STRENGTHENING AUSTRALIA'S RESPONSE TO MODERN SLAVERY: LESSONS FROM COMPARATIVE HUMAN RIGHTS DUE DILIGENCE LAWS.

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I INTRODUCTION

The introduction of Australia's *Modern Slavery Act 2018* (Cth) ('*MSA*')[1] was a useful first step in raising awareness among Australian businesses, policy makers and civil society about the risks of modern slavery in the operations and supply chains of Australian businesses.[2] Modern slavery is an umbrella term used to describe human trafficking, forced labour, sexual slavery, child labour and trafficking, domestic servitude, forced marriage, bonded labour, debt bondage, slavery and slavery-like practices.[3] According to Walk Free,[4] there are 49.6 million people in modern slavery worldwide,[5] and an estimated 41,000 in Australia.[6] This means that modern slavery exists in the operations and supply chains of at least some Australian businesses.

The *MSA* requires businesses and Commonwealth government entities with an annual turnover of $100 million or more to publish an annual statement covering their structures, operations and supply chains and what they are doing to assess and address

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1 *Modern Slavery Act 2018* (Cth) ('*MSA*').

2 See, eg, Australian Government, *Report of the statutory review of the Modern Slavery Act 2018 (Cth) The first three years* (Report by John McMillan, 2023) 33 ('Review Report'); Justine Nolan, Fiona McGaughey and Martijn Boersma, 'Submission to Federal Review of 'Modern Slavery Act 2018 (Cth)' 5 ('*Submission to MSA Review*').

3 Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, *Defence and Trade, Modern Slavery And Global Supply Chains: Interim Report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry Into Establishing a Modern Slavery Act in Australia* (Report, August 2017) 1.8.

4 Noting that these are estimates and that the methodology used is subject to critique, see, eg, Anne T Gallagher, 'What's Wrong with the Global Slavery Index?' (2017) 8 *Anti-Trafficking Review* 90; Andrew Guth et al, 'Proper Methodology and Methods of Collecting and Analyzing Slavery Data: An Examination of the Global Slavery Index' (2014) 2(4) *Social Inclusion* 14.

5 Walk Free, *Global Slavery Index* (Report, 2023) <https://www.walkfree.org/global-slavery-index/>.

6 Ibid, 'Australia' <https://www.walkfree.org/global-slavery-index/country-studies/australia/>.

the risks of modern slavery in their operations and supply chains.[7] The purpose of the *MSA* is to strengthen Australia's response to modern slavery, shining 'a light into the shadows of global supply chains where modern slavery thrives... send[ing] a clear message that modern slavery is unacceptable in the supply chains of all of our goods and services.'[8]

From 2020, reporting entities began to publish their statements under the *MSA*, which are available on a public repository,[9] and have been subject to some civil society and academic scrutiny.[10]

Section 24 of the *MSA* provided for a three-year review of the Act, and following some delays, the review was announced in March 2022.[11] Section 24 provides, *inter alia*, that the Minister must cause a report to be prepared reviewing the operation of the Act and any rules over the period; compliance with the Act and any rules over that period; whether additional measures to improve compliance with the Act and any rules are necessary or desirable, such as civil penalties for failure to comply with the requirements of the Act. The terms of reference for the review also specified that: 'The review will look specifically at the Australian context with respect to available legal frameworks and powers', and consider relevant international legislation to consider harmonisation across jurisdictions.[12] The review report was recently published on 25 May 2023 and recommended that:

> The Modern Slavery Act be amended to provide that a reporting entity must:
>
> - have a due diligence system that meets the requirements mentioned in rules made under s 25 of the Act, and
> - in the entity's annual modern slavery statement, explain the activity undertaken by the entity in accordance with that system.[13]

Therefore, a key question for policy makers, businesses, scholars and civil society is whether a human rights due diligence ('HRDD') law represents the logical next step for the business and human rights policy landscape in Australia. HRDD is the standard used in all relevant international legal instruments on business and human rights,[14] and a wave of HRDD laws are emerging in domestic and regional jurisdictions

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[7] *MSA* (n 1) s 16.
[8] Commonwealth, *Modern Slavery Bill 2018 Second Reading Speech*, Parliament, 28 June 2018, 6754 (Alex Hawke, Assistant Minister for Home Affairs).
[9] Australian Border Force, *Online Register for Modern Slavery Statements* (Web Page) <https://modernslaveryregister.gov.au/>.
[10] See, eg, Amy Sinclair and Freya Dinshaw, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (Report, February 2022) ('*Paper Promises*'); Freya Dinshaw et al, *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (Report, November 2022) ('*Broken Promises*'); Fiona McGaughey, 'Australia's Modern Slavery Act and COVID-19: a get out of jail free card?' (2021) 6(2) *Journal of Modern Slavery* 216, 219.
[11] Jason Wood, 'Government launches review of landmark Modern Slavery Act' (Media Release, Department of Home Affairs, 31 March 2022).
[12] Australian Border Force, 'Terms of Reference: *Review of the Modern Slavery Act 2018 (Cth)*' (31 March 2022) 2.
[13] Review Report (n 2) Recommendation 11.
[14] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United*

around the world, particularly in Europe. HRDD has been defined as 'a process by which businesses are expected to assess actual and potential human rights impacts, integrate and act upon the findings, track the responses, and communicate how those impacts are addressed'.[15] The late John Ruggie defined HRDD as 'a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks'.[16]

Robert McCorquodale and Justine Nolan chart the development of HRDD at an international level, beginning with the core business and human rights instrument, albeit soft law, the United Nations Guiding Principles on Business and Human Rights ('UNGPs') adopted in 2011.[17] They note that HRDD in the UNGPs is a method by which businesses are to prevent, mitigate, and where relevant, remediate adverse human rights impacts. However, the UNGPs seem to invoke two different HRDD concepts - both *a process to manage business risks* and *a standard of conduct required to discharge an obligation*.[18] Jonathan Bonnitcha and McCorquodale identify the use of the term 'due diligence' in the UNGPs as a clever and versatile choice that is understood by business people, human rights lawyers and States alike.[19] The challenge is that the term may mean different things to each of these groups - with lawyers understanding it as a standard of conduct required to discharge an obligation and businesses understanding it as a process to manage corporate and reputational risks.

Indeed, as the lead author of this paper has engaged with other researchers, civil society, policy makers, regulators, and businesses, we can say that the same uncertainty has arisen in our work in Australia in recent years when HRDD is frequently discussed as a possible solution to strengthen the *MSA*.[20] Several factors contribute to this. Overall, there is a lack of common understanding and consensus as to the meaning of HRDD and in our discussions, we often observe that 'the devil is in the detail'.[21] This article aims to help grapple with the necessary detail by analysing what is meant by

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Nations 'Protect, Respect and Remedy' Framework, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex 18-9 ('UNGPs'); Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises* (OECD Publishing, 2011) 5 ('*OECD Guidelines*').

[15] Robert McCorquodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68(3) *Netherlands International Law Review* 455, 455 ('*Preventing Business Human Rights Abuses*').

[16] Ibid 458.

[17] Ibid.

[18] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899, 899.

[19] Ibid 900; John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company, 1st ed, 2013) 141-148.

[20] Justine Nolan et al, *Good Practice Toolkit: Strengthening Modern Slavery Responses* (Report, July 2023) 3-6 <https://api.research-repository.uwa.edu.au/ws/portalfiles/portal/269687654/Good_practice_toolkit.pdf>; Nolan, McGaughey and Boersma, *Submission to MSA Review* (n 2) 4, 7-10.

[21] See, e.g. Bonnitcha and McCorquodale (n 18) 901; John Ruggie, *Clarifying the Concepts of 'Sphere of influence' and 'Complicity': Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 8th sess, Agenda Item 3, UN Doc A/HRC/8/16 (15 May 2008) [17].

HRDD as well as how the term has been interpreted and implemented into laws in other jurisdictions. This provides detail on what provisions and mechanisms are used within HRDD laws. In particular, we examine key aspects of HRDD laws which have been identified as gaps in the *MSA*.

