AUSTRALIA

Legal System	Constitution	Bill of Rights	Country Structure	Form of Government
Common Law Statutory Law	Written	No	Federation	Monarchy

1. INTRODUCTION

1.1. Australia and Modern Slavery (Human Trafficking)

Australia has long met the minimum standards for eliminating slavery and human trafficking, and the Government has recently renewed its policy efforts to improve Australia's legal framework for eliminating modern slavery. However, like the UK, the prevalence of modern slavery in Australia remains unknown because of its hidden nature, changing composition, and lack of reliable data. Enforcement agencies historically have had a low number of investigations and prosecutions, because many offences continue to go undetected or unreported. Notwithstanding these challenges, Australia's geographic proximity to and high levels of migration from South-East Asia mean that Australia's policy leadership and enforcement record can impact slavery and trafficking from nearby countries.

Australia is primarily a destination country for slavery and human trafficking. For a long period, it was thought that Australian slavery and trafficking issues were almost exclusively confined to the trafficking of women and girls from South-East Asian countries for work in Australia's commercial sex industry. More recently, it has been acknowledged that both men and women—not only from South-East Asian countries but also from Pacific Island nations—who have migrated to Australia have been exploited through forced labour, both in private sector business and within family relationships. Some emerging evidence suggests that forced labour exploitation in Australia is now more common and a bigger challenge for law enforcement than sexual exploitation.

Little data exists on the prevalence of slavery in the supply chains of companies doing business in Australia. Anecdotal evidence suggests that slavery exists in the production of certain Australian imported materials, such as coal, bricks, cocoa, coffee, seafood, cotton, garments, and footwear.

1.2. Australia's Policy and Legal Position

Australia is a federation of six states which, together with two self-governing territories, have their own constitutions, parliaments, governments, and laws. The Federal or Commonwealth Government is responsible for the conduct of national affairs, and it enacts legislation in accordance with its powers granted by the Australian Constitution. State and territory laws and Federal laws operate concurrently; however, they sometimes overlap. Where state and territory laws are inconsistent with Federal laws, the Federal laws will prevail. Violations of Australian Commonwealth, state, and territory laws typically carry sanctions ranging from criminal to civil and administrative penalties.

Like some other Western countries, Australia's policy and legislative response to slavery and human trafficking has recently evolved to become multi-faceted and better able to confront modern slavery risks. Australia has signed and ratified a number of international treaties prohibiting slavery, slavery-like conditions, and human trafficking. Australia's domestic legislation meets its international obligations by setting forth criminal offences for slavery, slavery-like conditions, and human trafficking. Victims of forced labour also can use, though they rarely do, Australia's labour and employment laws for civil recourse.

Unfortunately, Australia lacks any national, state, or territory compensation programs specifically for victims of slavery, slavery-like conditions, and human trafficking.

In 2018, the Commonwealth Parliament passed federal modern slavery legislation, which is based on the UK Modern Slavery Act. It requires large commercial organisations to report annually human rights violations in their supply chains. Some have criticised it for not imposing penalties for non-compliance. Separately from federal efforts, New South Wales, the most populated of Australia's six states and two territories, has attempted to enact its own modern slavery legislation. It is also based on, but extends, some of the UK Modern Slavery Act principles beyond transparency in supply chains, and notably imposes civil fines and penalties for non-compliance. However, due to the lack of harmony between New South Wales' proposed modern slavery legislation and its Commonwealth counterpart, commencement of the New South Wales legislation is yet to occur.

2. OVERVIEW OF AUSTRALIA'S LEGAL APPROACH TO COMBATING MODERN SLAVERY AND HUMAN TRAFFICKING

2.1. Australia's Regional and International Law Obligations

2.1.1. Fundamental human rights

Australia is one of the 48 countries that voted in favour of the Universal Declaration of Human Rights in 1948. Since then, Australia has ratified the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), and the Convention on the Elimination of All Forms of Discrimination against Women (1979).[1]

2.1.2. Slavery and trafficking

Australia is party to several treaties prohibiting modern slavery. Australia's principal international law obligations derive from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[2] Various other instruments addressing various forms of modern slavery, including the Worst Forms of Child Labour Convention (1999), supplement this treaty.[3]

Australia also has signed the Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime (2016).[4]

2.1.3. Effect under Australia's law

Australia's obligations under international instruments do not have automatic force of law in Australia; the Commonwealth Parliament or a state or territory parliament must enact legislation giving effect to an

[1] International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976); Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

[2] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003).

[3] Worst Forms of Child Labour Convention, opened for signature 17 June 1999, 38 ILM 1207 (entered into force 19 November 2000).

[4] *Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime*, adopted at the Sixth Ministerial Conference of the Bali Process On People Smuggling, Trafficking In Persons And Related Transnational Crime in March 2016.

international instrument. Accordingly, legislation or the common law sets forth the majority of criminal and civil law that is relevant to combating modern slavery in Australia.

Appendix 1 lists Australia's status in relation to the key international instruments that touch on modern slavery and human trafficking.

2.1.4. Bali Process

Australia and Indonesia are Co-Chairs of the Bali Process, which is a forum for policy dialogue, information sharing, and practical cooperation to help the Asia Pacific region address the consequences of people smuggling, trafficking in persons, and related transnational crime. The Bali Process' 49 members include the United Nations High Commissioner for Refugees (**UNHCR**), the International Organization for Migration (**IOM**), the United Nations Office of Drugs and Crime (**UNODC**), and the International Labour Organization (**ILO**), as well as a number of observer countries and international agencies.

The responsible ministers in member states, as well as the annual Senior Officials' Meetings and Ministerial Conferences, oversee the Bali Process.[5] In 2019, the Co-Chair Statement outlined discussions to implement the Bali Process Ministerial Declarations and associated strategies. However, due to the COVID-19 pandemic, there have not been any Bali Process forums, or statements published, since 2019.

2.2. Human Rights Protections Under Australia's Law

Australia does not have a Federal "Bill of Rights," and international instruments do not automatically have the force of law. Human rights protections in Australia come from domestic legislation that, in many cases, mirrors or incorporates principles and concepts from the international instruments to which Australia is a party. Examples of such legislation include making all forms of modern slavery a crime (discussed in Sections 3 and 5), the Racial Discrimination Act 1975 (Cth), and the Age Discrimination Act 2004 (Cth).[6] Australia's Constitution guarantees the right to vote and the right to trial by jury, and the courts acknowledge that the Constitution impliedly protects freedom of communication on governmental and political matters. The Constitution does not create a positive obligation to protect religious freedom, but it does limit the Commonwealth's ability to legislatively restrict the exercise of religion (for example, no law can be made to prohibit the free exercise of any religion).

This approach allows the Australian legislature (at the federal, state, and territory levels) to pass laws to protect human rights.

Federal legislation ensures all laws that pass through the Commonwealth Parliament have been vetted against Australia's international human rights obligations. The responsible member of Parliament must present a statement of compatibility with Australia's international human rights obligations.[7] Victoria, Queensland, and the Australian Capital Territory have enacted similar legislation.[8] These laws, however, do not prevent the enactment of legislation that is inconsistent with human rights law.

[5] For information relating to all proceedings arising from the Bali Process from 2018, *see* The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, "Ministerial Conferences & Senior Officials Meetings," *The Bali* Process, available at: https://bit.ly/2JO6Okn.

[6] Racial Discrimination Act 1975 (Cth); Age Discrimination Act 2004 (Cth).

[7] Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

[8] Racial Discrimination Act 1975 (Cth); Age Discrimination Act 2004 (Cth); Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

2.2.1. State and territory human rights regimes

The Victorian Charter of Human Rights and Responsibilities Act 2006 (VIC), the Queensland Human Rights Act 2019 (QLD), and the Australian Capital Territory Human Rights Act 2004 (ACT) were passed into law in recent years. These acts set out the rights, freedoms, and responsibilities shared by everyone in that state or territory and protected by law. The purpose of the regimes is to build a culture of respect and to promote human rights.

The rights protected are drawn from the International Covenant on Civil and Political Rights (**ICCPR**). The Queensland legislation also includes two economic, social, and cultural rights (the rights to health and education services), and one right from the Universal Declaration of Human Rights (the right to own property). The acts further recognise the distinct cultural rights of Aboriginal and Torres Strait Islander peoples.

The regimes adopt a "dialogue model" of rights, meaning that the legislation aims to foster a continuous conversation about human rights between the public sector, the judiciary, and the community.[9] This feedback loop is essential to the operation of the acts and to shaping a culture of human rights. In each of the states and territories, three mechanisms drive the aims of the act:

- public authorities are obligated to act compatibly with, and to take into account, human rights when making decisions;
- parliament and parliamentary bodies are to scrutinize all proposed laws through a human rights framework; and
- courts must interpret all existing laws, to the extent possible, in a way that is compatible with the human rights regime.

The regimes create independent statutory bodies that oversee the handling of complaints alleging human rights breaches and provide education and awareness of rights issues.

