused in the second reporting period on collaboration with industry and civil society experts to build a deeper awareness and understanding of the nature of modern slavery risks in its identified high-risk areas of procurement.¹⁰⁷

The *Commonwealth Modern Slavery Statement 2020–21* explains the Government’s ‘continuous improvement’ approach to addressing modern slavery risks in its operations and supply chains.¹⁰⁸ It identifies four ‘phases of action’, covering the first six years of reporting.¹⁰⁹ Following a ‘Foundation Phase’ in 2019–20, the Government has now moved into a two-year ‘Discovery Phase’, in which it is undertaking ‘targeted supply chain mapping and risk assessment to increase visibility and awareness of ... modern slavery risks’.¹¹⁰ This will be followed by a two-year ‘Implementation Phase’, in which action will be taken ‘to implement resources and recommendations made during the Discovery Phase’.¹¹¹ NCCEs will ‘consider mitigation strategies and targeted action around supplier engagement in high-risk procurements’, and the Government will consider ‘feasible options for remediation’.¹¹² The sixth year will consist of a ‘Review Phase’ in which the Government considers the ‘overall effectiveness’ of its approach and plans for the future.¹¹³ The 2020–21 Statement also explains how the Government intends to evaluate the effectiveness of its actions in future reporting periods.¹¹⁴

B *Integrating Modern Slavery Considerations into the CPR*

As explained in its initial *Modern Slavery Statement*, the Australian Government has sought to integrate modern slavery considerations into its procurement processes through existing rules in the *CPR*. Specifically, it encourages procurement officers to consider modern slavery in the context of the general prohibition on entities seeking to benefit from supplier practices that may be dishonest, unethical or unsafe (r 6.7 in div 1) and the need for officers to make reasonable enquiries that

¹⁰⁶ Ibid.

¹⁰⁷ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 10.

¹⁰⁸ Ibid 34.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid 36–8.

procurement is carried out considering relevant regulations and/or regulatory frameworks (r 10.9 in div 2).¹¹⁵

Rule 6.7 in div 1 states that '[r]elevant entities **must** not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.'¹¹⁶ The Commonwealth-provided model contract clauses (mandatory for procurements under \$200,000) include a clause requiring the supplier to 'comply with, and ensure its officers, employees, agents and subcontractors comply with, the laws from time to time in force in any jurisdiction in which any part of the Contract is performed'.¹¹⁷ An additional model clause requires supplier compliance with 'Commonwealth Laws and Policies', and for the supplier to 'provide such reports and other information regarding compliance as reasonably requested by the Customer or as otherwise required by a relevant law or policy'.¹¹⁸

Covered procurements must also comply with r 10.19, which we discussed above in Part III(A) as an example of the discretion granted to procurement officers by the drafting of the *CPR*. This rule requires officials to consider 'regulations and/or regulatory frameworks' relevant to a procurement 'including, but not limited to, tenderers' practices regarding labour regulations, including ethical employment practices'.¹¹⁹ The Australian Government Department of Finance guidance document elaborating upon this rule explains that officials should determine how best to satisfy this rule depending on their procurement requirements.¹²⁰ They should use their own judgement when determining what constitutes a relevant regulation and/or regulatory framework and, where unsure, seek advice internally or externally (for example, from subject-matter experts or other procuring officials).¹²¹ Labour and human rights regulatory standards fall within the scope of this rule. The guidance leaves it open to officials to determine how they go about meeting r 10.19. It offers several options. Officials could require potential suppliers to certify that they comply with the regulations and/or regulatory frameworks; require successful suppliers to provide assurance of their compliance (such as through an independent audit report); and/or undertake their own investigations to confirm that potential or preferred suppliers comply.¹²²

¹¹⁵ *Commonwealth Modern Slavery Statement 2019–20* (n 2) 13.

¹¹⁶ See *CPR* (n 41) r 6.7 (emphasis in original). That rule also says:

This includes not entering into contracts with tenderers who have had a judicial decision against them relating to employee entitlements and who have not satisfied any resulting order. Officials should seek declarations from all tenderers to this effect.

¹¹⁷ Department of Finance (Cth), *Commonwealth Contract Terms v 6.1* (19 November 2020) 3 [C.C.21] <https://www.finance.gov.au/sites/default/files/2020-11/Commonwealth_Contract_Terms_v6.1_19_November%202020.pdf>.

¹¹⁸ *Ibid* 4 [C.C.22].

¹¹⁹ *CPR* (n 41) r 10.19.

¹²⁰ Department of Finance (Cth), *Consideration of Relevant Regulations and/or Frameworks* (August 2020) 2 [7] <<https://www.finance.gov.au/sites/default/files/2020-08/consideration-of-relevant-regulations-and-or-frameworks.pdf>>.

¹²¹ *Ibid* 2 [7]–[8].

¹²² *Ibid* 2 [9].

C *The Modern Slavery Procurement Toolkit*

The Australian Government has produced ‘a suite of resources to assist Commonwealth procurement officers [to] identify and respond to modern slavery risks in current and future procurements, as well as influence change in the private sector’.¹²³ These resources, which consist of a risk screening tool, a supplier questionnaire and modern slavery model contract clauses, are assembled along with ‘Tender Guidance’ in the Australian Government’s *Addressing Modern Slavery in Government Supply Chains: A Toolkit of Resources for Government Procurement Officers* (*Procurement Toolkit*).¹²⁴ In this section, we briefly explain how these various tools are intended to be used in each of the three main stages of the procurement process: planning (qualification or eligibility to tender for a government contract); selection and award of tender; and management and enforcement of the procurement contract. While these resources provide guidance on addressing modern slavery in procurement, they also leave procurement officers with significant discretion throughout the various stages of the procurement process.