Section two of this paper briefly presents the current status of the *MSA*, its known shortcomings and explores the development of HRDD internationally. In Section three then we present a comparative analysis of HRDD laws (existing and proposed) in Germany, Norway, the Netherlands, France, the European Union ('EU'), and Canada. Some of the laws examined contain extensive detail (such as the *German Act*); whereas others are brief and anticipate the introduction of accompanying secondary legislation (such as the *Dutch Act*),[22] and so we have based our analysis on the primary legislation using reputable (but unofficial) English language translations and in-country academic literature written in English.

We focus on key features of these laws which are lacking in the *MSA,* namely: penalties, remedies, and stakeholder engagement. Crucially, the *MSA* does not have penalties for non-compliance and although reporting entities are required to 'describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes',[23] the absence of penalties has been found to have impacted the accountability of businesses that do not comply with the Act.[24] Similarly, it has been established that reporting entities under the *MSA* have struggled with remediation for modern slavery.[25] Further, despite being recommended under the *MSA*, stakeholder engagement is also poor, with only 17 per cent of companies reporting stakeholder consultation in developing or reviewing relevant policies and only 35 per cent reporting collaboration with unions, migrant worker groups, or civil society organisations in efforts to tackle modern slavery.[26]

Here, we explore key features of HRDD laws which are current gaps in the *MSA* and could form the basis of amendments to the *MSA* - and could form the basis of a more extensive mandatory HRDD law for businesses in Australia, or a mandatory human rights *and environmental* due diligence law. The Government's recent review of

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[22] Anneloes Hoff, 'Dutch child labour due diligence law: a step towards mandatory human rights due diligence' *Oxford Human Rights Hub* (Blog Post, 10 June 2019) <https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/>.

[23] *MSA* (n 1) s 16(1)(d).

[24] Sinclair and Dinshaw, *Paper Promises* (n 10) 3, 12; Dinshaw et al, *Broken Promises* (n 10) 24. The accountability gap can also be observed in respect of compliance with the *Modern Slavery Act 2015* (UK). See Business and Human Rights Resource Centre, *Modern Slavery Act: Five years of reporting – Conclusions from Monitoring Corporate Disclosure* (Report, February 2021) 2: 'Despite six years of persistent non-compliance by two in five (40%) of companies, not one injunction or administrative penalty (such as exclusion from lucrative public procurement contracts) has been applied to a company for failing to report.'

[25] Fiona McGaughey, 'Behind the scenes: reporting under Australia's Modern Slavery Act' (2021) 27(1) *Australian Journal of Human Rights* 20, 29-30.

[26] Dinshaw et al (n 4) 19.

the *MSA* has been published and makes recommendations on due diligence,[27] as well as penalties.[28] Relevant to stakeholder engagement, the review report also recommends including mandatory reporting criteria on internal and external consultation on modern slavery risk management; and arguably, options for remedies are implicit in a recommendation on complaints processes.[29]

II FROM DISCLOSURE REGIMES TO HRDD

Broadly speaking, there are two main legislative approaches to tackling human rights abuses by large corporations – disclosure regimes and HRDD. Disclosure regimes, also known as 'business reporting laws', place obligations on business to report on risks but not necessarily to do anything more proactive than that. The primary examples of relevance here being the United Kingdom *Modern Slavery Act 2015* ('*UK Act*'),[30] and the Australian *MSA*, which although distinct from the *UK Ac*t, was modelled on it.[31] In line with the 'light touch' regulation of a reporting regime, there are no penalties for non-compliance. Analyses of these laws and evaluations of their effectiveness have identified a range of issues including non-compliance with basic elements of the reporting regime, lack of detail and transparency, lack of acknowledgment of specific and known risks in the sector, lack of follow up on commitments made, failure to submit reports, and lack of engagement with stakeholders.[32] The solution to the failings of the disclosure law is often identified as HRDD, which would cover *all* human rights issues, not only modern slavery.

Having a broader remit that incorporates *all* human rights is fundamental to HRDD laws and to expanding the scope of obligations on Australia's businesses beyond what is currently required under the *MSA*. Also, as discussed below, many HRDD laws include obligations to minimise environmental harm. We posit that this is an essential consideration in the face of climate change;[33] aligns with emerging government policy on climate reporting obligations;[34] and gives effect to UN Human Rights Council and UN General Assembly resolutions on the *Right to a Clean, Healthy and Sustainable Environment,* both of which address the importance of the role of business in realising the right to a clean, healthy and sustainable environment.[35]

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[27] Review Report (n 2), Recommendation 11.
[28] Ibid, Recommendation 20.
[29] Ibid, Recommendation 8 on mandatory reporting criteria; Recommendation 24 on complaints.
[30] *Modern Slavery Act 2015* (UK) (*'UK Modern Slavery Act'*).
[31] *MSA* (n 1).
[32] Sinclair and Dinshaw (n 10) 2-3; Dinshaw et al (n 10) 2-3; Business and Human Rights Resource Centre (n 24) 2, 5; Steven Young and Mahmoud Gad, *Modern Slavery Reporting Practices in the UK: Evidence from Modern Slavery Statements and Annual Reports* (Report, April 2022) 4-5.
[33] See, eg, CSIRO and Bureau of Meteorology, *State of the Climate 2022* (2022, Commonwealth of Australia).
[34] Australian Government, 'Climate-related financial disclosure: Consultation paper' (June 2023) <https://treasury.gov.au/sites/default/files/2023-06/c2023-402245.pdf>.
[35] UN Human Rights Council, Resolution adopted by the Human Rights Council on 8 October 2021, 48/13. The human right to a clean, healthy and sustainable environment, UN Doc: A/HRC/RES/48/13 Human Rights Council Forty-eighth session 13 September–11 October 2021, Article 4 (a); UN General Assembly,

The genesis of HRDD derives from international law and the UNGPs have been responsible for much of the adoption of HRDD as a tool for tackling human rights risks within business. It has been argued that HRDD is 'at the heart' of the UNGPs, with five of the 31 Guiding Principles coming under the heading 'Human Rights Due Diligence'.[36] Since introduction on the UNGPs, HRDD has explicitly been incorporated into the key international standards in business and human rights, namely the *OECD's Guidelines for Multinational Enterprises 2011 ('OECD Guidelines')*, *the International Labour Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2017*, the *International Finance Corporation's Performance Standards 2012*, and the *Equator Principles 2013*.[37] The widespread adoption of HRDD indicates its popularity as an approach to ameliorating human rights risks within businesses, as well as its compelling and authoritative nature.

In terms of the definitional challenges in the UNGPs, as discussed in the Introduction, being both *a process to manage business risks* and *a standard of conduct required to discharge an obligation*, Bonnitcha and McCorquodale conclude that the UNGPs are best understood as imposing different responsibilities for a businesses' own adverse human rights impacts and for the human rights impacts caused by third parties with which the business has relationships.[38] They argue that businesses have a strict (no fault) responsibility for their own adverse human rights impacts and associated responsibility to provide a remedy, but that HRDD as a standard of conduct can determine the extent to which businesses are responsible for the adverse human rights impacts of third parties, and as a process HRDD can enable businesses to implement these responsibilities.[39]

Also at an international level, most recently, HRDD is provided for in the Third draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises* ('Business and Human Rights Treaty') published in 2021.[40] The draft treaty provides that States Parties shall require businesses to: a) Identify, assess and publish any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships; b) Take appropriate measures to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses…; c) Monitor the effectiveness of their measures to prevent and mitigate human rights abuses…; d) Communicate regularly and in an accessible manner to stakeholders, particularly to affected or

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Resolution adopted by the General Assembly on 28 July 2022 76/300. The human right to a clean, healthy and sustainable environment UN Doc: A/RES/76/300. Article 4.

[36] Bonnitcha and McCorquodale (n 18) 899-900.

[37] McCorquodale and Nolan, '*Preventing Business Human Rights Abuses*' (n 15).