Enforcement of human rights is limited to some extent in Victoria, Queensland, and the Australian Capital Territory. A legal claim that a public authority has breached a human right cannot stand on its own. That claim must be "piggybacked" onto another legal claim. A complainant is not entitled to receive damages; however, other remedies are available. For example, if a certain decision infringes on human rights, the court may set aside that decision or refer it back to the original decision-maker for reconsideration.

2.2.2. Impact on Australia's modern slavery landscape

Lawmakers who drafted the human rights regimes are alive to issues of modern slavery. Legislation in Victoria, Queensland, and the Australian Capital Territory recognises the right to be protected against forced labour. The Commonwealth has passed legislation to punish slavery offences,[10] and to impose reporting requirements on businesses regarding supply chain transparency.[11] Moreover, Australia has signed several international instruments prohibiting forms of modern slavery, including the Convention on the Rights of the Child and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

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[9] Victorian Equal Opportunity and Human Rights Commission, *Submission to Free and Equal: An Australian conversation on human rights,* (Submission to Australian Human Rights Commission consultation, November 2019), available at: https://www.humanrights.vic.gov.au/static/fbb71349e91b1166bca8e95a8d579885/Submission-Free_Equal-Nov_2019.pdf.

[10] *See* the Criminal Code 1995 (Cth), discussed in Section 3.

[11] *See* Modern Slavery Act 2020 (Cth), discussed in Section 4.

It remains to be seen how the interaction between state and territory legislation and modern slavery offences is treated as these regimes mature. No judicial decision has considered the impact of the state and territory human rights regimes on punishing modern slavery.

2.3. Criminalization of Modern Slavery

The Commonwealth Criminal Code Act 1995 (Cth) (**Criminal Code**) sets out the criminal prohibitions against various forms of modern slavery. That said, a raft of criminal laws related to sexual servitude and online child exploitation exist at a state and territory level, along with dedicated slavery offences in New South Wales.

2.4. Supply Chain Reporting

Following the United Kingdom and California, several Australian jurisdictions have attempted to enact supply chain reporting legislation. Only the Commonwealth has succeeded with its enactment of the Modern Slavery Act 2018 (**Federal Modern Slavery Act**). Since receiving Royal Assent on 10 December 2018, the Federal Modern Slavery Act has resulted in 1159 mandatory and 162 voluntary modern slavery statements published (covering 2588 entities).

The New South Wales Parliament passed the Modern Slavery Act 2018 (**NSW Modern Slavery Act**) on 21 June 2018; however, the legislation is yet to commence due to its significant inconsistencies with the Federal Modern Slavery Act concerning the different reporting thresholds and presence of a penalty regime (discussed further in Section 4.3.). Tasmania is the third jurisdiction to propose supply chain reporting legislation. The Supply Chain (Modern Slavery) Bill 2020 (**Tasmanian Modern Slavery Bill**) has been tabled in the Tasmanian House of Assembly, and it is unlikely to progress until New South Wales and the Commonwealth have harmonized their legislation.

2.5. Investigation, Prosecution, and Enforcement

2.5.1. Investigation and prosecution of criminal offenses

The Australian Federal Police (**AFP**) investigates slavery, slavery-like, and human trafficking offences for the Commonwealth. The Commonwealth Director of Public Prosecutions (**CDPP**) determines whether and how to prosecute any Commonwealth offence.

The relevant state or territory's police force investigates criminal offences under state or territory laws, and the relevant state or territory's Director of Public Prosecutions then handles the prosecution of those offences.

2.5.2. Mutual assistance/international cooperation

The AFP operates the Australian National Central Bureau (**NCB**), which is the contact point for International Criminal Police (**ICPO/INTERPOL**) inquiries. The NCB facilitates cross-border police cooperation to detect and prevent international crime, including human trafficking. ICPO/INTERPOL and its domestic contact points provide investigative support to police departments of member states, including shared police databases, forensics, and analysis.

Australia's mutual assistance laws assist foreign governments in bringing perpetrators of modern slavery to justice. The Mutual Assistance in Criminal Matters Act 1987 (Cth) (**Mutual Assistance Act**) governs this mutual assistance. Over 25 bilateral mutual assistance treaties to which Australia is a party support the process set out in the Mutual Assistance Act.

The International Crime Cooperation Central Authority within the Attorney General's Department (**ICCCA**) is responsible for:

- implementing the Mutual Assistance Act (including the execution of search warrants, taking evidence from witnesses, arranging for witnesses to travel, and registering and enforcing orders relating to proceeds of crime);
- Australia's obligations under mutual assistance treaties;
- seeking and providing government-to-government casework assistance in criminal matters;
- extradition; and
- international transfer of prisoners.

Australia can make and receive requests to and from any foreign country through both the ICCCA and NCB, and countries assist with the understanding that they will receive assistance in return when needed.

3. AUSTRALIA'S FEDERAL CRIMINAL OFFENSES RELATING TO SLAVERY, SLAVERY-LIKE CONDITIONS, AND HUMAN TRAFFICKING

3.1. Overview of Criminal Offenses

The Criminal Code sets out federal criminal offences. Division 270 of the Criminal Code specifies offences for slavery, slavery-like conditions (such as servitude, forced labour, and debt bondage), and human trafficking. The prosecution must establish both a physical element (such as conduct) and a fault element (such as intention). The offences are punishable by maximum penalties of imprisonment that vary depending upon whether the offence is aggravated.[12] [13]

[12] An offence under the slavery-like condition provisions of the Criminal Code is an "aggravated offence" if: (a) the victim is under 18 years of age; (b) the offender, in committing the offence, subjects the victim to cruel, inhumane, or degrading treatment; or (c) the offender, in committing the offence, recklessly engages in conduct that gives rise to a danger of death or serious harm to the victim or another person.

[13] In contrast, New Zealand's slavery offences do not require proof of the fault element and do not have separate penalties for aggravated offences.

3.2. Slavery Offenses Under the Criminal Code

3.2.1. General

In 1999, the Criminal Code introduced offences for intentionally engaging or recklessly transacting in slavery. These offences followed recommendations made by the Australian Law Reform Commission's Report Number 48.[14]

The Criminal Code defines "slavery" as: *"the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person."*[15]

The Criminal Code makes it an offence (punishable by a maximum penalty of 25 years of imprisonment) for a person inside or outside Australia to intentionally:[16]

- reduce a person to slavery;
- possess or exercise any of the other powers attaching to ownership over a slave;
- enter into any commercial transaction involving a slave, including reducing a person to slavery; or
- exercise control or direction over, or provide finance for, either any act of slave trading or any commercial transaction involving a slave.

[14] Sections 270 and 271 of the Commonwealth Criminal Code Act 1995.

[15] This definition is based on, but is not identical, to the definition of "slavery" in the 1926 International Convention to Suppress the Slave Trade and Slavery, opened for signature 25 September 1926, 212 UNTS 17 (entered into force 7 July 1955) art 1.

[16] Persons will satisfy the test of "intention" under the Criminal Code in this context if they mean to engage in the relevant conduct.

The Criminal Code also makes it an offence (punishable by a maximum penalty of 25 years of imprisonment) for a person inside or outside of Australia, in connection with certain matters relating to slavery, to recklessly:[17]

- enter into any commercial transaction involving a slave;
- exercise control or direction over, or provide finance for, any commercial transaction involving a slave; or
- exercise control or direction over, or provide finance for, any act of slave trading.

The Criminal Code defines "Slave Trading" to include the capture, transport, or disposal of a person with the intention of reducing them to slavery and the purchase or sale of a slave.

There have been 12 reported prosecutions[18] pursuant to these provisions of the Criminal Code for slavery, including one prosecution that gave rise to the leading Australian High Court decision on slavery in 2009 (*see Tang* Case below).[19] Appendix 2 has a list of reported prosecutions.

3.2.2. Extraterritorial application

The Criminal Code offences relating to slavery and human trafficking operate extraterritorially. They facilitate the prosecution of persons in Australia, regardless of where the conduct constituting an offence occurs.

The Commonwealth Director of Public Prosecutions can prosecute a person under the Criminal Code for slavery offences regardless of whether the offending conduct or a result of that conduct occurred within Australia. If the allegedly unlawful conduct occurred wholly outside of Australia and only the result of the

[17] The Criminal Code section 20 provides that a person is reckless with respect to a circumstance or a result if the person is: (a) aware of a substantial risk that the circumstance or result will occur; and (b) the circumstances known to the person make it unjustifiable to take the risk.

[18] For the period from 2004 to 30 June 2017.

[19] *The Queen v. Tang* [2008] HCA 39.

conduct occurred within the country, the Commonwealth Director of Public Prosecutions must have the consent of the Commonwealth Attorney General before proceeding with a prosecution.

TANG CASE – THE FIRST CONVICTION OF SLAVERY OFFENSES

In a landmark case, the High Court convicted Wei Tang of several slavery offences under the Criminal Code, including intentionally possessing a slave and exercising a right of ownership, "use," over a slave. Tang was the first person convicted in Australia under this regime.