Stage 1: Planning

The *Procurement Toolkit* recommends that procurement officers begin by assessing the risk of modern slavery in new procurements and existing contracts and considering how these can be mitigated through the procurement process.¹²⁵ A ‘Risk Screening Tool’ is provided to assist officers to assign a modern slavery risk classification to the procurement being undertaken.¹²⁶ It is recommended that this initial risk assessment be conducted ‘as far down the supply chain as possible’, and at the very least, at the ‘Tier One’ level.¹²⁷ The Tender Guidance enumerates a range of ways in which modern slavery considerations can be factored into the preparation of procurement documentation, emphasising that the actions taken by procurement officers should be proportionate to the modern slavery risk level identified.¹²⁸ These include stipulating ‘conditions related to modern slavery mitigation, remediation and due diligence in their conditions for participation’ (‘COP’) or as conditions precedent to the contract.¹²⁹ Such conditions may only be included in the COP where they are directed at ensuring that a potential supplier has ‘the legal, commercial, technical and financial abilities’ to meet the procurement requirements.¹³⁰ The *Procurement Toolkit* suggests a potential COP to the effect that ‘the supplier meets all labour laws and standards in the jurisdiction in which they operate’.¹³¹

¹²³ *Commonwealth Modern Slavery Statement 2019–20* (n 2) 6.

¹²⁴ *Procurement Toolkit* (n 4). The Tender Guidance was produced by the Australian Border Force in consultation with the Commonwealth Modern Slavery Statement Interdepartmental Committee: at 9. The Committee is comprised of senior procurement officers and legal representatives from a range of NCCEs.

¹²⁵ *Ibid* 9.

¹²⁶ *Ibid* 6–8.

¹²⁷ *Ibid* 9. A Tier One supplier is ‘[a] manufacturer who provides products directly to a company without dealing with a middleman or other manufacturers’: *ibid* 20.

¹²⁸ *Ibid* 9–10.

¹²⁹ *Ibid* 10.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

Modern slavery considerations may also be included ‘in the specifications or [Statement of Requirements] where the risks are relevant to the subject matter of the contract ... and proportionate to the risk profile of the procurement.’¹³² The *Procurement Toolkit* notes that officials *may* specify ‘compliance with particular technical, labour or employment standards (for example the International Labour Organisation’s Labour Standards).’¹³³ For any such requirement included in the Statement of Requirements, consideration should be given to what evidence will be required to prove compliance.¹³⁴

Where procurements are deemed to have a high risk of modern slavery, procurement officers are advised to ‘consider requiring suppliers to complete a *Modern Slavery Supplier Questionnaire* as part of the application process’.¹³⁵ This questionnaire is described as a tool to ‘facilitate collaborative two-way engagement between government agencies and suppliers’¹³⁶ and is not to be used as a basis for excluding potential suppliers from participating in the tender process or against them in the evaluation stage.¹³⁷

Stage 2: Evaluation, Selection and Contract Negotiation

Procurement officers are advised to develop and adopt evaluation methodologies that ‘ensure that modern slavery issues contribute in a meaningful way to the evaluation process’.¹³⁸ Procurement officers *should* evaluate the potential suppliers’ compliance with any modern slavery COP and/or any draft conditions of the contract or relevant specifications.¹³⁹ It is also advised that procurement officers ask suppliers ‘to explain any costs that appear to be abnormally low’.¹⁴⁰ Where the supplier’s answers ‘are not satisfactory or give rise to ... concerns, procurement officers should discuss this further with the supplier’.¹⁴¹

Procurement officials ‘*should* consider whether specific terms and conditions should be included in the contract to manage modern slavery associated risks’.¹⁴² In addition to the Australian Government’s standard contract terms, the Government has produced three sets of draft modern slavery clauses.¹⁴³ These draft clauses have ‘graduating obligations [short form, standard, and long form] that agencies can select from depending on the modern slavery risk profile of the particular procurement’.¹⁴⁴ The short form option is recommended for contracts where the risks of modern

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid 12.

¹³⁷ Ibid 10.

¹³⁸ Ibid 11.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid (emphasis added).

¹⁴³ Australian Government, ‘Draft Modern Slavery Clause Options for Commonwealth Entities’, *Resources* (October 2020) <<https://modernslaveryregister.gov.au/resources/>> (‘Draft Modern Slavery Clause Options’).

¹⁴⁴ *Procurement Toolkit* (n 4) 21.

slavery in the relevant supply chain is assessed as low.¹⁴⁵ It imposes two basic obligations on the supplier:

- (i) to ‘take reasonable steps to identify, assess and address risks of [m]odern [s]lavery practices in the operations and supply chains used in the provision of the [g]oods and/or [s]ervices’;¹⁴⁶ and
- (ii) as soon as ‘reasonably practicable’ after becoming aware of any modern slavery practices in the operations and supply chains used in the performance of the contract, to ‘take all reasonable action to address or remove these practices, including where relevant by addressing any practices of other entities in its supply chain’.¹⁴⁷

The standard option imposes additional obligations. Suppliers are required to ensure that ‘[p]ersonnel responsible for managing the operations and supply chains used in the performance of the contract have undertaken suitable training to be able to identify and report modern slavery’.¹⁴⁸ Suppliers are required to prepare, implement, and comply with a ‘Modern Slavery Risk Management Plan’.¹⁴⁹ This plan ‘should at a minimum detail’:

- (a) ‘the [s]upplier’s steps to identify and assess risks of [m]odern [s]lavery practices in the operations and supply chains used in the performance of the [c]ontract’;
- (b) ‘the [s]upplier’s processes for addressing any modern slavery practices of which it becomes aware’;
- (c) ‘the content and timing of [modern slavery] training’; and
- (d) details of the grievance mechanism available to [p]ersonnel.¹⁵⁰

Suppliers must not require personnel to pay recruitment fees, nor destroy or retain exclusive possession of travel or identity documents of personnel, and must ensure personnel can access a grievance mechanism.¹⁵¹ Finally, suppliers must ‘take all reasonable steps’ to remediate any adverse impacts caused or contributed to by the supplier from modern slavery practices in its operations and supply chains, in accordance with the standards outlined in the *UNGP*.¹⁵²

The long form clause is advised as appropriate for procurements assessed as having a higher risk of modern slavery.¹⁵³ Procurement officers are advised to use these clauses for high value and/or high modern slavery risk procurements over

¹⁴⁵ Australian Government, ‘Draft Modern Slavery Clause Options’ (n 143) 1.