[38] Bonnitcha and McCorquodale (n 18) 899, 912.

[39] Ibid 912.

[40] *Text of the third revised draft legally binding instrument with the textual proposals submitted by States during the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, 49th sess, Agenda Item 3, UN Doc A/HRC/49/65/Add.1 (28 February 2022) 20-1 [6.4].

potentially affected persons...[41] These provisions sit under the heading 'prevention' and other parts of the draft treaty clearly provide for liability and remedies. Article 8.7 also specifies that HRDD 'shall not automatically absolve a legal or natural person conducting business activities from liability'. As discussed in the following section, various aspects of this approach to HRDD can be seen in domestic laws in a number of jurisdictions.

III COMPARATIVE ANALYSIS OF HRDD LAWS

A *Comparative Legislative Developments*

Here we provide a chronological summary of the relevant legislative developments. The *California Transparency in Supply Chains Act of 2010* led the charge of business reporting laws related to human trafficking and slavery.[42] This was followed by the EU's Non-Financial Reporting Directive (2014/95/EU) in 2014 ('*NFRD*').[43] The *NFRD* requires companies with over 500 employees to report on relevant environmental, social, human rights and corruption risks and outcomes. Human rights risks can include human trafficking and slavery. The *UK Act* was introduced in 2015 and was intended to be consistent with the *NFRD*. The *UK Act* has seven parts, including protection for victims, civil and criminal provisions, new maritime enforcement mechanisms, and the establishment of an Anti-slavery Commissioner. Of particular interest here is section 54 - the business reporting obligations which require commercial organisations who supply goods or services in the UK and who have an annual turnover above £36m to publish a slavery and human trafficking statement each financial year.[44] The *UK Act* was influential in the development of Australia's *MSA*, introduced in 2018. The terms of reference of the inquiry into establishing an Australian *MSA*, begin: 'With reference to the United Kingdom's Modern Slavery Act 2015 … the Committee shall examine whether Australia should adopt a comparable Modern Slavery Act'.[45]

Meanwhile, the French *Droit de Vigilance or Corporate Duty of Vigilance Law* ('*French Act*') introduced in 2017,[46] was the first human rights and environmental due diligence law whereby businesses are required to produce a 'vigilance plan' which includes 'reasonable vigilance measures to adequately identify risks and prevent serious

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[41] Ibid 20 [6.3].
[42] *California Transparency in Supply Chains Act 2010* § 1714.43 Cal Civil Code (2010).
[43] *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups* [2014] OJ L 330.
[44] *UK Modern Slavery Act* (n 30) s 54.
[45] Parliament of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Terms of Reference' (August 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Interim_Report/section?id=committees%2freportjnt%2f024092%2f24997>.
[46] *LOI n° 2017-399 du 27 mars 2017* [Law No 2017-399 of 27 March 2017] (France) JO, 23 March 2017 ('*French Act*').

violations of human rights and fundamental freedoms, risks to serious harms to health and safety and the environment'.[47] Also in 2017, the *EU Conflict Minerals Regulation* (2017/821) was introduced establishing supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, as these products have sometimes been used to finance armed conflict and/or have been mined using forced labour.[48]

In 2019, the second national due diligence law was introduced in the form of the *Dutch Child Labour Due Diligence Act* ('*Dutch Act*').[49] At time of writing, this Act had not come into effect as anticipated and a new, broader Responsible and Sustainable International Business Conduct Bill is now under consideration instead.[50] Nonetheless, as noted below with regard to the *Canadian Bill C-262*, we retain this analysis as an example of a HRDD law to help inform possible Australian law reform. The *Dutch Act* required companies to investigate whether its goods or services were produced using child labour and to devise a plan to prevent child labour in their supply chains if they find it. The law imposed a reporting obligation as well as administrative fines and criminal penalties for non-compliance.[51] A limitation of the *Dutch Act* was its exclusive focus on the prevention of child labour and aim of ensuring consumer protection, rather than aiming to protect children from labour exploitation or advancing human rights and environmental protections more broadly.[52]

Providing 'further momentum for mandatory measures to promote corporate respect for human rights, including future regulations in the European Union',[53] both Germany and Norway adopted due diligence laws on the same day – 10 June 2021. The German *Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains* ('*German Act*'),[54] places due diligence obligations on companies to comply with specific human rights and environmental standards, with liabilities for violations. It came into force on 1 January 2023. The *German Act* lists

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[47] Ibid 320.

[48] *Parliament and Council Directive Regulation EU/2017/821 of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating From Conflict-Affected and High-Risk Areas* [2017] OJ L360/1.

[49] Wet Zorgplicht Kinderarbeid [Child Labour Due Diligence Act] (Netherlands) 24 October 2019 ('*Dutch Act*').

[50] Gijs Smit and Bas van Niekerk, 'The Netherlands: A Dutch initiative for a value chain due diligence' *Linklaters* (Web Page, 17 February 2023) <https://sustainablefutures.linklaters.com/post/102i833/the-netherlands-a-dutch-initiative-for-a-value-chain-due-diligence#:~:text=Next%20steps,Diligence%20Act%20will%20be%20revoked>.

[51] Ibid.

[52] See, eg, Liesbeth Enneking, 'Putting the Dutch Child Labour Due Diligence Act into Perspective: An Assessment of the CLDD Act's Legal and Policy Relevance in the Netherlands and Beyond' (2019) 12(4) *Erasmus Law Review* 20, 23.

[53] Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6(3) *Business and Human Rights Journal* 550, 550.

[54] *Gesetz über die unternehmerischen "Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten* [Corporate Due Diligence Obligations for The Prevention of Human Rights Violations in Supply Chains Act] (Germany) July 2021, BGBl I, 2021, 2959 ('*German Act*').

comprehensive obligations including the establishment of a risk management system and outlines the preventive and remedial measures, mandatory complaint procedures, and regular documentation and reports. The Norwegian *Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act)* ('*Norwegian Act*') requires businesses to respect human rights and offer good working conditions by carrying out due diligence in accordance with the *OECD Guidelines for Multinational Enterprises*.[55] It entered into force on 1 July 2022. The Act establishes sanctions for non-compliance, including financial penalties.

The final two laws analysed here are proposed, rather than adopted. The first proposed law is the Canadian *Bill C-262 Canadian Corporate Responsibility Bill: An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad ('Canadian Bill C-262').* At the time of drafting this article, it was one of two legislative options under consideration in Canada - the other being a reporting law (*Bills C-243 and S-211*) as opposed to *Bill C-262,* which resembles a HRDD law.[56] According to the Canadian Network on Corporate Accountability: 'Canada is at a crossroads: take principled and effective action against harmful corporate practices, or remain complicit with ongoing human right violations.'[57] Unfortunately, it was the reporting law, rather than the due diligence law, that was eventually passed.[58] However, we retain our analysis of *Canadian Bill C-262* here as an example of what a HRDD law *could* look like. *Canadian Bill C-262* would have required businesses to establish processes to prevent, address and remedy adverse impacts on human rights that occur in relation to their business activities conducted abroad. Environmental impacts of corporate activity are also in scope but only insofar as they are linked to human rights.

The second proposed law is the EU *Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* ('*EU Directive*'). If passed, this will have a significant impact globally as it would apply to 27 EU member States and to certain non-EU companies operating in those States also.[59] It would set a new regional standard by establishing a corporate sustainability due diligence duty to address negative human rights and environmental impacts.

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[55] *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)* [Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act)] (Norway) July 2022 ('*Norwegian Act*').

[56] Bill C-423, *An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff,* 2nd Sess, 42nd Parl, 2018; Bill S-211, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*, 1st Sess, 44th Parl, 2022; *Bill C-262 Canadian Corporate Responsibility Bill: An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad ('Canadian Bill')*

[57] Canadian Network on Corporate Accountability, *Don't Mistake Reporting for Accountability* (Report, June 2022) 1 <https://cnca-rcrce.ca/site/wp-content/uploads/2022/06/Dont-Mistake-Reporting-for-Accountability-EN-1.pdf >.