Tang operated a licensed brothel known as Club 417 in Fitzroy, Melbourne. Tang agreed to "purchase" five women who had recently arrived in Australia from Thailand, and to provide them with contract sex work. The women were required to pay off their "debt" to Tang, which accounted for their "purchase price" and living and travel expenses. Tang retained the complainants' passports and return air tickets. The women rarely left the premises as they were required to work long hours and feared detection from immigration authorities. The Court found that the women were financially deprived and vulnerable, spoke little English, and knew no one.

The case has legal significance for two reasons:

- the High Court established that the modern definition of "slavery" encompasses attributes of effective ownership; and
- an accused person need not have appreciated that a complainant was a slave, and it was enough that the accused person knew the facts relevant to determine the condition of slavery.

In this case, Tang had made the complainants objects of purchase, controlled their movements, and used their services without commensurate compensation.

3.3. Slavery-Like Offenses in Australia's Legal Order

3.3.1. Servitude

The Criminal Code includes offences which, while originally limited to sexual servitude, since 2013 have included servitude generally. The Criminal Code defines "servitude" as the condition of a person (or the victim) who:

- provides labour or services; but
- because of the use of coercion, threat, or deception (whether against the victim or another person),

reasonable persons in the victim's position would not consider themselves to be free to cease providing the labour or services or to leave the place or area where the labour or services are provided; or the victims are significantly deprived of personal freedom in other aspects of their lives. A condition of "servitude" can exist irrespective of whether it is practicably possible for the victim to escape or the victim has attempted to escape.

The Criminal Code makes it an offence (punishable by 20 years of imprisonment for an aggravated offence, and 15 years in any other case) for a person to engage in conduct which causes another person to enter into or remain in servitude, or conduct a business that involves the servitude of other people.

There have only been two reported Australian prosecutions for servitude pursuant to these provisions of the Criminal Code.

3.3.2. Forced labor

The Criminal Code makes it an offence to engage in conduct[20] that causes another person to enter into or remain in forced labour or, to conduct a business that involves the forced labour of another person (an offence punishable in each case by a maximum penalty of 12 years of imprisonment for an aggravated offence and nine years of imprisonment otherwise). Although the Criminal Code's definition of "forced labour" is effectively the same as the definition for servitude, forced labour offences carry a lesser maximum penalty of imprisonment than is the case for servitude offences.[21]

There have been no reported prosecutions under the forced labour provisions of the Criminal Code.

3.3.3. Deceptive recruiting for labor or services

The Criminal Code makes it an offence (punishable by a maximum penalty of nine years of imprisonment for an aggravated offence and seven years of imprisonment otherwise) for a person (the recruiter) to intentionally induce another person (the victim) by means of deception to provide labour or services. Deceptive recruiting extends to certain prescribed matters, such as a victim's freedom of movement, debts, exploitation, confiscation of travel documents, or sexual services.

To date, there have been no reported prosecutions under the deceptive labour recruiting provisions of the Criminal Code.

3.3.4. Early and forced marriage

The Criminal Code makes it an offence (punishable by nine years of imprisonment for an aggravated offence, and seven years of imprisonment otherwise) to cause a forced marriage. The Criminal Code defines "forced marriage" as a marriage that one party (the victim) has entered without free and full consent because of:

- the use (either against them or another person) of coercion, threat, or deception; or
- the victim was incapable of understanding the nature and effect of the marriage ceremony (which, in the case of a person under 16 years of age, is assumed unless the defendant proves otherwise).

The Criminal Code defines "marriage" broadly to include registered relationships under Australian (and in some cases foreign) law.

The Marriage Act 1961 (Cth) (**Marriage Act**) also makes it an offence to solemnise, or purport to solemnise, a marriage if the person has a reason to believe that either party to the marriage is not of marriageable age, which is 18 years of age or older. The Marriage Act also makes it an offence to go through a form or ceremony of marriage with a person who is not of marriageable age.

[20] "Conduct" is defined in the Criminal Code section 13 as an act or omission to perform an act, or a state of affairs, and "engaging in conduct" can mean doing or omitting to do an act.

[21] Given the lesser maximum penalties for forced labour, the Criminal Code allows a defendant to be found guilty of forced labour as an alternate to servitude, even if the defendant has originally been prosecuted for engaging in conduct that causes another person to enter into or remain in servitude. The alternate offence of forced labour becomes applicable where the defendant has been prosecuted for engaging in this form of servitude conduct, and the trier of fact is not satisfied that the defendant is guilty of that offence, but is nonetheless satisfied that the defendant is guilty of conducting a business that involves the servitude of people. Provided the defendant has been afforded procedural fairness, in such circumstances, the trier of fact can find the defendant guilty of the forced labour offence as an alternative to the servitude offence that was prosecuted.

3.3.5. Debt bondage

The Criminal Code makes it an offence (punishable by a maximum penalty of seven years of imprisonment for an aggravated offence and four years of imprisonment otherwise) for a person to intentionally cause another person to enter into debt bondage. The Criminal Code defines "debt bondage" as a pledge of personal services by a victim to another person (including where the victim is under another person's control), and the pledge is made as security for a debt owed, or allegedly owed by the victim, in circumstances where the debt is manifestly excessive, unreasonable relative to the services that will extinguish it, or the length and nature of the services are not limited and defined.

3.3.6. Any other relevant offenses

Australia has no other relevant slavery-like offences.

3.3.7. Extraterritorial application of the offenses

In similar fashion to the Criminal Code's slavery offences, the slavery-like offences also apply extraterritorially, and a person may be charged and prosecuted in Australia for conduct that occurs outside the country. The scope for extraterritorial application of the offences is slightly narrower, and the criminal conduct or the result of the criminal conduct must have some connection to Australia.

The requirement for a connection to Australia is satisfied if either the relevant conduct, or a result of the conduct, occurred partly in Australia or on board an Australian ship or aircraft. Alternatively, the required connection exists if the accused person is an Australian citizen or resident or, in the case of a corporation that has committed the offence, if the corporation is incorporated under the law of the Commonwealth or an Australian state or territory.

3.4. Human Trafficking/Smuggling-Related Criminal Offenses

3.4.1. International and domestic trafficking/smuggling of people

The Criminal Code makes trafficking of persons into or out of Australia either for exploitation or sexual services an offence.

The Criminal Code makes it an offence (punishable by a maximum penalty of 12 years of imprisonment) for a person to organise or facilitate the actual or proposed entry, exit, or receipt of another person into or from Australia (as applicable) where the offender:

- uses coercion, threat, or deception resulting in that person complying with the relevant entry, exit, or receipt; or
- is reckless as to whether the other person will be exploited after that entry, exit, or receipt.

The Criminal Code also makes it an offence (punishable by a maximum penalty of 20 years of imprisonment for an aggravated offence[22] and 12 years of imprisonment otherwise) for a person to organise or facilitate the actual or proposed entry, exit, or receipt of another person into or from Australia (as applicable) where:

[22] An aggravated offence can occur under some but not all of these trafficking provisions. An aggravated trafficking offence occurs if the offender commits the offence: (a) with the intention that the offender or someone else will exploit the victim; (b) by subjecting the victim to cruel, inhumane, or degrading treatment; and (c) in circumstances where the criminal conduct gives rise to a danger of death or serious harm to the victim or another person, and the offender is reckless as to that danger.

- the offender deceives the other person about the fact that the other person's entry or receipt for their Australian stay will involve sexual services, their exploitation, or the confiscation of their travel or identity documents;

- the offender deceives the other person about the fact that the other person's exit is for the purpose of providing sexual services outside Australia, their exploitation, or the confiscation of their travel or identity documents; or

- there is an arrangement for the other person to provide sexual services in Australia, and the offender deceives the other person about the nature or extent of the other person's freedom from providing those services, or to leave their own residence, or the amount or existence of any debt owed or allegedly owed in connection with those services.

Similar offences exist under the Criminal Code for domestic trafficking in persons where the offender organises the transport of a victim from one place in Australia to another. The same maximum penalties applying to international trafficking in persons under the Criminal Code apply to domestic trafficking in persons.

3.4.2. International and domestic trafficking in children

The Criminal Code makes it an offence (punishable by a maximum penalty of 25 years of imprisonment) for a person to organise or facilitate the entry, receipt, or exit of another person, in or from Australia where the other person is:

- under 18 years of age; and

- the offender intends the victim to provide sexual services or is reckless as to whether the victim will be used to provide sexual services or will be exploited.

Similar offences exist under the Criminal Code for domestic trafficking in children where the offender organises the transport of a child from one place in Australia to another. The same maximum penalties applying to international trafficking in children under the Criminal Code apply to domestic trafficking in children.

3.4.3. Victim harboring

The Criminal Code makes it an offence (punishable by a maximum penalty of seven years of imprisonment for an aggravated offence involving a victim under the age of 18 years, and four years of imprisonment otherwise) for a person to recklessly harbour, receive, or conceal a victim in circumstances where the person's conduct:

- assists a third person in connection with any offence that the third person has committed; or

- furthers a third person's purpose in relation to any offence that the third person has committed.