¹⁴⁶ Ibid Option 1 – short form cl X.2.

¹⁴⁷ Ibid cl X.3.

¹⁴⁸ Ibid Option 2 – standard form cl X.3. ‘Personnel’ is defined to include any person who is an officer, employee, contractor (including subcontractor) or agent of the Supplier involved in providing the Good and/or Services: *ibid* Option 2 – standard form cl X.1.

¹⁴⁹ Ibid Option 2 – standard form cl X.4.

¹⁵⁰ Ibid.

¹⁵¹ Ibid Option 2 – standard form cl X.7.

¹⁵² Ibid Option 2 – standard form cl X.6(b).

¹⁵³ Ibid 1.

\$200,000.¹⁵⁴ This clause builds on the obligations in the standard clause, but provides the customer with a right to review and suggest amendments to the supplier's Modern Slavery Risk Management Plan. It also requires the supplier to notify the customer of any modern slavery practices it becomes aware of and to consult with the customer concerning actions taken.¹⁵⁵

Procurement officers are encouraged 'to consider using the strongest modern slavery clauses in all procurements in order to drive increased awareness and accountability for modern slavery risks by all suppliers'.¹⁵⁶ They are also encouraged 'to foster continuous improvement' in suppliers' practices regarding modern slavery by including further requirements at contract renewal and review stages.¹⁵⁷

Stage 3: Contract Management

The *Procurement Toolkit* makes clear that the main purpose of the modern slavery clauses is to provide 'an opportunity for agencies to monitor supplier actions systematically as part of established contract management processes, and to use the potential material breach of contract to initiate dialogue and engagement with the supplier'.¹⁵⁸ Procurement officers are encouraged to foster collaborative relationships,¹⁵⁹ and to 'work in partnership with suppliers to monitor compliance and provide support when needed'.¹⁶⁰ They are also advised to monitor supplier compliance through processes such as 'regular contract management meetings, audits and the use of key performance indicators'.¹⁶¹ The guidance cautions that any such measures be 'proportionate and relevant to the risk classification of the procurement'.¹⁶²

The right of termination should only be exercised in relation to material breach of a modern slavery contract clause where the supplier has repeatedly and deliberately disregarded the terms of the clause/s, and demonstrates no intention of engaging with the Government entity to remedy the breach.¹⁶³

V Prospects and Limitations of the Australian Approach

Through its application to the Australian Government, the *Modern Slavery Act* has prompted the Commonwealth to regularly collate information on the scope of its operations and supply chains, as well as on relevant procurement policies and practices, and to present this in an accessible form.¹⁶⁴ It has also, to some degree,

¹⁵⁴ *Procurement Toolkit* (n 4) 21.

¹⁵⁵ Australian Government, 'Draft Modern Slavery Clause Options' (n 143) Option 3 – long form drafting notes.

¹⁵⁶ *Procurement Toolkit* (n 4) 21.

¹⁵⁷ *Ibid* 11.

¹⁵⁸ *Ibid* 21.

¹⁵⁹ *Ibid* 11.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid*.

¹⁶² *Ibid*.

¹⁶³ *Ibid* 21.

¹⁶⁴ See, eg, *Commonwealth Modern Slavery Statement 2019–20* (n 2), *Commonwealth Modern Slavery Statement 2020–21* (n 3).

enlivened those *CPR* that require procurement officers to consider the presence of unlawful and/or egregious labour practices among its suppliers that may otherwise have been overlooked or tolerated. Procurement officers can now avail themselves of the *Procurement Toolkit*, which provides advice, tailored to the public procurement context, on identifying, assessing and responding to modern slavery risks during the tendering and contract management processes. Model clauses are available for adaptation and inclusion within government contracts. Efforts are also underway to improve procurement officers' awareness of modern slavery and modern slavery risks in the goods and services they purchase. These are all positive developments.

However, we suggest that from a labour regulation and compliance perspective, the steps taken by the Australian Government to date may be limited in important respects. We raise three sets of concerns below. These go to: the scope of the Government's efforts; the extent to which the measures suggested in the *Procurement Toolkit* will be effectively implemented given the broad (almost unfettered) discretion given to procurement officers, alongside limited expertise and resourcing; and finally, the limited attention paid to questions around how compliance with these clauses are to be monitored and enforced.

Before proceeding, it is important to emphasise that the discussion below does not apply to the Government's coordinated procurement arrangements. As explained above, coordinated procurement arrangements exist in relation to a limited number of goods and services, including property services (which encompasses cleaning and security services). Some of these arrangements impose additional labour-related performance criteria, as well as additional monitoring and compliance-related measures.¹⁶⁵ While the design and implementation of these arrangements merit further analysis from a labour regulation perspective, this task is beyond the scope of this article.