[58] *Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*, S-211, 2023.

[59] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive* [2022] OJ L 360/1, art 30 ('*EU Directive*').

The following sections discuss the overall scope of the laws and the HRDD provisions therein; before focusing on our three main themes addressing specific gaps in the Australian regime: penalties, remedies, and stakeholder engagement.

B *Scope of Legislation and HRDD Provisions*

The scope of obligations varies across the legislation under consideration here. First, there are differences in the type and scope of conduct. For example, the *German Act, French Act,* and proposed *EU Directive* capture a wide scope of harm in that they target both human rights *and* environmental harms.[60] In addition, the proposed amendments from the European Parliament to the *EU Directive* would also require companies to adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement.[61] *Canadian Bill C-262* does not include such a requirement; however, Section 8(d) of *Canadian Bill C-262* does provide that in developing and implementing its due diligence procedures, an entity must:

> have regard to the relationship between human rights and the environment, specifically that a healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, sustainably produced food and safe water.

Therefore, environmental harms are within the purview of the *Canadian Bill C-262 if* they relate to human rights impacts. In terms of the types of entities covered by laws, as well as jurisdictional reach, the laws clearly target larger corporations, but do so in different ways, as we discuss below.

In terms of scope, the *German Act* applies to entities with a principal place of business, administrative headquarters, or statutory seat in Germany - and to entities with a domestic branch office (as defined in the Act) - that employ more than 3,000 employees in Germany including those posted abroad. From 2024, this threshold will decrease to 1,000 employees.[62] The *French Act* also uses employee numbers as a threshold. It applies to companies that for a period of two or more consecutive years have employed 5,000 or more employees worldwide and whose registered office is located within French territory.[63] It also applies to overseas companies operating in France with greater than 10,000 employees worldwide whose registered office is

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[60] *German Act* (n 54) s 3 – 8; *French Act* (n 46) Article 1; Ibid Articles 15 – 17 in particular.
[61] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive* [2022] 2022/0051 Article 50.
[62] See, *German Act* (n 54) s 1.2: '*From 1 January 2024 the thresholds stipulated in sentence 1 no.2 and sentence 2 no. 2 around to 1,000 employees, respectively*'; CSR, 'Supply Chain Act: Act on Corporate Due Diligence Obligations in Supply Chains' *Business and Human Rights* (Web Page) https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html.
[63] See, *French Commercial Code*, Art L. 225-102-4.-I, Art L. 233-16 ('*French Commercial Code*').

located within French territory or abroad.[64] The *Dutch Act* also takes a broad approach to the scope of companies to which the law applies. The *Dutch Act* applies to any company registered in the Netherlands that sells or supplies goods or services to Dutch consumers; and to companies not registered in the Netherlands that sell or supply goods or services to Dutch consumers,[65] but not including companies that merely transport goods into the Netherlands.[66]

The other laws all use a combination of employee numbers and monetary thresholds to determine relevant entities. The *Norwegian Act* applies to enterprises resident in Norway that offer goods and services in or outside Norway; or foreign enterprises that offer goods and services in Norway and are liable for tax in Norway.[67] The threshold in the *Norwegian Act* can be monetary or based on the number of employees. To be within scope, businesses must fit into two of the following categories: have sales revenue of over NOK 70 million; or a balance sheet total of over NOK 35 million; or have 50 full-time employees.[68] Similarly, the *German Act* includes both monetary and employee thresholds. The *German Act* adopts the meaning of 'large companies' in the German Commercial Code which includes companies that have: 250 or more employees, more than €20 million in assets, and have a turnover of €40 million.[69]

The *Canadian Bill C-262* does not define scope but section 19(c) provides that regulations may be made that provide for the exemption of 'an entity or a class of entities from the application of any provision of this Act, including on the basis of revenue or number of employees'.[70]

The proposed *EU Directive* has the most detailed criteria for determining application of the law. The *Directive* proposes to apply to companies registered in Europe that meet two or more of following criteria:

- the company had more than 500 employees on average and had a net worldwide turnover of more than €150 million in the last financial year; or

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[64] Ibid; French Constitutional Council, Decision No. 2017-750 DC (23 March 2017): 'The provisions will thus apply to French parent companies but also to French subsidiaries of foreign groups'; *French Commercial Code* (n 59) Art L. 233-3.

[65] *Dutch Act* (n 49) Art 4(1). Article 4(3) provides: 'Exceptions may be granted by or pursuant to an order in council before the date on which the declaration is delivered and further rules may be laid down on the content and form of the statement.'

[66] Ibid Art 4(4).

[67] *Norwegian Act* (n 55) s 2, 3(a).

[68] Ibid s 3(a)(1)-(3).

[69] *German Commercial Code (Handelsgesetzbuch – HGB) (BGBl., Federal Law Gazette), Part III, Section 4100-1, Book 1, as amended by Article 11 of the Act of 18 July 2017 (Federal Law Gazette Part I p. 2745), Book 2, as amended by Article 14 of the Act of 22 December 2020 (Federal Law Gazette Part I p. 3256), Book 3, as amended by Article 5 of the Act of 7 August 2021 (Federal Law Gazette Part I p. 3311), Book 4, as amended by Article 184 of the Act of 19 June 2020 (Federal Law Gazette Part I p. 1328) and Book 5, as amended by Article 184 of the Act of 19 June 2020 (Federal Law Gazette Part I p. 1328)*, s267(2). An English translation by the Federal Ministry of Justice is available here: https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.pdf.

[70] *Canadian Bill C-262 (*n 56) s19(c).

- the company had more than 250 employees on average and had a net worldwide turnover of more than €40 million in the last financial year - and at least 50% of this net turnover was generated in one or more identified high-risk sectors (listed in the Directive).[71]

It also applies to companies from abroad operating in the EU:

- that have generated a net turnover of more than €150 million in the EU in the financial year preceding the last financial year; or
- have generated a net turnover of more than €40 million but not more than €150 million in the EU in the financial year preceding the last financial year, provided that at least 50 per cent of its net worldwide turnover was generated in one or more of the listed high-risk sectors.[72]

Therefore, Australia companies meeting these criteria would be in scope. The high-risk sectors include manufacturing, agriculture and the extractive industry.[73] The EU model is promising as the criteria include consideration of high-risk sectors. For laws that are ostensibly about identifying and tackling risk, this is a positive development. Revenue levels or numbers of employees may give a sense of the scale of the business and its ability to manage the administrative and other tasks associated with due diligence, but it does not take account of their *risk* profile.

Table 1: Due Diligence Obligations

Law	**Due Diligence ('DD') obligations**
German Act Effective from 1 January 2023.	- establish a risk management system; - designate a responsible person within the company; - perform regular risk analyses; - issue a policy statement; - lay down preventive measures in own operations, subsidiaries and vis-à-vis direct suppliers; - take remedial action; -establish a complaints mechanism; - implement DD obligations with regard to risks at indirect suppliers in case of 'substantiated knowledge' of abuses; and - document and report.
Norwegian Act Effective from 1 July 2022.	- embed responsible business conduct into company's policies; - identify and assess actual and potential impacts; - implement measures to cease, prevent or mitigate impacts based on prioritisations;

[71] *EU Directive* (n 59) Art 2(1)(a),(b).
[72] Ibid, Art 2(2)(a),(b).
[73] Ibid, Art 2(1)(b).