3.4.4. Extraterritorial application of human trafficking and smuggling offenses

The same provisions for the extraterritorial application of slavery-like offences also apply to the Criminal Code's human trafficking offences, except for those offences that prohibit domestic human and organ trafficking. A person can still be prosecuted for those domestic offences, even if the criminal conduct occurs to any extent outside of Australia. However, given that the offences relate to the trafficking of persons and organs across domestic and state borders, these offences require some connection to Australia.

3.4.5. International and domestic organ trafficking

The Criminal Code prohibits removal of a person's organ if:

- the removal is contrary to the applicable Australian state or territory law at the place of the removal;
- neither the victim nor the victim's guardian consents to the removal; or
- the removal would not meet the victim's medical or therapeutic needs.

The Criminal Code makes it an offence (punishable by a maximum penalty of 25 years of imprisonment for an aggravated offence involving a child, 20 years of imprisonment for an aggravated offence involving an adult, and 12 years of imprisonment otherwise) for a person to organise or facilitate the entry, receipt, or exit of a victim into or from Australia (as applicable) where:

- the offender is reckless as to whether the conduct will result in the removal of a victim's organ; and
- the Criminal Code prohibits the organ removal.

The Criminal Code also prohibits and penalizes domestic organ trafficking where an offender organises or facilitates the transportation or proposed transportation of a victim from one place in Australia, and is reckless as to whether the Criminal Code prohibits the organ removal. The Criminal Code's same maximum penalties for international organ trafficking also apply to domestic trafficking in organs.

3.5. Online Exploitation of Children Offenses

3.5.1. Overview

The Criminal Code has a number of offences addressing crimes of online child exploitation. Each such offence refers to "carriage services," which are services that carry communications by means of electromagnetic energy (including telephone and internet access services).

3.5.2. Using a carriage service for child pornography material or child abuse material

The Criminal Code makes it an offence for a person to access, transmit, make available, publish, distribute, advertise, promote, or solicit child pornography or child abuse material through a carriage server (punishable by a maximum penalty of 30 years of imprisonment for an aggravated offence, and 15 years of imprisonment otherwise).

"Child pornography material" includes material that depicts a person who is, or appears to be, under 18 years of age and who is, or is in the presence of a person who is, engaging in sexual activity. The definition includes material depicting a sexual organ, anal region, or female breasts of a person who is, or appears to be, under 18 years of age in circumstances that a reasonable person would find such content offensive.

"Child abuse material" includes offensive material that depicts or describes a person who is, or appears to be, under 18 years of age and who is being tortured or physically abused.

The fault element of this offence requires intention or recklessness on the offender's part. This requirement protects people who unintentionally access child pornography or child abuse material on the internet and encourages the reporting of such content to the authorities.

3.5.3. Possessing, controlling, producing, supplying, or obtaining child pornography material or child abuse material for use through a carriage service

The Criminal Code makes it an offence to possess, control, produce, supply, or obtain child pornography material or child abuse material through a carriage service (punishable by a maximum penalty of 30 years of imprisonment for an aggravated offence, and 15 years of imprisonment otherwise). These preparatory offences aim to discourage conduct intended to commit the primary offences described in Section 3.5.2.

3.5.4. Obligations of internet service providers and internet content hosts

Internet service providers and content hosts are subject to notification obligations. They are liable under the Criminal Code if they become aware that persons are using their service to access child pornography or child abuse material and they fail to report such information to the Australian Federal Police within a reasonable time. Non-compliance is punishable with a maximum of 800 penalty units (which at the date of writing is equal to AUD 177,600).

3.5.5. Extraterritorial application of Commonwealth online exploitation of children offenses

The Criminal Code's online child exploitation offences operate extraterritorially if there is a sufficient connection to Australia.

Such a connection is satisfied when the conduct or a result of the criminal conduct occurred either wholly or partly in Australia or on board an Australian ship or aircraft. Alternatively, there is a sufficient connection if the accused person is an Australian citizen or resident or, in the case of a corporation, if the corporation is incorporated under the law of the Commonwealth or an Australian state or territory.

3.6. Child Sex Tourism Offenses

3.6.1. Overview

Child sex tourism is generally defined as the commercial sexual exploitation of children by persons who travel from their own country to another to engage in sexual acts with children. The Criminal Code prohibits such behaviour.

3.6.2. Sexual intercourse and sexual activity with a child outside Australia

The Criminal Code makes it an offence for a person to engage in sexual intercourse or sexual activity with a child outside Australia. A person commits this offence if:

- the person engages in sexual intercourse or sexual activity with a child;
- the child is under 16 years old; and
- the sexual intercourse or sexual activity occurs outside Australia.

The maximum penalty for engaging in, or causing a child to engage in, sexual intercourse with a child is 25 years of imprisonment, and the maximum penalty for engaging in sexual activity with a child is 20 years of imprisonment.

The Criminal Code also makes it an offence to cause a child to engage in sexual intercourse or sexual activities outside Australia in the presence of the defendant. A person commits this offence if:

- the person's conduct causes a child to engage in sexual intercourse or sexual activity in the presence of the person;
- the child is under 16 years old; and
- the sexual intercourse or sexual activity occurs outside Australia.

3.6.3. Aggravated offenses

A person commits an aggravated offence and is liable for imprisonment for life if:

- the child who is the subject of the offence has a mental impairment;
- the person is in a position of trust or authority in relation to the child; or
- the person commits such offences on three or more separate occasions.[23]

3.6.4. Sexual intercourse and sexual activity with a young person outside Australia

The Criminal Code makes it an offence (punishable by up to 10 years of imprisonment) to engage in sexual intercourse and sexual activity with a young person outside Australia. The defendant must be in a position of trust or authority to the child to be prosecuted for these offences. These sections operate in a similar way to the offences discussed in Section 3.6.2., however, "child" is replaced with "young person," who is defined as a person who is at least 16 years old but under the age of 18. The person liable for this offence must be in a position of "trust or authority" in relation to the young person. That position of trust or authority includes (among others) certain family members, health practitioners, religious and spiritual leaders, and employers.

3.6.5. Grooming and procurement offences

The Criminal Code makes it an offence for a person to "groom" or "procure" a child to engage in sexual activity outside Australia. This offence for procuring (punishable by 15 years of imprisonment) requires a person to:

- engage in conduct with a child who is, or is believed to be, under 16 years of age,
- with the intention of procuring the child to engage in sexual activity outside Australia.

The offence for "grooming" (also punishable with 15 years of imprisonment) requires a person to:

- engage in conduct with a child who is, or appears to be, under 16 years of age,
- with the intention of making it easier to procure the child to engage in sexual activity outside Australia.

3.6.6. Benefiting from, planning to commit, and encouraging child sex tourism

The Criminal Code makes it an offence to benefit from, encourage, or plan for the commission of child sex tourism offences. Encouraging and benefiting from child sex tourism offences carries a penalty of 25 years of imprisonment, while planning to commit a child sex tourism offence carries a penalty of 10 years of imprisonment.

[23] *See* Criminal Code sections 272.10 and 272.00.

3.6.7. Equivalent offenses in state and territory legislation

Only the WA Criminal Code makes child sex tourism an offence. This legislation makes it is an offence to do any act with the intention of enabling or aiding another person, or otherwise counsel or procure that person, to engage in conduct outside Western Australia with a person under 18 years of age that would be a sexual offence under Chapter XXXI.[24] This offence carries a maximum penalty of 20 years of imprisonment.

3.7. Anti-Money Laundering and Counter-Terrorism Financing Laws

3.7.1. Overview of the Australian anti-money laundering and counter-terrorism financing framework

As is the case with most forms of criminal enterprise, perpetrators of slavery and human trafficking often seek to exploit banks and other financial institutions to launder or move their profits internationally to low or no-enforcement jurisdictions. As such, Australia's laws for anti-money laundering and counter-terrorism financing (**AML/CTF**) help to detect and prosecute modern slavery offences and play an important part in policy development.

Australia was a founding member of the Financial Action Task Force (**FATF**) in 1990.[25] The FATF is an inter-governmental policy-making body and watchdog that sets international standards to prevent illegal AML/CTF activities. The FATF first issued standards to fight against terrorist financing in 1990. Known as the "Forty Recommendations" for implementing effective anti-money laundering (**AML**) measures, these measures (revised in 2012) now are the global standards for anti-money laundering and combatting the financing of terrorism. They provide a system for monitoring and evaluating a country's systems relating to AML/CTF.

In 2020, news media reported that Australia hosts "significant quantities of illicit funds from outside the country."[26] Australia ranked 48 out of 133 countries in the Financial Secrecy Index (**FSI**), which ranks countries based on the intensity that their legal and financial system enables the wealthy (through tax avoidance) as well as criminals, to launder money from around the world.[27]

Two key pieces of legislation, the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (**AML/CTF Act**) and the Proceeds of Crime Act 2002 (Cth) (**Proceeds of Crime Act**), as well as other rules and regulations,[28] seek to bring Australia in line with international obligations. The AML/CTF Act works to identify money laundering or counter-terrorism financing risks by requiring banks and other financial services to disclose certain matters to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**). The Proceeds of Crime Act operates to recover property obtained through criminal acts.