A *Scope*

The Australian Government's focus on modern-slavery-related risks within its supply chains, while understandable in the context of the *Modern Slavery Act*, is limited in scope in at least two significant ways. First, it does not appear to adequately acknowledge, or seek to address, the broader conditions that enable severe forms of labour exploitation to exist in the first place. With the exception of the general prohibition on recruitment fees and on the retention or destruction of identity documents in the standards and long form model clauses,¹⁶⁶ the Government does not appear to be taking additional steps to identify or address broader labour rights violations or poor working conditions in its supply chains, despite the fact that these factors are widely acknowledged to heighten worker vulnerability to extreme

¹⁶⁵ See, eg. the Commonwealth's discussion of the extent to which it considers that its 'Property Services Coordinated Procurement Arrangements' mitigate modern slavery risks: *Commonwealth Modern Slavery Statement 2019–20* (n 2) 20–1; *Commonwealth Modern Slavery Statement 2020–21* (n 3) 25.

¹⁶⁶ *Ibid* Option 2 – standard form cl X.7.

forms of labour exploitation.¹⁶⁷ The initiatives certainly do not, as Prime Minister Scott Morrison claimed in 2020, evince a commitment on the part of the Australian Government to ‘ensuring our procurements and purchases promote supply chains that protect the rights of workers from the first to the last’.¹⁶⁸ While it could be argued that compliance with broader labour rights is addressed through cls 6.7 and 10.19 of the *CPR* (see above Part IV(A)), these clauses are unlikely to be sufficient to prompt procurement officers to identify or seek to mitigate broader labour and human rights risks when engaging in transactions with the private sector.

Second, the exclusive focus on modern-slavery-related risks falls short of meeting the expectations of the international community when it comes to measures adopted by States to address potential and actual human rights abuses in public procurement. As noted in Part II above, the *UNGP* set forth expectations concerning state action in relation to all internationally-recognised human rights. To date, and despite continuing to profess commitment to the *UNGP*, the Australian Government has taken a very selective approach to the human rights that it is asking its suppliers to take seriously. If it is to align its practices with international standards in this area, the Australian Government will need to expand its responsible procurement policies and practices to address other human rights risks in its operations and supply chains.

B Regulatory Discretion

The Australian Government’s approach to the integration of modern slavery considerations in its procurement is striking for the broad degree of discretion it affords entities covered by the *CPR* and procurement officers. Use of the *Procurement Toolkit* is encouraged, but optional. The Toolkit itself makes it clear that it is up to procurement officers to determine not only the extent to which they take modern slavery considerations into their decision-making, but how they do so, what specific standards they require, and how any such standards are monitored and enforced. There are no minimum mandatory requirements, even when the procurement is deemed high risk of modern slavery. There is not even any explicit prohibition on engaging suppliers that are not in compliance with their reporting obligations under the *Modern Slavery Act*.¹⁶⁹

This broad discretion leaves scope for public procurement officials to tailor contracts to specific contexts and suppliers, and to experiment and innovate. It is hoped that such innovation takes place, and that mechanisms exist through which such approaches can be disseminated to other procurement officers, and learnings extrapolated. However, it may also lead to ineffectiveness, with procurement officials choosing to ignore the *Procurement Toolkit* or engage with it only in a cursory fashion. We suggest that competing priorities faced by procurement officers

¹⁶⁷ For a brief discussion of an alternative ‘labour regulation’ approach, see, eg, Landau and Marshall (n 102) 330–4.

¹⁶⁸ Scott Morrison, ‘Prime Minister’s Foreword’ in *Commonwealth Modern Slavery Statement 2019–20* (n 2) 1.

¹⁶⁹ See further Australian Government, *Australian Government Response to the Recommendations of the Final Report of the Inquiry into Establishing a Modern Slavery Act in Australia: Hidden in Plain Sight* (October 2020) 26.

and broader contextual considerations, as we have outlined in Part III(A), will, in practice, significantly constrain the exercise of this discretion.

To illustrate, the guidance to procurement officials on r 10.19 advises that where a procurement officer determines that a certain labour regulation and/or regulatory framework is relevant and will apply throughout the contract, officials should reference the specific regulations and frameworks in the contract documentation.¹⁷⁰ They should also satisfy themselves that these standards are being met.¹⁷¹ The measures taken should be necessary and appropriate, and ‘the level of assurance necessary will depend on the likelihood and impact of the regulation or regulatory framework not being met throughout the life of the contract’.¹⁷² Procuring authorities thus appear at first glance to have the discretion to both stipulate relevant labour and human rights criteria in contracts where relevant, and to impose more demanding monitoring requirements where the risk of non-compliance is considered high. However, the guidance advises that ‘officials should be mindful of minimising red tape and additional costs to suppliers bidding for government contracts’.¹⁷³ It also emphasises in bold type that: ‘**Paragraph 10.19 of the CPRs does not require comprehensive compliance auditing that would add materially to the cost for taxpayers.**’¹⁷⁴ In light of this guidance, we suggest, procurement officers will opt for minimal forms of verification, such as requiring suppliers to certify that they comply and self-reporting any instances of non-compliance. We discuss the inadequacies of these approaches below.

C *Expertise and Resourcing*

To be meaningfully implemented, the measures proposed by the Government require procurement officers within NCCEs to have commitment, expertise, and adequate resourcing. The *Procurement Toolkit* presumes that procurement officers will have the necessary expertise to carry out the risk assessment process, as well as to make decisions on important questions such as what conditions relating to modern slavery mitigation, remediation and due diligence (if any) should be included in the COP, as conditions precedent to the contract or in the Statement of Requirements. Procurement officers are also expected to respond appropriately and in an effective and collaborative manner to any suspected or self-reported incidences of modern slavery.¹⁷⁵

The Australian Government has recognised the need to enhance procurement officers’ awareness of modern slavery and their capacity to make more informed contracting decisions. It has developed two online modern slavery training modules for procurement officers that are being integrated into NCCCE learning platforms.¹⁷⁶ Individual NCCEs have also taken their own educational initiatives: the Australian Taxation Office, for example, has developed a ‘Modern Slavery Help Card’ for its

¹⁷⁰ Department of Finance (Cth), *Consideration of Relevant Regulations and/or Frameworks* (n 120) 2 [11].