Law	**Due Diligence ('DD') obligations**
	- track implementation and results; communicate with affected stakeholders how impacts are addressed; and - co-operate in remediation and compensation. DD shall be carried out regularly and in proportion to: - the size of the enterprise; - the nature of the enterprise; - the context of its operations; and - the severity and probability of adverse impacts on fundamental human rights and decent working conditions.
Dutch Act Did not enter into force.	- integrate DD into company's policies; - manage systems and business processes; - identify and analyse potential and actual impacts; - draw up and carry out an action plan to prevent and mitigate impacts; - monitor the application and effectiveness of measures; - set up remediation mechanism or cooperate with an existing one; and - offer to enable remediation or contribute to it.
French Act Effective from 27 March 2017.	- establish and effectively implement a vigilance plan which shall include a mapping assessment to identify and rank risks; - set out procedures to assess subsidiaries, subcontractors and suppliers; - establish appropriate action to mitigate risks and prevent violations; and - create an alert mechanism, and monitoring scheme to assess efficiency of measures implemented.
EU Directive Proposal for Directive under negotiation by EU institutions.	- integrate DD into company's policy, including code of conduct; - identify potential and actual impacts; - prevent impacts via prevention plans, contractual assurances, third-party audits, investments and SME support; - option to suspend contracts; - cease or minimize impacts via corrective plans, contractual assurances, third-party audits, investments and SME support; - establish a complaints mechanism; - adopt a climate transition plan; - company directors must ensure due consideration given to advice of stakeholders, and civil society; and

Law	**Due Diligence ('DD') obligations**
	- organisations may submit complaints if obligation not met.
Canadian Bill C-262 Not adopted.	- develop and implement DD procedures for company's activities, its affiliates and its business relationships, incl. procedures to: - identify and assess actual and potential adverse impacts on human rights resulting from its activities and from its business relationships; - cease any activity that led to the adverse impacts and take remedial action; - mitigate risks of adverse impacts; and - have internal alert mechanism to notify of any potential adverse impacts on human rights.

As noted in the Introduction, HRDD can have different meanings and each of the laws above has distinct HRDD obligations. Here, we identify shared provisions in the laws, and points of divergence.

Each law requires a system of risk (or 'impact') identification, assessment, analysis and/or ranking. There is a requirement that this risk analysis take place regularly in both the *German Act* and *Norwegian Ac*t.[74] Whereas the *Dutch Act* required companies to submit a statement once and it appeared to have long-term validity.[75] The *French Act* requires the publication of a vigilance plan annually and so regularity is implied; this is similar to *Canadian Bill C-262* and the *EU Directive*.[76]

All of the laws have some provision(s) that relate to the incorporation of HRDD into policies and/or procedures of the company, and all include provisions to mitigate or prevent risks. Most of the laws require the establishment of an internal complaints or alerts mechanism (which we might refer to as whistleblowing in English). These operation-level grievance mechanisms ('OLGMs') are discussed further in the 'Stakeholder' section below. Some of the laws specifically require companies to provide remedies (*German Act, Norwegian Act, Dutch Act, Canadian Bill*); whereas others provide access to remedies through an external complaint or 'formal notice' mechanism (*French Act, EU Directive*).[77] Access to remedies are an essential component of the UNGPs which have three pillars - protect, respect and remedy.[78] Next, we

[74] *German Act* (n 54) s 5(4); *Norwegian Act* (n 55) s 4.
[75] *Dutch Act* (n 49) Article 4(1).
[76] *French Act* (n 46) Article 1, in accordance with the *French Commercial Code* (n 63) *Article L225-102-3*; *Canadian Bill C-262* (n 56) s 9; *EU Directive* (n 59) Articles 28 and 44.
[77] *French Act* (n 46) Art. L. 225-102-4. – I., II; *EU Directive* (n 59) Art 7; *Dutch Act* (n 49) Art 7; *Norwegian Act* (n 55) s 5, *German Act* (n 54) s 7; *Canadian Bill C262* (n 56) s 10(4).
[78] UNGPs (n 14) 27.

explore the three key HRDD themes in more detail: penalties, remedies, and stakeholder engagement.

C *Penalties*

As noted in the introduction, use of penalties is strikingly absent from the *MSA*. Civil pecuniary penalties are commonly used in corporate law to deter breaches of the relevant law(s) and both Australian Consumer Law (schedule 2 to the *Competition and Consumer Act 2010 (Cth)*) and the *Australian Securities and Investments Commission Act 2001 (Cth)* have led to extensive jurisprudence in this regard.[79] Penalties are a well-established regulatory tool for corporations, we argue that this feature must form an integral part of any proposed HRDD scheme in Australia and here we examine the penalties models in these HRDD laws. The UNGPs refer to 'punitive sanctions' - criminal or administrative (such as fines) as one of a suite of options under the umbrella of remedy.[80]

The question of penalties for non-compliance with the *MSA* has been contentious for some time. It was extensively considered prior to the adoption of the *MSA* but despite widespread calls from scholars and civil society, no penalty clauses were included in the legislation. Rather, the Attorney-General's Department cited 'public criticism' as a repercussion of non-compliance,[81] and it is clearly assumed that 'consumers, investors, civil society, and the media will actively monitor business operations and relationships, and thereby reinforce business incentives to protect reputation'.[82] Several studies have critically examined corporate compliance with the *MSA*,[83] with little evidence that the current approach is effective. Section 24 (1) (ab) of the *MSA* which provides for review of the Act, includes consideration of 'whether additional measures to improve compliance with this Act and any rules are necessary or desirable, such as civil penalties for failure to comply with the requirements of this Act'. The review report recommends:

> The Modern Slavery Act be amended to provide that it is an offence for a reporting entity:
>
> - to fail, without reasonable excuse, to give the Minister a modern slavery statement within a reporting period for that entity;
> - to give the Minister a modern slavery statement that knowingly includes materially false information;

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[79] See, eg, Rebecca Faugno, 'Ideas of Corporate Culture from the Perspective of Penalties Jurisprudence' in Elise Bant (ed) *The Culpable Corporate Mind* (Bloomsbury Publishing Plc, 2023) 159.
[80] UNGPs (n 14) 27.
[81] Attorney-General's Department (Australia), *Modern Slavery in Supply Chains Reporting Requirement* (Consultation Paper, 2017) 17.
[82] Paul Redmond, 'Regulating Through Reporting: An Anticipatory Assessment of The Australian Modern Slavery Acts' (2021) 26(1) *Australian Journal of Human Rights* 5, 6.
[83] Sinclair and Dinshaw (n 10) 2-3; Dinshaw et al. (n 10) 2, 24.

- to fail to comply with a request given by the Minister to the entity to take specified remedial action to comply with the reporting requirements of the Modern Slavery Act; and
- to fail to have a due diligence system in place that meets the requirements set out in rules made under s 25 of the Act.[84]

However, little detail on potential penalties is provided. Each of the HRDD laws we examine here include various types of penalties according to the nature and severity of the breach. In contrast to the Australian discourse which has been largely focused on penalties for non-compliance (i.e. not submitting a report or submitting a non-compliant report), the HRDD laws examined in this article engage with a range of penalties that are much more diverse - and more onerous than this.

The *French Act* has three 'sanctions' - an injunction with a possible periodic penalty payment; civil liability; and the potential publication of the court decision on civil liability.[85] The civil liability provisions will be discussed under 'D. Remedies'. An injunction can be brought by any party with standing (such as NGOs, trade unions and individuals) if a company fails to establish, implement, or publish a vigilance plan. The company is first given notice to comply within three months. Following that, the party can ask the court to order the company to comply.

In addition to civil pecuniary penalties, an interesting feature of the *Dutch Act* was that was the first HRDD law to introduce *criminal sanctions* for a failure to exercise HRDD.[86] The other interesting aspect was that penalties start small but can increase in severity for ongoing non-compliance. If a company failed to produce a statement (or does so inadequately), failed carry out the investigation, or set up an action plan, the regulator may first impose a minor fine of €4,100 but repetition within five years is an economic offence under the *Economic Offences Act*, carrying criminal penalties such as up to four years of imprisonment, community service, or a fine of up to €83,000.[87] As noted above, the Act did not eventually come into force.