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[24] *See* section 187.

[25] "Australia," Financial Action Task Force (web page, 7 June 2021), available at: https://www.fatf-gafi.org/countries/#Australia.

[26] "Australia a safe haven for illicit funds, but Cayman Islands the world's worst," ABC News (web page, 7 June 2021), available at: https://www.abc.net.au/news/2020-02-19/australia-still-a-safe-haven-for-illicit-funds/11977994.

[27] "Australia a safe haven for illicit funds, but Cayman Islands the world's worst," ABC News (web page, 7 June 2021), available at: https://www.abc.net.au/news/2020-02-19/australia-still-a-safe-haven-for-illicit-funds/11977994.

[28] Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1); *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulation 2018*.

3.7.2. Anti-Money Laundering and Counter-Terrorism Financing Act

Australia enacted the AML/CTF Act in 2006. Under the legislation, both money laundering (processing of criminal profits to disguise their illegal origin) and terrorism financing (financing of terrorist acts, terrorists, and terrorist organisations) are criminal offences in Australia.

The AML/CTF Act obligates banks and other financial services entities operating in Australia to monitor their customers' activities and to report "suspicious matters" to AUSTRAC. A "suspicious matter" includes anything that may be relevant to the investigation or prosecution of a person for an offence against a law of the Commonwealth, state, or territory. Financial institutions are also required to report cash transactions over AUD 10,000 (**threshold transactions**).

Australian companies that are required to submit reports on suspicious matters or threshold transactions under the AML/CTF Act also have a responsibility to monitor their customers' behaviour and report any activity indicating that the customer is engaging in slavery or human trafficking activity.

AUSTRAC has identified a number of customer behaviours indicating involvement in slavery and human trafficking:

- several low-value international funds transfers to overseas beneficiaries, and in particular, to countries known to source trafficked persons;
- funds transfers to recipients in countries with no apparent commercial connection to the person sending the funds;
- individuals acting as co-signatories to an account where there is no apparent connection between them, which may indicate a victim and perpetrator of human trafficking opening an account together so that the perpetrator can deposit and then withdraw the victim's wages to appear legitimate; and
- a series of structured deposits to avoid transaction reporting thresholds.

Failure to report a suspicious matter or a threshold transaction may result in fines. The maximum penalty is AUD 11 million for a body corporate and AUD 2.2 million for an individual.

3.7.3. Proceeds of crime in Australia

Australian courts and legislatures have historically attempted to remove convicted offenders' access to proceeds of crime. Since 1987, proceeds of crime legislation has been a feature of federal criminal law.[29] The prior scheme provided a process to recover the proceeds of a crime after conviction, accompanied by prior restraining orders to secure the property.

The current Proceeds of Crime Act creates a legal framework for parallel civil forfeiture and confiscation after conviction. Civil forfeiture does not require a conviction. The determinative question for a court order of civil forfeiture is whether it is more probable than not that a person committed a serious offence and that property has been derived from that conduct.

In 2009, new legislation, introduced as part of a national response to organised crime, allows courts to compel persons to prove that they did not obtain their wealth from criminal offences.[30]

[29] Proceeds of Crime Act 1987 (Cth).

[30] Proceeds of Crime Act 1987 (Cth) Part 2-6.

3.7.4. Impact of the AML/CTF regimes on modern slavery

While the AML/CTF Act does not address modern slavery directly, banks and other financial institutions must report to AUSTRAC any suspected slavery offences or participation in modern slavery at the Commonwealth, state, and territory levels. This reporting enables AUSTRAC to assist law enforcement officials within Australia and overseas with investigating and prosecuting criminal conduct. Likewise, the Proceeds of Crime Act is an essential component of compensating victims of modern slavery and human trafficking.

Despite the AML/CTF Act, criminals continue to engage in AML/CTF offences. In 2016, the Attorney General's Department released a statutory review report of the AML/CTF Act and the associated Rules and Regulations.[31] This report identified money laundering as a "key enabler" of organised crime, through criminals engaging in activities such as people smuggling. The report produced 84 recommendations.

Australia's rules for reporting International and Electronic funds transfer instructions (**IFTI**) distinguish Australia from other countries. The AML/CTF Act,[32] which sets the reporting requirements for IFTIs, does not have a minimum value threshold for IFTI reporting. Reporting all IFTIs, regardless of the transaction value, helps to combat modern slavery by putting to rest the misconception that low value transactions equate to a low risk of criminal activity. People smuggling and human trafficking often involve low value payments. In this way, Australia's AML/CTF regime indirectly combats modern slavery.

WESTPAC ANTI-MONEY LAUNDERING CASE

AUSTRAC brought proceedings in the Federal Court of Australia against Westpac Banking Corporation (**Westpac**) for alleged breaches of the AML/CTF Act. AUSTRAC applied for a civil penalty order in the amount of AUD 1.3 billion.

Westpac admitted to over 23 million breaches of the AML/CTF Act, including failures to report IFTIs, failure to maintain risk-based controls that complied with the regulations, failure to maintain records in accordance with the AML/CTF Act, and failure to conduct customer due diligence. Westpac conceded that a penalty in the amount of AUD 1.3 billion was appropriate.

The Court agreed that AUD 1.3 billion was an appropriate penalty for Westpac's admitted contraventions, taking into account the penalty's deterrent effect and the AML/CTF Act's objectives. Beech J considered Westpac's size and financial position, and the persistence of its breaches over a lengthy period of time, though not deliberate.

Beech J observed that the transactions that Westpac failed to report indicated criminal activity, and that reduced transparency in the reporting process limits the ability of AUSTRAC and the ATO (Australian Taxation Office) to trace the origin and character of funds. Westpac admitted that 18 of the IFTI reports lodged late were transactions suspected to be made in connection with child exploitation. The Court also stated that Westpac's failure to manage money laundering and terrorism financing risks resulted in loss of opportunity for law enforcement to disrupt unlawful activity, including child exploitation offences.

[31] Australian Government Attorney-General's Department, Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and associated rules and regulations, April 2016.

[32] Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) s 45.

4. AUSTRALIA'S SUPPLY CHAIN REPORTING LEGISLATION

4.1. Overview

Following the lead set by the United Kingdom (through the introduction of the Modern Slavery Act 2015 (UK) (**UK Modern Slavery Act**)) and California (through the introduction of the Transparency in Supply Chains Act (**Californian Modern Slavery Act**)), the Commonwealth of Australia has now enacted dedicated supply chain reporting legislation through the Federal Modern Slavery Act.

The enactment of the Federal Modern Slavery Act came shortly after the New South Wales Government attempted to enact its own legislation, the NSW Modern Slavery Act, which not only included broader and more onerous reporting obligations, but also specified penalties for non-compliance. Due to the inconsistencies between the NSW Modern Slavery Act and its federal counterpart, commencement of the NSW Modern Slavery Act is yet to occur.[33]

The only other state or territory to take similar legislative action is the State of Tasmania, which tabled the Tasmanian Modern Slavery Bill in 2020. Because the Tasmanian Modern Slavery Bill is similar to the NSW Modern Slavery Act, it is unlikely that the Tasmanian Modern Slavery Bill will progress further until the inconsistencies between the New South Wales and federal modern slavery legislation have been resolved.

4.2. Federal Modern Slavery Act

4.2.1. Overview

Following the completion of an inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade (**JSC**), the Commonwealth Parliament passed the Federal Modern Slavery Act. The JSC inquiry assessed the effectiveness of the UK Modern Slavery Act and whether Australia could introduce similar or improved measures. The final JSC report, titled *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australi*a (**JSC Report**), recommended that the Commonwealth Parliament introduce legislation that, among other things, sets out the modern slavery offences and requires large entities to report on modern slavery risks in their supply chains.[34] In the JSC's view, dedicated modern slavery legislation would send a strong message to the Australian community that modern slavery is unacceptable.

The Federal Modern Slavery Act as passed establishes a duty for supply chain reporting. It requires approximately 2,500 large businesses and other entities operating in Australia to make annual public reports on their actions to address modern slavery risks in their businesses. Non-compliant companies will face the threat of significant reputational harm, if they have not implemented adequate measures.

4.2.2. Base obligation for "Reporting Entities" to provide annual slavery and human trafficking statement

The Federal Modern Slavery Act requires that certain entities (**Reporting Entities**) annually provide to the Minister for Home Affairs (**Minister**) a "modern slavery statement" describing the risks of modern slavery in the operations and supply chains of the entity and any entities it owns or controls. The statement must

[33] Where there are inconsistencies between Federal laws and state or territory laws, the Federal laws prevail.