¹⁷¹ *Ibid* 2 [12].

¹⁷² *Ibid*.

¹⁷³ *Ibid* 3 [13].

¹⁷⁴ *Ibid* 3 [14] (emphasis in original).

¹⁷⁵ *Procurement Toolkit* (n 4) 11.

¹⁷⁶ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 29.

procurement officers and the Australian Government Department of Infrastructure has produced a ‘modern slavery FAQ and Quick Reference Guide’.¹⁷⁷ However, it is unclear whether these resources will be sufficient to equip procurement officers with the expertise necessary to implement the measures proposed in the *Procurement Toolkit* effectively. The Government has also not indicated whether any additional time or resourcing has been provided to procurement officers to effectively implement these new expectations.¹⁷⁸

The question of appropriate expertise is particularly salient in light of the requirement in the standard and long form draft clauses for suppliers to develop and implement Modern Slavery Risk Management Plans.¹⁷⁹ From a regulatory perspective, this process-oriented approach to setting and monitoring modern-slavery-related performance criteria in public contracts has advantages.¹⁸⁰ It recognises the heterogeneity and complexity of businesses and the industries in which businesses engage, and that detailed prescriptive rules may be ill-suited to the complexity of organisations and their supply chains, and to regulatory problems.¹⁸¹ It does not require the regulator to have a precise understanding of what outcomes it is seeking or exactly what action is required.¹⁸² Rather, the approach capitalises on a business’s inherent capacity to regulate itself and its superior access to business-specific information. Importantly, it also recognises and promotes continuous improvement of organisations in terms of understanding and responding to risks of modern slavery in their operations and their supply chains.

However, the effectiveness of this process-oriented approach is contingent upon appropriate oversight of a plan’s quality and implementation by the relevant regulator. Under the Australian Government’s approach, the relevant regulators are the procurement officers located in various NCCs. It is open for these officers simply to accept any plan submitted to them as adequate evidence of compliance. Hopefully, some attempt will be made to assess the validity and effectiveness of a supplier’s Modern Slavery Risk Management Plan. But it is unclear how these is to be done or against what criteria. Given limited expertise, time and resources, there is a high risk of these officers adopting a tick-the-box approach to these plans. This would be a highly undesirable outcome as it would encourage the adoption by suppliers of cosmetic forms of compliance.¹⁸³

The risks inherent in implementing a compliance-plan approach in contexts in which the regulator may lack expertise, knowledge and/or commitment, is well-exemplified by the US Government’s experience implementing the anti-trafficking

¹⁷⁷ Ibid 32–3.

¹⁷⁸ On the importance of adequate resourcing for the effectiveness of labour-related procurement initiatives, see Sanchez-Graells (n 9).

¹⁷⁹ See above nn 149–50, 155 and accompanying text.

¹⁸⁰ See above Part III(B).

¹⁸¹ Gunningham (n 92) 212.

¹⁸² Gilad (n 83) 486–7.

¹⁸³ See further Ford and Nolan (n 102); Ingrid Landau, ‘Human Rights Due Diligence and the Risk of Cosmetic Compliance’ (2019) 27(1) *Melbourne Journal of International Law* 221; Genevieve LeBaron and Andreas Rühmkorf, ‘Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK *Bribery Act* and *Modern Slavery Act* on Global Supply Chain Governance’ (2017) 8(S3) *Global Policy* 15.

provisions in the *Federal Acquisition Regulation* ('*FAR*').¹⁸⁴ The US Government requires all relevant agencies to insert a clause — in contracts for work performed inside or outside the US — that effectively prohibits contractors and their subcontractors, employees and agents from engaging in human trafficking and other certain prohibited practices such as the use of forced labour, confiscation of employee identity or immigration documents, and use of misleading or fraudulent recruitment or employment practices.¹⁸⁵ Contractors are required to notify the relevant agency's Contracting Office and the Inspector General of any credible allegation of violations, and take steps to remedy them.¹⁸⁶ Where contracts are performed outside the US and exceed US\$550,000 in value (but excluding contracts for the purchase of commercially available off-the-shelf items), a contractor is also required to submit a compliance plan to the agency's Contracting Officer.¹⁸⁷ Minimum requirements for such plans include an awareness programme to inform contractor employees about the requirements; a process for employees to report suspected violations without fear of retaliation; a plan to ensure compliance with required recruitment and wage protections; a housing plan (if appropriate); and procedures to prevent agents and subcontractors from engaging in trafficking at any tier, and to monitor, detect and terminate them if they have violated the policy.¹⁸⁸

Inquiries by the US Government Accountability Office and the Inspector General of the Department of Defence have found significant problems with the implementation of the combatting trafficking in persons rules in the *FAR*.¹⁸⁹ A 2020 inquiry into the extent to which Department of Defence contracts in Kuwait complied with these rules, for example, found that contracting personnel did not consistently confirm that contracts included the required clauses or had the requisite contract oversight plans.¹⁹⁰ While suppliers to the US Government were required to meet national labour law requirements regarding wages, housing and safety standards, the contracting organisations lacked any process for determining what these were, let alone ensuring contractors complied with these standards.¹⁹¹

Limitations arising from the lack of expertise (and potentially commitment) of procurement officers with respect to modern slavery can be overcome to some degree by the engagement of assistance from third parties. As we noted in Part III above, third parties in this context may include NGOs, commercial advisory and

¹⁸⁴ *Federal Acquisition Regulation*, 48 CFR §22.17 (2022) ('*FAR*').