Our next law, the *German Act*, also has strong regulation through the 'Federal Office for Economic Affairs and Export Control' which can receive and assess company reports, adopt necessary measures to detect, end and prevent violations of the law and may summons people, request information and enter business premises.[88] They may either do so *ex officio* or upon request by persons with a substantiated claim that their rights have been, or are at imminent risk of being, violated by a company as a result of not fulfilling its obligations under the law.[89] The regulator can impose administrative fines of up to €500,000 or up to two per cent of the annual turnover of

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[84] Review Report (n 2), Recommendation 20.
[85] Elsa Savourey, *French Country Report: Study on Due Diligence Requirements Through the Supply Chain Part III Country Reports* (Report, January 2020) 56.
[86] Hoff (n 22).
[87] Enneking (n 85) 21.
[88] Krajewski, Tonstad and Wohltmann (n 53) 557.
[89] Ibid.

very large companies.[90] Although the *German Act* does not provide for criminal penalties, somewhat like the *Dutch Act*, we see differentiated penalties. Finally, the Act includes a public procurement debarment regime (for up to three years) for companies which are fined.[91] There is some precedent for this type of approach in Australia, as although the *MSA* does not have fines, non-compliance with the Act can result in debarment from public procurement in Western Australia under the *Public Procurement Act 2020* (WA).[92]

Turning then to the *Norwegian Act*, the National Consumer Authority may impose fines for breaches of the Act. Penalties include fines, prohibitions, injunctions and enforcement or infringement penalties. The amount of the penalty includes consideration of the severity, scope, and effects of the infringement. Repeat violations of the duty, as prescribed in the Act, to provide information on HRDD risks can result in infringement penalties. The size of the penalty is discretionally set by the National Consumer Authority, depending on the severity, scope, and effects of the infringement.[93]

The *Canadian Bill C-262* does not specify penalties by the regulator but does provide for the right to bring an action for loss or damage suffered as a result of failure to comply with the Act, as discussed in the following section.

D *Remedies*

Remedies are an essential component of HRDD and one of the three pillars of the UNGPs – protect, respect and remedy.[94] The UNGPs require that when businesses identify that they have caused or contributed to adverse impacts, they should provide remediation to those affected.[95] Remedy can take a range of forms such as apologies, restitution, rehabilitation, compensation, punitive sanctions (criminal or administrative), as well as the prevention of harm through an injunction, for example.[96] However, some of these forms of 'remedy' may not directly benefit the affected stakeholder – for example an administrative fine. All of the HRDD laws examined here include some provisions we can broadly describe as 'remedy', but the *Dutch Act* is the weakest. Its remedy options are not aimed at providing remedy to affected communities, as discussed below.

The *French Act* contains civil liability clauses; these provide that companies failing to comply will have to remedy the damage that 'the execution of these obligations

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[90] Ibid.
[91] Ibid.
[92] See Fiona McGaughey et al, 'Public Procurement for Protecting Human Rights' (2022) 47(2) *Alternative Law Journal* 143, 143, 145-6.
[93] *Norwegian Act* (n 55) s 8, 9, 11.
[94] UNGPs (n 14) [25].
[95] Ibid [22].
[96] Ibid, 27.

could have prevented'.[97] Although the vigilance plan of the parent company must include companies they control and certain other entities they have a business relationship with, the parent company is *not liable* for action/inaction on their part.[98] Claimants bear the burden of proof and must also demonstrate that the case satisfies the three conditions for civil liability in tort - a damage, a breach of / failure to comply with an obligation, and a causal link between the damage and the breach.[99] A high profile case was brought against energy company Total by six French and Ugandan NGOs arguing that Total's oil projects in Uganda and Tanzania caused preventable human rights violations and environmental harm.[100] However, it has recently been reported that the case was dismissed on procedural grounds.[101]

Victim-survivors of the actions or inactions of Dutch companies would not have had the same type of access to remedy as the *French Act* under the *Dutch Act.* As Enneking notes, the aim of that Act is to protect Dutch consumers, rather than victim-survivors.[102] It provided that any natural or legal person whose interests have been affected by the actions or inactions of a company bound by the Act, could file a complaint with the regulator but only after the company itself has dealt with the complaint, or if the company fails to respond to the complaint within six months.[103] Enneking posits that the *Dutch Act* did nothing to improve access to remedies for the actual victim-survivors of child labour in accordance with the UNGPs and that they would remain dependent on Dutch company law and/or tort law. She argues that the best option for victim-survivors seeking legal remedies for the harm they have suffered as a result of corporate activities by or for Dutch companies would be to use civil liability procedures before Dutch courts against the companies.[104] In any case, we have now noted that the *Dutch Act* has never come into effect and that other legislation is under consideration.

Canadian Bill C-262 provides for the right to bring an action for loss or damage suffered as a result of failure to comply with the Act.[105] Those affected can claim relief through damages for any loss or damage suffered; aggravated or punitive damages; an injunction; an order for specific performance; the cost of any land remediation; and any other appropriate relief, including the costs of the action. Claims can be brought

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[97] Civil Code (France) art 225-102-5 cited in Savourey (n 85) 56.
[98] Savourey (n 85) 56.
[99] Civil Code (France) art 1240-1 cited in Savourey (n 85) 68.
[100] Business and Human Resource Rights Resource Centre, *Total lawsuit (re failure to respect French duty of vigilance law in operations in Uganda)* (Web Page, 23 October 2019) <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/>.
[101] Business and Human Resource Rights Resource Centre *France: Landmark 'duty of vigilance' case against TotalEnergies over human and environmental rights impacts of EACOP dismissed on procedural grounds* (Web page, 28 February 2023) <https://www.business-humanrights.org/en/latest-news/france-landmark-duty-of-vigilance-case-against-totalenergies-over-human-environmental-rights-impacts-of-eacop-dismissed/>.
[102] Liesbeth Enneking, *Netherlands Country Report: Study on Due Diligence Requirements Through the Supply Chain Part III Country Reports* (Report, January 2020) 177.
[103] Hoff (n 22).
[104] Enneking (n 102) 21, 33.
[105] *Canadian Bill C-262* (n 56) s 10(1).

by those directly affected or having a genuine interest in the matter. Section 13(1) provides that it is a defence for the entity to establish that it exercised all due diligence to prevent the adverse impact on human rights in respect of which the action is brought.[106] However, again this legislation was not passed.

The Norwegian Act, which is in force, requires businesses to 'provide for or co-operate in remediation and compensation where this is required,'[107] although, as with many of these laws which have been introduced in recent years:

> It remains to be seen whether the due diligence duty it contains is sufficient and effective when it comes to ensuring access to remedy for rights-holders that are adversely impacted by enterprises and their business relationships.[108]

The *German Act*, also in force, has detailed remedies provisions. Section 7 provides that if the enterprise becomes aware of a breach or imminent breach of a human rights or environmental obligation in its own operations or within a direct supplier, they must take appropriate remedial action to prevent, end, or minimise the harm. It also provides clarity on when a business relationship should be ended and provides for review of the effectiveness of remedial action annually.[109]

The proposed *EU Directiv*e envisages that due diligence will be enforced through two mechanisms: administrative supervision and civil liability. The rules in the *EU Directive* pertaining to directors' duties will be implemented through the Member States' laws and the member states have an obligation to ensure victim-survivors can access compensation for damages as a result of failing to comply with the *EU Directive*.

E *Stakeholder Engagement*

Our final theme is stakeholder engagement. As stated in the Introduction, business practice on stakeholder engagement is limited - in particular, engagement with groups that may be directly impacted by business activities. Here we set out what the UNGPs expect of companies and how requirements to engage with stakeholders have materialised in HRDD laws, including in relation to operational-level grievance mechanisms ('OLGMs').