[34] In its report on Human Trafficking in New South Wales (**NSW Human Trafficking Report**), the New South Wales Select Committee on Human Trafficking in New South Wales (**NSW Select Committee**) also encouraged the Commonwealth to introduce a "modern slavery act."

also report the entity's actions taken to address those risks and its assessment of the effectiveness of those actions.

Under the Federal Modern Slavery Act, Reporting Entities comprise:

- all Australian entities, or entities carrying on business in Australia,[35] with consolidated annual revenue of at least AUD 100 million;
- the Commonwealth, and all corporate Commonwealth entities or Commonwealth companies with consolidated annual revenue of at least AUD 100 million; and
- any other entity that has volunteered to comply with the requirements of the proposed act.[36]

Reporting Entities may provide the Minister with a "joint modern slavery statement" covering two or more Reporting Entities.

4.2.3. Relevant definition of "modern slavery"

In considering the "risks of modern slavery practices," Reporting Entities must take into account the definition of modern slavery under the proposed legislation. It comprises conduct constituting an offence under Divisions 270 (Slavery and slavery-like offences) or 271 (Trafficking in persons) of the Criminal Code,[37] trafficking in persons,[38] or the worst forms of child labour.[39]

4.2.4. Content of statement

The Federal Modern Slavery Act requires a Reporting Entity's modern slavery statement to:

- identify risks of modern slavery in its operations and supply chains;
- describe the actions taken by the Reporting Entity to assess and address those risks;
- describe the effectiveness of those actions; and
- include any other relevant information.

4.2.5. Publication of statement

The Federal Modern Slavery Act requires that the Government maintain a free and publicly available online register of modern slavery statements. This requirement implements one of the JSC's key recommendations and seeks to address a key criticism of the UK legislation that the lack of a centralised repository of

[35] The legislation refers to the wide-reaching definition of "carrying on business" set out in section 21 of the Corporations Act 2001 (Cth). "Carrying on business" under that section includes "establishing or using a share transfer office or share registration office in Australia" and "administering, managing, or otherwise dealing with, property situated in Australia as an agent, legal personal representative or trustee, whether by employees or agents or otherwise."

[36] Any entity that is an Australian entity or carries on business in Australia may write to the Minister and volunteer to comply with the requirements of the legislation.

[37] Refer to Section 3.

[38] As defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, drafted in New York on 15 November 2000 ([2005] ATS 27).

[39] As defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, drafted in Geneva on 17 June 1999 ([2007] ATS 29 38).

statements limits the public's ability to access and evaluate the veracity of statements submitted by Reporting Entities.

4.2.6. Regulatory oversight

The Federal Modern Slavery Act does not provide for the appointment of an independent anti-slavery commissioner. Rather, the Department of Home Affairs will have ultimate responsibility for ensuring that Reporting Entities comply with their obligations under the proposed legislation.

4.2.7. Penalties

The Federal Modern Slavery Act does not set any penalties for non-compliance with the requirement for Reporting Entities to produce a modern slavery statement (unlike the proposed NSW Modern Slavery Act). The Commonwealth Parliament expects that market forces will "regulate and penalise companies which are required to report for any non-compliance."[40] In his second reading speech, the Assistant Minister for Home Affairs noted that the Commonwealth Government would "lead by example by considering possible modern slavery risks" in Commonwealth procurement. Commonwealth agencies likely will take into account Reporting Entities' compliance when making procurement decisions. Therefore, Reporting Entities bidding for government contracts will have an incentive to comply.

The Minister has the power to request a Reporting Entity to explain its failure to comply with the Federal Modern Slavery Act. The Minister is also empowered to request the non-compliant Reporting Entity to undertake remedial action; if that Reporting Entity declines, the Minister may publish information about the non-compliance (including the identity of the non-compliant Reporting Entity). This approach reinforces Australia's focus on achieving supply chain transparency through the threat of reputational and subsequent financial costs, rather than imposing traditional government-sanctioned penalties.

4.2.8. Reporting outcomes

The Commonwealth Parliament passed the Federal Modern Slavery Act on 29 November 2018. Since the Minister opened the Modern Slavery Register, 1159 mandatory and 162 voluntary statements have been lodged, covering 2588 Reporting Entities.[41]

4.3. New South Wales Modern Slavery Act

4.3.1. Overview

In 2016, the NSW Parliament established the NSW Select Committee on Human Trafficking (**NSW Select Committee**) to inquire into and report on human trafficking in NSW. In its 2017 report (**NSW Human Trafficking Report**),[42] the NSW Select Committee recommended, among other things, that the NSW Government urge the Commonwealth Government to establish federal modern slavery legislation and a supply chain reporting regime for Australia. Despite the NSW Select Committee's recommendation for federal legislation, the NSW Parliament introduced and enacted the NSW Modern Slavery Act, which addresses some of the findings and recommendations from the NSW Human Trafficking Report and the Commonwealth's JSC Report.

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[40] Modern Slavery Act 2018 (Cth). *See also* Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6754.

[41] Information obtained on 7 June 2021 from website available at: https://modernslaveryregister.gov.au/.

[42] Select Committee on Human Trafficking in New South Wales, Parliament of New South Wales, *Human Trafficking in New South Wales* (Report, October 2017).

The NSW Modern Slavery Act reflects that the majority of people trafficked into Australia live in New South Wales or Victoria.[43] The NSW Modern Slavery Act's proposed reporting regime is similar in many respects to the Commonwealth's legislation. However, because of its inconsistency with the Federal Modern Slavery Act, the NSW Modern Slavery Act will not commence in its current form.

In 2019, the NSW Legislative Council Standing Committee on Social Issues undertook an inquiry into the NSW Modern Slavery Act and handed down its report on 25 March 2020. The New South Wales Government Response, released in September 2020, reaffirmed its commitment to implementing the NSW Modern Slavery Act and made several recommendations:

- harmonising the revenue threshold for Reporting Entities with the Federal Modern Slavery Act;
- retaining components of the NSW Modern Slavery Act that complement, but are not inconsistent with, the Federal Modern Slavery Act, including:
- establishing the NSW Anti-slavery Commissioner, together with its public awareness and advisory functions;
- ensuring that goods and services procured by NSW government agencies[44] are not the product of modern slavery; and
- increasing support and assistance for victims of modern slavery;
- including a statutory review of the NSW Modern Slavery Act, to be conducted in conjunction with the statutory review of the Federal Modern Slavery Act*;* and
- amending the reporting threshold terminology in section 24 of the NSW Act from "turnover" to "consolidated revenue."

4.3.2. Base obligation for "Commercial Organisations" to provide annual slavery and human trafficking statement

The current proposed NSW Modern Slavery Act would require several types of organisations to publish a modern slavery statement (each of which are **Commercial Organisations**):

- organisations employing people in New South Wales;
- organisations that supply goods and services for profit or gain; and
- organisations that have a total turnover in a financial year of AUD 50 million or more.

Considering the size of the New South Wales economy and the present threshold of AUD 50 million (or the final threshold amount, which will be between AUD 50 and AUD 100 million once legislative harmonisation

[43] When introducing the NSW Slavery Act into parliament, the Honourable Paul Green acknowledged that, while the Criminal Code and the Australian Federal Police have primary investigative carriage of modern slavery offences in Australia, the NSW Police Force and the NSW Government play important roles in identifying and responding to suspected cases of human trafficking. He expressed the NSW Parliament's desire to strengthen its own resolve against modern slavery.

[44] "Government agencies" is defined in the NSW Modern Slavery Act section 5 as including: (a) a government sector agency (within the meaning of the Government Sector Employment Act 2013 (NSW)); (b) a NSW Government agency; (c) a State-owned corporation; (d) a company incorporated under the Corporations Act 2001 (Cth), of which one or more shareholders are a Minister of the Crown; (e) a council, county council, or joint organisation within the meaning of the Local Government Act 1993 (Cth); (f) any other public or local authority that is constituted by or under an Act or that exercises public functions; and (g) any public or local authority that is constituted by an Act of another jurisdiction that exercises public functions.

takes place), the NSW legislation likely will require most large businesses operating in New South Wales to report.

Commercial Organisations do not have to prepare a modern slavery statement if they are subject to similar obligations under certain prescribed laws of the Commonwealth or an Australian state or territory. Accordingly, NSW's legislation likely will excuse any organisation that is required to prepare a Commonwealth modern slavery statement from NSW's requirement.

Like the Federal Modern Slavery Act, the NSW Modern Slavery Act does not call for a public list of entities that are required to prepare modern slavery statements. However, it does require the Commissioner to maintain a register of all entities that reported in their statement that their organisation's goods or services are, or may be, a product of supply chains in which modern slavery may be taking place.

4.3.3. Relevant definition of "modern slavery"

In considering the "risks of modern slavery practices," Commercial Organisations must take into account the legislation's definition of modern slavery, which includes:

- certain sexual servitude, child abuse, or slavery offences under the Crimes Act 1900 (NSW);
- trading in tissue offences under the Human Tissue Act 1983 (NSW); or
- offences under Division 270 (Slavery and slavery-like offences) or 271 (Trafficking in persons) of the Commonwealth's Criminal Code.