¹⁸⁵ *Ibid* §22.1705(a)(1). The relevant clause is found at §52.222-50.

¹⁸⁶ *Ibid* §52.222-50(d)–(e).

¹⁸⁷ *Ibid* §52.222-50(h).

¹⁸⁸ *Ibid* §52.222-50(h).

¹⁸⁹ See, eg, United States ('US') Government Accountability Office, *Human Trafficking: DOD Should Address Weaknesses in Oversight of Contractors and Reporting of Investigations Related to Contracts* (Report to Congressional Committee, GAO-21-546, August 2021) <<https://www.gao.gov/assets/gao-21-546.pdf>>.

¹⁹⁰ Inspector General, US Department of Defence, *Evaluation of DoD Efforts to Combat Trafficking in Persons in Kuwait DODIG-2019-088* (11 June 2019) i <<https://media.defense.gov/2019/Jun/20/2002147915/-1/-1/1/DODIG-2019-088.PDF>>. This inquiry was prompted by revelations that employees of a Department of Defence contractor that operated food services for US and Coalition personnel at certain military bases in Kuwait had not received the legally mandated minimum monthly salary, been required to pay exorbitant recruitment fees and to work 7 days a week, 12-hour workday schedules with continuous overtime, and lived in sub-standard housing.

¹⁹¹ *Ibid*.

audit firms, and trade unions. Contracting authorities could engage third parties with appropriate expertise to help develop guidelines, templates, tools and training to support procurement officers assess supplier performance against the performance standards.¹⁹² They could also engage them to review compliance plans and/or to advise on monitoring, non-compliance, and corrective actions. In a welcome development in this context, the Australian Government has indicated in its second *Modern Slavery Statement 2020–21* that it is collaborating with the *Cleaning Accountability Framework*, an Australian multistakeholder initiative directed at securing decent work in property services,¹⁹³ and Electronics Watch, an international multistakeholder initiative that works with public sector organisations to promote and protect the rights of workers in the electronics industry.¹⁹⁴ To date, this collaboration appears to be largely focused on gaining a better understanding of modern slavery risks in the relevant sectors and the provision of recommendations for areas of improvement and remediation. However, the *Cleaning Accountability Framework* has also helped develop educational resources on modern slavery risks for procurement officers.¹⁹⁵ This type of engagement may go some way in assisting procurement officers to use the *Procurement Toolkit* effectively.

D Monitoring and Enforcement

We have emphasised the importance of monitoring and enforcement to an effective regulatory regime. If the Australian Government is serious about including modern-slavery-related obligations in purchasing contracts, it should put in place monitoring and compliance mechanisms to secure their observance. Failure to do so renders any such clauses mere window-dressing. Laxity in enforcement may also be counterproductive — by leaving companies that do invest in compliance feeling at a competitive disadvantage vis-à-vis others seen to be ‘getting away with it’.¹⁹⁶

Monitoring and enforcement of labour and human rights requirements in public procurement contracts is often weak. A 2016 survey of public procurement and human rights in 20 countries, for example, found that ‘systematic and comprehensive monitoring of the performance of public contracts with regard to respect for human rights amongst government suppliers was not identified in any surveyed jurisdiction’.¹⁹⁷ According to a 2019 survey of 28 countries by the OECD, only half of survey respondents had provisions within their frameworks that allowed

¹⁹² The US Government, for example, has engaged non-profit labour organisation Verité to assist with the development of guidance and training material for public contractors in relation to human trafficking and forced labour: *Responsible Sourcing Tool* (Web Page) <<https://www.responsiblesourcingtool.org/pages/partnerinfo>>.

¹⁹³ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 26, 43. See also *Cleaning Accountability Framework, About the Cleaning Accountability Framework* (Web Page, 2022) <<https://www.cleaningaccountability.org.au/about-us/>>.

¹⁹⁴ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 28, 43. See also *Electronics Watch* (Web Page) <<https://electronicswatch.org>>.

¹⁹⁵ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 4.

¹⁹⁶ Gunningham (n 92) 125.

¹⁹⁷ Methven O’Brien, Vander Meulen and Mehra (n 14) 10. See also Walter Kahlenborn, Christine Moser, Joep Frijdal and Michael Essig, *Strategic Use of Public Procurement in Europe: Final Report to the European Commission* (MARKT/2010/02/C, 2011) 135–7; National Agency for Public Procurement (n 34) 37.

for action to be taken against suppliers if their supply chains infringe responsible business conduct objectives.¹⁹⁸ While we are not aware of studies in Australia, findings by the National Auditor-General into other social procurement initiatives in Australia indicates monitoring of supplier performance with stipulated requirements is often limited or absent. For example, a recent National Auditor-General report into Australian Government requirements for NCCEs to apply mandatory minimum targets for Aboriginal and Torres Strait Islander participation in major procurements found that the ineffective monitoring was a key factor undermining the effectiveness of the initiative.¹⁹⁹

It is thus perhaps unsurprising to find that the Australian Government's modern-slavery-related procurement initiatives place insufficient emphasis on monitoring and enforcement. We have already raised concerns over the extent to which effective monitoring of any contractual requirements concerning compliance with labour and human rights frameworks imposed under *CPR* r 10.19 is likely to take place. Given the clear emphasis placed on cost considerations, procurement officers are likely to opt for cost-neutral forms of monitoring, such as requiring suppliers to monitor themselves and report any instances of suspected non-compliance in their operations or supply chains.