Stakeholder engagement is an integral aspect of the HRDD process - specifically, engagement with individuals, groups and communities affected most by business activities - referred to in the UNGPs as 'potentially affected stakeholders'.[110] As potentially affected individuals, these stakeholders have an 'existential stake in the due diligence process',[111] and their perspectives can therefore be more critical than other

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[106] Ibid s 13(1).
[107] *Norwegian Act* (n 55) s 4(f).
[108] Krajewski, Tonstad and Wohltmann (n 53) 558.
[109] *German Act* (n 54) s7.
[110] UNGPs (n 14) 15.
[111] Shauna Curphey and Jared Cole, 'Stakeholder Engagement in Human Rights Due Diligence' (Discussion Paper, American Bar Association, 2 January 2022) 1-2.

stakeholders such as investors,[112] and they can be integral to avoiding or mitigating human rights harm. The UN Working Group on Business and Human Rights have stated that a key outcome for the next decade of the UNGPs is for companies to 'put affected stakeholders at the centre of their human rights due diligence processes' and demonstrate how they involve stakeholders in these processes.[113]

The UNGPs expect that identifying and assessing human rights impacts should involve 'meaningful consultation with potentially affected groups and other relevant stakeholders' and acting on feedback from affected stakeholders when tracking the effectiveness of responses to human rights impacts.[114] The UNGPs also state that companies should communicate to affected stakeholders on how they address human rights impacts, particularly when concerns are raised by them.[115] Engagement plays an important role in the design and operation of grievance mechanisms, which are crucial to ensure that affected stakeholders can raise concerns about potential and actual impacts and seek remedy for harm.[116]

There are differing approaches to requirements to engage with stakeholders across the HRDD laws we consider here. Firstly, most current HRDD legislation does not provide a definition of affected stakeholders but there are some emerging attempts. In the proposed *EU Directive*, stakeholders are defined as including employees, employees of subsidiaries, and those individuals, and groups or communities whose rights may be affected by the products, services, and operations of a company. This includes further detail that 'affected stakeholders' refers to 'individuals or groups that have rights or interests that are affected or could be affected by the company's activities or the activities of entities in its value chain, and the legitimate representatives of such individuals or groups'.[117] In the development and implementation of HRDD, *Canadian Bill C-262* expects companies to 'consult with individuals whose human rights may be directly affected, or representatives of those individuals, as well as with trade unions, employees, affected communities and other relevant stakeholders, including independent experts.'[118] Both of these definitions are broadly aligned with the UNGPs and expand on UNGP 18 to a degree, which does not provide an express definition but refers to 'potentially affected stakeholders' and engaging with alternative stakeholders such as human rights defenders and civil society.[119]

Turning to an obligation to engage with stakeholders as part of HRDD, some of the HRDD laws have no requirements at all to engage with stakeholders, such as the

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[112] Ibid 2.
[113] UN Working Group on Business and Human Rights, *UNGPs 10+: A Roadmap for the Next Decade of Business and Human Rights* (Report, 2021) 37 ('*A Roadmap for the Next Decade*').
[114] UNGPs (n 14) [18], [20].
[115] Ibid [21].
[116] Ibid, UNGPs (n 14) 31-2; Curphey and Cole (n 111) 1.
[117] *EU Directive* (n 59) art 3(1)(a).
[118] *Canadian Bill S-262*, (n 56), s8(b).
[119] UNGPs (n 14) 18.

Dutch Act and *German Act*. Others require companies to engage with stakeholders only at certain stages of the due diligence process, such as the *Norwegian Act* which requires companies to 'communicate with affected stakeholders and rights-holders regarding how adverse impacts are addressed',[120] in alignment with the UNGPs' expectations on communicating with stakeholders on the effectiveness of actions taken.[121] Other approaches are focused more on requiring companies to engage with internal stakeholders, workers and trade unions - rather than a broad requirement to engage with potentially affected individuals or groups. The *French Act* requires the vigilance plan to be drafted only with the involvement of company stakeholders but does require companies to include information in their plans regarding grievance mechanisms developed in partnership with trade unions.[122] Other emerging laws may engage further with stakeholder involvement in HRDD.[123]

The latest proposed amendments from the European Parliament to the *EU Directive*[124] would require companies to consult with affected stakeholders throughout the entire due diligence process, including verifying the implementation and effectiveness of due diligence measures, and to deliver remedy through a corrective action plan developed in consultation with affected stakeholders - with specific detail on how engagement should take place.[125] While the Council of the EU has put forward a negotiating approach that appears to water down the scope and nature of due diligence, it has retained requirements for companies to consult with stakeholders throughout the due diligence process including with potentially affected individuals, groups or communities.[126] However, the proposed changes to reduce the scope of due diligence obligations from the value chain to a 'chain of activities' may also result in potentially affected stakeholders downstream being excluded from company engagement on HRDD.[127]

Conversely, while the proposed *EU Directive* and the *German Ac*t do require companies to establish grievance mechanisms, they omit any specific requirement to engage with stakeholders in their development and implementation. Indeed, the only legislation that makes a small step towards such a requirement is the *French Act*, which requires the vigilance plans to detail a mechanism for receiving reports or complaints

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120 *Norwegian Transparency Act* (n 55) s 4.
121 UNGPs (n 14) [21].
122 *French Act* (n 46) Art. L. 225-102-4(4°).
123 See, eg, the Belgian Duty of Vigilance proposal would require all vigilance plans to be developed in consultation with workers, trade unions and civil society organisations, but large companies or those operating in high-risk sectors would be subject to additional requirements to carry out public consultations of interested persons and groups. Belgium 'Law Proposition establishing a duty of vigilance and duty of responsibility for companies throughout their value chains' (2021), Article 4.3 and Article 8(3). See also Dutch Bill on Responsible and Sustainable International Business Conduct (2022), Section 2.
124 Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive [2022] 2022/0051.
125 Ibid [27], [38], [44a].
126 *EU Directive* (n 59) art 3(1)(a).
127 Ibid, 3(g).

of human rights risks, which is expected to have been developed in partnership with trade union organisations and company stakeholders.[128]

While engaging stakeholders in establishing OLGMs is not specifically required by normative expectations, the UNGPs do indicate that these mechanisms can be an important complement to wider stakeholder engagement,[129] and that if companies do establish an OLGM, they should consider engaging with affected stakeholder groups about its design and performance to ensure it is suitable for their needs and that it will be used.[130] This is reflected in findings by the *OHCHR Accountability and Remedy Project on non-State based grievance mechanisms*, which indicate that to ensure the effectiveness of OLGMs, stakeholder needs and perspectives need to be understood and incorporated into the design of mechanisms.[131] Furthermore, the *UNGPs+10 Roadmap* has specifically called on companies to ensure rights-holders are meaningfully involved in the design and implementation of grievance mechanisms.[132] This is because OLGMs can be a key tool in supporting effective due diligence by helping to identify potential human rights impacts before they occur, to mitigate or remediate actual adverse impacts before they increase in severity, and to identify improvements needed to the overall due diligence process.[133] However, findings on business practice have indicated that this is a considerable gap in how companies ensure that OLGMs are fit for purpose. 91 per cent of companies do not appear to engage with actual or potential users of OLGMs including workers and affected communities in the formulation, implementation, and performance of such mechanisms.[134]

Given these emerging expectations and lack of good business practice bar a few outliers, this is a clear gap in HRDD laws that should be addressed. In terms of what these developments mean for Australia, the guidance on the *MSA* recommends that companies engage directly with stakeholders when developing their modern slavery responses and in reporting;[135] therefore, a due diligence law in Australia could build on this existing approach. Current research indicates that while 58 per cent of Australian companies in high-risk sectors continue to express support for freedom of association, only 14 per cent report the presence of, or collaboration with, independent trade unions in their high-risk operations and/or supply chains.[136] This was found to be of particular concern in the horticultural sector, with just seven per cent of

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[128] *French Act* (n 46), 4.
[129] UNGPs (n 14) 32.
[130] UNGPs (n 14) 34-5.
[131] Michelle Bachelet, *Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms,* 44th sess, Agenda Items 2 and 3, UN Doc A/HRC/44/32 (19 May 2020) 11.
[132] *A Roadmap for the Next Decade* (n 113) 33.
[133] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) 88-91;
Curphey and Cole (n 111) 27.
[134] World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022* (Report, November 2022) 3-4.
[135] 'Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities' Australian Government (Guidelines, 2018), 49, 52, 85. <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>.
[136] Dinshaw et al (n 10) 19.

companies providing evidence in their modern slavery statements of collaboration with unions to manage horticultural supply chain risks.[137] Stakeholder engagement remains poor, with only 17 per cent of companies reporting stakeholder consultation in developing or reviewing relevant policies and only 35 per cent reporting collaboration with unions, migrant worker groups, or civil society organisations in efforts to tackle modern slavery.[138]

IV DISCUSSION AND CONCLUSION

The stark difference between reporting laws such as the *MSA* and HRDD laws, in their various forms, examined above is succinctly captured by Clerc in his analysis of the *French Act*:

> The Duty of Vigilance Law is satisfactory in that it imposes a 'duty of care' standard, not just a due diligence and reporting duty: this means companies have to actually act properly, not just report on whether they act properly.[139]

Moving from reporting to action is what commentators on the *MSA* have been calling for,[140] and Australia can learn lessons from the growing collection of HRDD laws. As we have established, HRDD is integral to the UNGPs, the main source of international law in this area, this and its increasing adoption in international and national laws indicate its compelling and authoritative nature.