4.3.4. Content of statement

Unlike the Federal Modern Slavery Act, the NSW Modern Slavery Act does not specify the content of a modern slavery statement. Regulations will set out those requirements, which likely will mirror the Federal Modern Slavery Act's requirements.

4.3.5. Publication of statement

Under NSW's legislation, each Commercial Organisation must make its modern slavery statement public in accordance with the regulations to be issued.

The NSW Modern Slavery Act also requires the Commissioner to maintain a register that is freely and publicly available. The register must identify each Commercial Organisation (and each other organisation or body that has voluntarily made a modern slavery statement to the Commissioner) that has disclosed in its modern slavery statement that its goods or services are, or may be, a product of supply chains in which modern slavery may be taking place and whether the Commercial Organisation has taken steps to address the concern.

4.3.6. Regulatory oversight

Unlike the Commonwealth's approach, the NSW Modern Slavery Act also establishes an Anti-Slavery Commissioner and a joint committee of members of the NSW Parliament, called the "**Modern Slavery Committee.**"

The Anti-Slavery Commissioner would have a broad advocacy and monitoring role with respect to modern slavery in NSW and would be responsible for a range of activities, including: advocating and promoting actions to combat modern slavery; providing recommendations, information, advice, education, and training about actions to prevent, detect, investigate, and prosecute offences involving modern slavery; and monitoring the effectiveness of legislation and governmental policies and actions in combating modern

slavery. Similarly, the proposed legislation would require the Modern Slavery Committee to report to the New South Wales Parliament on matters relating to modern slavery.

4.3.7. Penalties

Unlike the Federal Modern Slavery Act, the proposed NSW Modern Slavery Act would impose significant financial penalties on Commercial Organisations that fail to comply. Under the proposed legislation, Commercial Organisations would face penalties of 10,000 penalty units (which, as at the date of writing, is equal to AUD 1.1 million) if they fail to either:

- prepare a compliant NSW modern slavery statement each financial year; or
- make their NSW modern slavery statements public in accordance with the regulations.

Moreover, the proposed NSW Modern Slavery Act prohibits any person from providing information in connection with modern slavery that the person knows, or ought reasonably to know, is false or misleading. A contravention of that provision may lead to a maximum penalty of 10,000 penalty units which, as at the date of writing, is equal to AUD 1.1 million.[45]

4.4. Tasmanian Supply Chain (Modern Slavery) Bill 2020

In April 2020, the Tasmanian House of Assembly tabled the Tasmanian Modern Slavery Bill. That Bill is unlikely to progress any further until the NSW Modern Slavery Act and the Federal Modern Slavery Act have been harmonised.

The draft legislation defines "modern slavery" as "any conduct constituting a modern slavery offence, or any conduct involving the use of any form of slavery, servitude or forced labour to exploit children or other persons taking place in the supply chains of government agencies or non-government agencies." A "modern slavery offence" is defined as any offence committed pursuant to section 270.4 or 270.1 of the Commonwealth Criminal Code, as scheduled to the Criminal Code Act 1995 (Cth).

Similar to the NSW Modern Slavery Act, the Tasmanian Modern Slavery Bill proposes to appoint a Supply Chain (Anti-Slavery) Commissioner, to write independent reports and maintain a publicly available register identifying any Commercial Organisation that has disclosed that its goods and services are a product of supply chains in which modern slavery is taking place and whether the Commercial Organisation has taken steps to address the concerns. The Tasmanian Modern Slavery Bill also proposes to create a Modern Slavery Committee, which would inquire into matters relating to modern slavery and report to both Houses of the Tasmanian Parliament on those matters.

Section 24 of the Tasmanian Modern Slavery Bill requires Commercial Organisations, which include entities supplying goods and services with a total annual turnover of not less than AUD 30 million, to provide a modern slavery statement each financial year.

The Tasmanian Modern Slavery Bill authorizes the Governor to make regulations to give effect to the legislation, which may include creating an offence punishable by a penalty not exceeding 50 penalty units.

[45] The Crimes Act 1900 (NSW) has other offences relating to false and misleading information (*see* sections 307B and 307C relating to providing false or misleading information or documents). Those offences carry maximum penalties of imprisonment for two years, a fine of AUD 22,000, or both.

5. FORCED LABOR: OVERVIEW OF AUSTRALIA'S APPLICABLE EMPLOYMENT AND MIGRATION LAWS

5.1. Employment Law Rights for Victims of Human Trafficking and Forced Labor

The Australian common law and workplace relations statutes provide a number of civil mechanisms through which victims of forced labour and trafficking can seek meaningful civil remedies.

Victims of forced labour and trafficking may not necessarily have entered into an employment agreement with those who have trafficked or exploited them. In some cases, the relationship between victim and trafficker may clearly be a type of employment (for example, where someone is brought to Australia on the understanding that they will work domestically for remuneration, although this remuneration is unlawfully withheld or is manifestly inadequate). However, in other cases it is contemplated that victims will not be paid for their work. Rather, they will be forced to work through threat, coercion, debt bondage, misrepresentations, or deception (rather than induced to work through promises of payment).

Such arrangements are more akin to slavery than employment. Australian common law has no recognised category for those who are forced to work. The law acknowledges several structures through which individuals can work together lawfully (and for each other), including employer and employee, independent contractor and principal, partnership, traineeship, and volunteer engagements. Forced labour for the benefit of others does not fit within any recognised category.

Nevertheless, a court could consider a victim of forced labour or trafficking to be an employee (who is entitled to all the protections and claims associated with Australian employment laws). Where employment terms are not recorded, the courts will imply reasonable terms of employment, which are at least as favourable as those set out in relevant Australian legislation and industrial instruments (primarily, the Fair Work Act 2009 (Cth) (**FW Act**)).

5.2. Applicability of Employment Legislation in the Context of Forced Labor or Trafficking

Victims of forced labour or trafficking could be considered to be employees if they are performing labour (of any kind) for the benefit of someone else and:

- it was contemplated that the victims would be paid[46] (in some form) for their work; or
- the victims were forced to perform such work (and did not volunteer their time).

Victims who satisfy these requirements may be in a position to bring employment claims against those who have trafficked them or benefitted from their labour, including claims that allege a breach of:

- an employment contract (and the implied terms of such a contract), entitling an award of damages; or
- protections provided in the FW Act (which, in turn, allows for awards of compensation and the imposition of civil penalties associated with such breaches).

[46] Assuming that the victims are not independent contractors operating their own businesses.

From the victims' perspective, FW Act claims can be resolved more quickly and cheaply than breach of contract claims (and there is little risk that employees will be required to meet a costs order if they are unsuccessful).[47]

Victims of forced labour or trafficking (or their legal representatives) can commence FW Act claims. So can any trade union who represents victims or the Fair Work Ombudsman (the Australian regulator responsible for attending to compliance of the FW Act).

5.3. Statutory Rights

5.3.1. Rights to minimum wages, entitlements, and other applicable minimum standards

The FW Act sets out entitlements that arguably may apply to victims of forced labour or trafficking:

- the right to be paid (at least) the national minimum wage for all hours worked (AUD 19.84 per hour or AUD 24.80 per hour for casual employees);[48] and
- the right to paid and unpaid leave, including annual leave, sick leave, compassionate leave, and parental leave.

Additionally, the FW Act grants rights to higher wages, allowances, penalty rates, and loadings[49] if the worker is covered by an applicable modern award.[50] These entitlements to minimum wages, penalty rates, and allowances can be financially material where an individual is exploited for an extended period of time.[51]

5.3.2. Claims available in relation to misrepresentations and "sham" arrangements

Misrepresentations regarding diverse matters relating to employment or employment-related benefits may be made to induce victims of human trafficking to migrate to Australia.

Misrepresentations made in connection with employment may be actionable, because the FW Act prohibits a person from knowingly or recklessly making false or misleading representations about an individual's workplace rights.[52]

[47] *See* section 570 of the Fair Work Act 2009 (Cth), which allows costs orders in such proceedings only where they are commenced vexatiously or in other limited circumstances.

[48] As per the 2020 National Minimum Wage Order, which applies from 1 July 2020 to 30 June 2021.

[49] Loadings are additional wages paid in addition to base wages for certain work, such as work during extended periods or during particular hours of the day.

[50] Modern awards set out the minimum statutory terms and conditions of employment and are industry-based, covering employees of certain industries or occupations.

[51] For example, in *Ram v. D & D Indian Fine Food Pty Ltd* [2015] FCCA 389, the Federal Circuit Court was asked to consider the entitlements of Dulo Ram. Mr. Ram was trafficked from India to work as a chef in a restaurant in Sydney. Mr. Ram was paid a basic salary, but this wage was manifestly inadequate to satisfy his entitlements, considering that he was required to work in slave-like conditions 12 hours per day, seven days a week over a 16-month period. The Court found that Mr. Ram was entitled to AUD 125,431.22 in wages, superannuation, and annual leave for the 16-month period, as well as a further AUD 60,607.81 in interest on the judgment.