The modern slavery model clauses also promote self-monitoring and self-reporting. All model clauses require suppliers to take all reasonable action to address or remove modern slavery practices that they become aware of in their own operations or supply chains. Where the long form model clause is used, a business is also required to report any such practices to the relevant contracting authority and to consult with them concerning remediation.²⁰⁰ While the *Procurement Toolkit* observes that procurement officers may choose to undertake additional monitoring of suppliers' compliance by way of measures such as regular contract management meetings and audits,²⁰¹ it is unclear what motivation procurement officers would have to schedule such meetings, how any additional information provided by the supplier would be verified, how audits would be used in this context or what key performance indicators would be useful and appropriate.

Reliance on the terms of the model clauses (without additional monitoring efforts) will undoubtedly appeal to many procurement officers due to the absence of burden these clauses place on the officers as regulators. However, they are an inadequate means of obtaining information on supplier compliance. They do little,

¹⁹⁸ OECD, *Integrating Responsible Business Conduct into Public Procurement* (n 25) 54.

¹⁹⁹ Australian National Audit Office, *Aboriginal and Torres Strait Islander Participation Targets in Major Procurements: Across Entities* (Performance Audit, Auditor-General Report No 25, 2019–20, 20 February 2020) 6, 8 [9], 8 [11], 33.

²⁰⁰ Australian Government, 'Draft Modern Slavery Clause Options' (n 143) Option 3 – long form cl X.8(a).

²⁰¹ See above n 161 and accompanying text. Despite its entrenchment in corporate practice, labour rights advocates and scholars have long questioned the appropriateness of the commercial audit as a means through which to assess working conditions. It is seen as a blunt instrument, incapable of achieving the level of worker engagement and understanding necessary to reveal a full or true account of working conditions, or of addressing the underlying causes of labour exploitation. It is also criticised for providing 'an illusion rather than a reality of effective global supply chain governance': Genevieve LeBaron, Jane Lister and Peter Dauvergne, 'Governing Global Supply Chain Sustainability through the Ethical Audit Regime' (2017) 14(6) *Globalizations* 958, 972.

if anything, to promote continuous improvement among suppliers with respect to how they go about identifying and managing labour rights risks in their own activities and supply chains. It also risks fostering a ‘don’t ask, don’t tell’ mentality, as the public procurement officers will only be aware of what the suppliers choose to disclose.²⁰² It is also unclear as to how procurement officers are expected to know whether the actions that a supplier reports they have taken in response to any instance of modern slavery identified are sufficient or what constitutes an adequate timeframe for progress. We note in this context that a US Government Accountability Office inquiry into implementation of the *FAR* in the Department of Defence found that, despite being required to do so, the overwhelming majority of procurement officers interviewed as part of the investigation had not conducted regular monitoring, evaluation or oversight of contractor compliance with human trafficking requirements. The reasons cited for failure to do so included a lack of awareness of their responsibilities and related guidance; a lack of adequate know-how; and/or the attachment of low prioritisation to these responsibilities.²⁰³

It is unrealistic to expect procurement officers to engage in their own on-the-ground monitoring of contractor practices. But there are examples from Australia and internationally of ways in which monitoring of labour-related performance criteria in public contracts can be undertaken meaningfully if the requisite government commitment is present. One possible approach would be to entrust supplier monitoring and oversight to a specialised state agency. The Australian Building and Construction Commission, for example, is responsible for monitoring and enforcing compliance with the Australian *Code for the Tendering and Performance of Building Work 2016* (Cth),²⁰⁴ notwithstanding that ‘funding entities’ — the Departments, agencies and other government bodies procuring the construction work — are responsible for applying the Code to their purchasing. Under the *Workplace Gender Equality Procurement Principles*, non-public sector employers with 100 or more employees in Australia who wish to contract with the Australian Government must obtain a letter from the Workplace Gender Equality Agency to demonstrate that they are compliant with the *Workplace Gender Equality Act 2012* (Cth).²⁰⁵ The Australian Government could also take a broader and strategic approach by implementing a monitoring program targeted at suppliers within sectors identified as high risk.²⁰⁶ Monitoring could be undertaken by qualified government monitors or by third parties with relevant expertise, capacity and independence. These third parties would also be well-positioned to play a role in working with suppliers and other entities within their supply chains to develop and implement appropriate remediation and preventative measures.²⁰⁷ As noted above, the Australian Government is engaging with the *Cleaning Accountability Framework* and Electronics Watch to gain a better understanding of modern slavery

²⁰² Sariana García-Ocasio, ‘How Tolerant is Zero Tolerance: The Loopholes in Anti-Trafficking Federal Contract Regulations’ (2014–2015) 44(3) *Public Contract Law Journal* 551, 563.

²⁰³ US Government Accountability Office (n 189) 13–15.

²⁰⁴ *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) s 16.

²⁰⁵ Department of Prime Minister and Cabinet (Cth), *Workplace Gender Equality Procurement Principles and User Guide* (1 August 2013) <<https://www.wgea.gov.au/sites/default/files/documents/PMC-WGE-Procurement-Principles.pdf>>.

²⁰⁶ Glimcher (n 36) 10.

²⁰⁷ *Ibid.*

risks in two of its priority sectors and to advise on appropriate mitigation and remediation strategies. Both these multistakeholder initiatives have developed collaborative regulatory schemes directed at enabling ongoing and effective monitoring of working conditions within suppliers throughout the relevant supply chains.²⁰⁸ It remains to be seen whether the Australian Government, or individual NCCEs, will choose to formally participate in these schemes.