The UK and Australia with their 2015 and 2018 *Modern Slavery Acts* were initially seen as leading the charge in tackling modern slavery, but the failings of these reporting regimes and the introduction of more robust laws elsewhere in the world has left Australia lagging behind. In particular, the draft *EU Directive* will have significant global impact as it will apply to the 27 EU Member States and potentially to non-EU companies operating in the region, in which case Australian suppliers to the EU will be expected to comply and in 2020, Australia had goods exports of $11.9 billion, and services exports of $5.1 billion to the EU.[141]

In the context of the current review of Australia's *MSA*, here we have summarised key features of the scope of HRDD laws, focusing on either proposed or enacted laws in Germany, Norway, the Netherlands, France, the EU, and Canada. We presented a systematic comparative exercise, examining the features key for effective HRDD. Although all laws examined are due diligence laws, they vary in scope – with the *Dutch Act* having a narrow remit focused on child labour and the *French Act* having a more

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137 Ibid.
138 Ibid.
139 Christopher Clerc, *The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains'* (Policy Brief No 1/2021, 13 January 2021) 3.
140 Dinshaw et al (n 10) 24.
141 Australian Government Department of Foreign Affairs and Trade, 'Australia-European Union Free Trade Agreement Fact Sheet' *Australia-European Union Free Trade Agreement* (Web Page) <https://www.dfat.gov.au/trade/agreements/ negotiations/aeufta/australia-european-union-fta-fact-sheet>.

expansive remit covering both human rights and the environment. The scope of the laws varies in terms of the criteria used to identify applicable entities - some use a number of employees as a threshold, others use the monetary value of annual turnover. The proposed *EU Directiv*e has the most detailed criteria for determining application of the law and the criteria include consideration of high-risk sectors - we see this as a positive development for laws that are ostensibly about identifying and tackling risk. In particular here, we focused on areas where there are gaps in Australia's regime, namely penalties, remedies, and stakeholder engagement.

One limitation of this approach is that two of the laws are proposed, rather than adopted and in fact, since time of drafting this article, *Canadian Bill C-262* did not proceed and a weaker reporting law was adopted. Also, the *Dutch Act* did not enter into force and a more substantial law is under consideration. The German and Norwegian laws have been adopted quite recently and as such, it is not yet possible to comment on their effectiveness and impact. However, their introduction indicates a clear trend towards HRDD obligations with which multi-national enterprises are increasingly required to comply.

First, we find that there are several avenues for penalties and multiple ways to hold companies (and in some cases, individuals) liable for non-compliance. There is a wide range of penalties in existing HRDD laws - both civil and criminal. All of the laws examined include financial penalties. Further, the *Dutch Act, Canadian Bill C-262,* and *EU Directive* all support some form of criminal liability for company directors.[142] Given the current absence of penalties in Australia's MSA, there is a smorgasbord of options on the table for us. This type of 'smart regulatory mix' has previously been proposed in the Australian Law Reform Commission ('ALRC') report on corporate criminal responsibility which recommended a failure to prevent offence for modern slavery,[143] complemented by a mandatory due diligence regime so that all corporations should engage in due diligence to prevent, identify, mitigate, and remediate any instances of modern slavery in their supply chains.[144] They proposed that a breach of due diligence obligations, without resultant harm, could lead to civil penalties; whereas a failure to prevent offence would import criminal responsibility where the corporation failed to implement reasonable measures to prevent such conduct by associates.

Second, we find that the importance of remedies in business and human rights is fundamental to the UNGPs and established to be lacking in the Australian context.[145] The laws examined here present a range of options. Compensation for victim-

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[142] *French Act* (n 46) Art L. 225-102-4.II, L. 225-102-5; *Norwegian Act* (n 55) s 2.7.2; *Canadian Bill C-262* (n 56) s 10(4); *German Act* (n 54) ss 23-24; MVO, 'Update: Frequency asked questions about the New Dutch Child Labour Due Diligence Law' (Web Page, 3 June 2019) https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/.

[143] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report No 136, April 2020) 259 ('ALRC Final Report').

[144] Ibid 480-481.

[145] McGaughey (n 25).

survivors of breaches of HRDD laws, has been adopted (or proposed) in all jurisdictions we examined, apart from Germany. For example, the *French Act*, one of the most established HRDD laws, provides that companies failing to comply will have to remedy the damage that the execution of these obligations could have prevented. The use of extended limited periods for access to remedies, as proposed in the *Canadian Bill*, would be a step towards removing arbitrary boundaries to justice. A broad approach to standing whereby NGOs and other entities can bring claims on individuals' behalf (as adopted in Germany, the Netherlands, and proposed in Canada and the EU) justifiably widens the scope for accountability. These features are worthy of consideration by Australian legislators.

Finally, we have identified a trend towards including an obligation to engage with potentially affected stakeholders in HRDD laws. Most of the laws, with the exception of the *Dutch* and *German Acts*, contain explicit provisions to engage with stakeholders at certain stages of the HRDD process. The fact that some laws include no stakeholder engagement requirements, indicate that future legislation could omit this crucial component. The importance of meaningful stakeholder engagement to an effective HRDD process - and the limited good business practice in this area - means that a clear requirement to do so should be included into any HRDD law in Australia and supplemented with clear guidance and support for companies.

We note that the MSA Review Report has recently been published and supports the introduction of HRDD. Further, HRDD and elements of the laws we have considered here also align with recommendations put forward in the ALRC report on corporate criminal responsibility.[146] The ALRC recommended that the Australian Government should consider applying the failure to prevent offence in the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* to other Commonwealth offences that might arise in the context of transnational business, such as modern slavery.[147] The ALRC also recommended that this offence could be complemented by a mandatory due diligence regime so that all corporations should engage in due diligence to prevent, identify, mitigate, and remediate any instances of modern slavery in their supply chains.[148] The proposal was that a breach of due diligence obligations, but with no resultant harm, could lead to civil penalties; whereas a failure to prevent offence would import criminal responsibility, but only in cases where the conduct was for the benefit of the corporation, and the corporation failed to implement reasonable measures to prevent such conduct by associates. The failure to prevent offence would carry a far more serious penalty but would be limited to conduct engaged in for the corporation's benefit. A failure to undertake mandatory due diligence would carry a

[146] ALRC Final Report (n 143) 259.
[147] Ibid 18.
[148] Ibid 480-481.

lesser penalty but apply more broadly.[149] The use of HRDD as a defence to an action was recommended in *Canadian Bill C-262*, for example.[150]

A HRDD law in Australia would broaden the scope of risks considered by corporations - from a narrow focus on modern slavery, to a broad human rights focus. Most of the laws we have examined also include some obligations to minimise environmental harm, surely a critical consideration in face of the looming climate crisis.[151] The *MSA* was a useful first step in regulating business and human rights in Australia, but the time has come for more robust regime if we are serious about tackling modern slavery and human rights abuses.

[149] Ibid.
[150] *Canadian Bill C-262* (n 56) s 13(1).
[151] See, eg, CSIRO and Bureau of Meteorology (n 33).