With respect to enforcement, the *Procurement Toolkit* emphasises that contract termination should be considered as a matter of last resort.²⁰⁹ This approach is broadly consistent with what is considered good practice in regulatory compliance and transnational private governance scholarship. Simply exiting the commercial relationship where cases of non-compliance are discovered can impact negatively on the intended beneficiaries of such initiatives. Rather, regulators (and those with economic leverage) should build trust with suppliers and use their commercial relationships to promote continuous improvement in supplier behaviour.²¹⁰ Relational contracting (distinct from a formalistic approach to contract management emphasising monitoring of compliance with performance standards) is also often encouraged in government procurement as a way of achieving performance of long-term contracts.²¹¹

However, there are risks associated with this approach which may undermine the effectiveness of the outcomes sought to be achieved. A risk of regulatory capture, if not corruption, may arise from the formation of collaborative relationships with suppliers in circumstances where procurement officers hold significant discretion and there may be imbalance in access to relevant information and resources between purchaser and supplier. It is also questionable to what extent procurement officers have the resources and/or expertise to take steps beyond a standardised model of contract management.

VI Conclusion

In this article, we have contextualised and described the Government's modern-slavery-related procurement response over the first two *Modern Slavery Act*

²⁰⁸ See Sarah Kaine and Michael Rawling, 'Strategic "Co-Enforcement" in Supply Chains: The Case of the Cleaning Accountability Framework' (2019) 31(3) *Australian Journal of Labour Law* 305; Michael Rawling, Sarah Kaine, Emmanuel Josserand and Martijn Boersma, 'Multi-Stakeholder Frameworks for Rectification of Non-Compliance in Cleaning Supply Chains: The Case of the Cleaning Accountability Framework' (2021) 49(3) *Federal Law Review* 438; Björn Skorpen Claeson 'Making Rights Effective in Public Procurement Supply Chains: Lessons from the Electronics Sector' in Olga Martin-Ortega and Claire Methven O'Brien (eds) *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, 2019) 192; Olga Martin-Ortega, 'Public Procurement as a Tool for the Protection and Promotion of Human Rights: A Study of Collaboration, Due Diligence and Leverage in the Electronics Industry' (2018) 3(1) *Business & Human Rights Journal* 75.

²⁰⁹ *Procurement Toolkit* (n 4) 21.

²¹⁰ See, eg, Richard M Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy* (Cambridge University Press, 2013).

²¹¹ See, eg, John Alford and Janine O'Flynn, *Rethinking Public Service Delivery: Managing with External Providers* (Palgrave Macmillan, 2012) 85; Nestor M Davidson, 'Relational Contracts in the Privatization of Social Welfare: The Case of Housing' (2006) 24(2) *Yale Law & Policy Review* 263, 302–10.

reporting periods. We have also sought to evaluate this response from a labour regulation and compliance perspective. Our analysis has revealed that the Act has compelled the Australian Government to begin to engage with modern slavery risks in its own operations and supply chains. In the Australian context, where successive federal governments have largely been oblivious to the risks of labour and human rights violations when procuring goods and services beyond our own shores, this is a significant step in the right direction.

Our analysis has identified promising elements of the Government's approach, when considered from a regulatory perspective. We have also identified features of the Government's response that may limit its potential effectiveness. To date, there is little evidence to suggest that the Government's procurement-related initiatives are intended to address, or capable of addressing, labour rights violations or poor workplace practices within its operations and supply chains that may render workers vulnerable to extreme forms of labour exploitation or slavery. The regulatory framework also appears to leave broad discretion to procurement officers with respect to the regulatory standards themselves, as well in deciding how to monitor for compliance and how to address infractions when identified. The effectiveness of these initiatives is thus highly contingent on the degree of commitment and resources invested at departmental and individual procurement officer level. There also appears to remain considerable space for modern-slavery-related considerations to be subsumed within, or overlooked by, procurement officers with limited resources and under pressure to minimise public expenditure and the burden placed on suppliers.

We have also suggested that the Government's approach elides the significant challenges associated with monitoring and compliance of business practice in contexts in which the primary regulators are public procurement officials with limited expertise and resources in labour and human rights matters. Drawing on insights from labour regulation and compliance, we have emphasised the importance of engagement and collaboration with external stakeholders, including with respect to monitoring compliance and remediation. In this respect, it will be interesting to see the extent to which the Australian Government and/or individual NCCs formalise and continue their engagement with third parties such as the *Cleaning Accountability Framework* and Electronics Watch throughout the implementation and evaluation phases of their modern slavery response.

We conclude with a brief reflection on the role of state purchasing in promoting and securing respect for labour rights transnationally. In the realm of labour regulation, it has been observed that in the 21st century, attention may broaden from a focus on the State as rule-maker and 'model employer' to encompass its role as 'model buyer'.²¹² Yet while there is a rich interdisciplinary literature on the conditions under which businesses may successfully leverage their purchasing power to improve working conditions in their global supply chains, much less consideration has been given to precisely what constitutes a model state purchaser. For example, important questions remain as to the extent to which governments are

²¹² Jimmy Donaghey, Juliane Reinecke, Christine Niforou and Benn Lawson, 'From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains' (2014) 53(2) *Human Resource Management* 229, 247.

willing and able to coordinate efforts to leverage their significant purchasing power in the context of highly decentralised public procurement systems. Another important question concerns the desirability and feasibility of public procurement authorities adopting the types of regulatory techniques (such as social auditing) that are prevalent in the private sector.

From an empirical perspective, understanding how those responsible for implementing and enforcing rules exercise their functions is central to an understanding of how a regulatory system operates.²¹³ Yet little is known about how procurement officers manage the multiple demands upon them in practice, or how they seek to manage contractual relationships in cases of suspected supplier non-compliance with labour and human rights performance obligations. There is also very limited empirical study of the impact of different approaches on supplier practice and, ultimately, on working conditions. It is our hope that the Government's recent modern-slavery-related procurement initiatives prompt greater engagement by policymakers and scholars with these types of questions.

²¹³ Black, 'Managing Discretion' (n 71) 3.