[52] Jurisdictional complications may arise where a representation was made outside of Australia (to induce a trafficked person to travel to Australia).

5.3.3. Claims available in relation to unlawful deductions, loans, and debt bondage

The FW Act restricts when an employer may make deductions (such as for migration-related costs) from workers' wages. Although unlawful deductions are common, the FW Act only permits deductions where:

- the employee and employer agree in writing (the employee can terminate this agreement at any time);
- the agreement specifies the amount; and
- the deduction is principally for the employee's benefit.[53]

5.3.4. Remedies

Victims of forced labour or trafficking (or a trade union or the Fair Work Ombudsman acting on their behalf) can commence a claim in the Federal Circuit Court for outstanding wages or other benefits (and interest) to which the FW Act entitles them.

Additionally, the FW Act authorizes civil penalties for its breach. The court can also order that violators pay those penalties to the victims of a breach. Recently, amendments to the FW Act significantly increased the maximum penalties for a breach up to AUD 13,320 (for an individual) and AUD 66,600 (for a corporation).[54] The penalties can increase tenfold for a "serious contravention" (AUD 133,200 and AUD 660,000 per contravention). A "serious contravention" occurs where a person knowingly contravenes the FW Act, and the contravention was part of a systematic pattern of conduct.[55]

SAMUEL KAUTAI CASE – Modern Slavery in Australian Construction Industry Supply Chains

Samuel Kautai was a young man from the Cook Islands. The brother of an employer in the construction industry recruited Mr. Kautai along with four other men, all around the ages of 17- to 18-years-old. They were promised that, after no wages for the first three weeks, they would get paid full wages, and be able to send money back home to their families. However, Mr. Kautai's employer never paid him more than AUD 50 a month. The employer also physically abused, underfed, and forced Mr. Kautai and some of his co-workers to work long hours without decent breaks.

This case was pursued by the Construction, Forestry, Maritime, Mining and Energy Union under industrial mechanisms and by the NSW Police Force under state criminal law, resulting in two decisions in favour of the applicant. The employer was ordered to pay Mr. Kautai and the other employees their full wages.

After surviving years of violence and slave labour conditions, Mr. Kautai was awarded around USD 160,000 in compensation.

5.3.5. Employment rights affected where workers are exploited in Australian waters

Australia's shipping industry faces a continuing problem with Flag of Convenience (**FOC**) shipping. Vessels that travel internationally often are not registered to the state with which it is most closely associated. A ship's national registration determines the applicable laws governing all activities on that ship until it reaches territorial waters. Therefore, ships in Australia's Exclusive Economic Zone (but outside its territorial

[53] Fair Work Act 2009 (Cth) s 324.

[54] *See* the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth), which took effect on 15 September 2017.

[55] Fair Work Act 2009 (Cth) s 557A.

waters) remain registered to countries, such as Panama and Mongolia, that have minimal regulation and are less likely to investigate deaths and welfare issues.

In 2017, an Australian senate committee launched an inquiry following three suspicious deaths on the Sagittarius, a Japanese-owned ship. The committee's primary concerns are detailed in the interim report. The concerns included the potential for exploitation and corruption, poor wages, inadequate safety conditions, bullying and abuse of crews, and a lack of welfare services on-shore.[56]

Unlike Australia so far, New Zealand has effectively addressed these concerns with FOC vessels. New Zealand has introduced re-flagging requirements under the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014 to protect crews on all ships entering New Zealand's exclusive economic zone.

CASE STUDY - FOREIGN EMPLOYEE ON 457 VISA UNDERPAID BY TAJ PALACE

The vulnerability of foreign workers on work visas was emphasised in this case involving an Indian national engaged by his employer on a subclass 457 visa as a chef.

The foreign worker allegedly was forced to work up to 71 hours per week for a flat AUD 752/week. He spoke little English, had not previously been employed in Australia, and had come from a country with poor working conditions and standards, so had limited education about employee's rights. Despite the attractive working conditions Australia presented, the court recognised the vulnerabilities of foreign workers as aggravating difficulties in enforcing their rights. However, the court did not address the vulnerability of employees who depend on their employer's sponsorship to remain in the country.

In 2010, the restaurant back-paid the worker's wage entitlements, which amounted to AUD 24,217.90 during a 10-month period during 2008–9.

5.4. Rights to a Safe Workplace and Compensation Associated With Injuries or Illness

In addition to the FW Act, other employment laws may apply to victims of forced labour or trafficking in Australia, including workers compensation laws (*see* the Workers Compensation Act 1987 (NSW), for example, in New South Wales) and work, health, and safety laws (*see* the Work Health and Safety Act 2012 (NSW)).

Those laws require employers to provide safe workplaces and to compensate workers who are injured in the course of their work. Those laws also provide for significant criminal sanctions (including, in severe cases, imprisonment) where workers are put in danger at work.

5.5. Access to Justice and Practical Issues Associated With Enforcing Social Legislation

Due to a number of significant practical barriers in the Australian legal system, victims of forced labour or trafficking in Australia rarely use the rights and claims available under the FW Act.

[56] Journals of the Senate No. 152, 3 May 2016, p. 4210. The substantive interim report was the second interim report of the committee. The report can be found on the website available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Shipping/Second_Interim_Report.

While many victims of forced labour and trafficking in Australia are likely to have strong claims under the FW Act, most victims have no access to the legal assistance needed to navigate complex Australian employment law and litigation procedures. It is particularly difficult for victims who have little education and do not speak the language to commence proceedings without legal assistance. As the Justice Project Final Report of the Law Council of Australia noted, this is a major gap in the availability of legal services for employment law related matters.[57]

Additionally, the Fair Work Ombudsman's prosecution action does not appear to effectively deter significant proportions of Australian industry from non-compliance with Australian employment laws. For example, the Fair Work Ombudsman's recent five-year inquiry into the Australian horticulture industry found that more than half of the 638 businesses visited were in breach of Australian employment laws. Almost 70% of these businesses employed migrant workers on various working visas. Despite this widespread non-compliance, the Fair Work Ombudsman only brought eight prosecutions in the industry.[58]

Australian trade unions have historically played a significant role in protecting vulnerable workers through the enforcement of employment laws. That said, trade unions are unlikely to assist victims of forced labour or trafficking. Trade union membership has declined drastically: from 51% of the Australian workforce in 1976 to only 14% in 2020, with the majority now employed in public service.[59] Additionally, many trade unions may be politically conflicted from assisting foreign victims of forced labour and trafficking since:

- trade unions traditionally advocate to reduce the number of foreign workers entering Australia; and
- trade unions will likely advance the interests of their local members over those of exploited foreign workers.

Because of these factors, most victims of forced labour or trafficking will not benefit from FW Act claims and remedies.

MT Turmoil Case – Protecting vulnerable foreign seafarers

This case illustrates employers' ability to take advantage of vulnerable foreign seafarers.

The Fair Work Ombudsman commenced legal action against the Norwegian company Transpetrol, asserting that the FW Act entitled the crew to the minimum entitlements set by Australia's Seagoing Industry Award and national Minimum Wage order.

Mt Turmoil, an oil and chemical tanker, allegedly paid their 61 workers just AUD 1.25 per hour, in addition to allowance and overtime. The ship was flagged to Panama. BP and Caltex chartered the ship while in Australian waters between 2013 and 2015.

The underpayments to workers totalled more than AUD 255,000. Even though all of the workers on board were back-paid in full, the Fair Work Ombudsman pursued legal action "because of the significant amount involved for vulnerable workers."

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[57] Law Council of Australia, "The Justice Project: People Who Have Been Trafficked and Exploited," *Law Council of Australia* (Consultation Paper, August 2017), available at: https://bit.ly/2HJblTv, 22, particularly referring to the Productivity Commission's report "Access to Justice Arrangements."

[58] 150 cautions were issued along with 145 infringement notices and compliance notices.

[59] Parliament of Australia, "Trends in Union Membership in Australia," *Parliament of Australia* (Report, 15 October 2018), available at: https://bit.ly/2UeLSap.

5.6. Interaction Between Employment Law and Migration

5.6.1. Employment rights affected where employment is unlawful under migration law

Victims of forced labour or trafficking may be working in breach of their visa conditions. Whether such a breach of Australian migration laws makes a worker's employment illegal (preventing them from bringing a contract or FW Act claim) is uncertain.

In 2004, the Supreme Court of Queensland ruled that workers compensation laws do not protect workers who have breached visa conditions.[60] However, since that decision and the introduction of the FW Act, the Federal Magistrates (Circuit) Court has twice ruled that workers in breach of their visa conditions can bring FW Act claims (the Fair Work Ombudsman brought both cases).[61]

Currently, courts appear to consider that a breach of the Migration Act 1958 (Cth) does not affect a worker's right to enforce the FW Act. That said, the appellate courts have not addressed this issue in detail.

5.6.2. Rights/remedies available under applicable migration law and regulations

Victims of forced labour or trafficking may also have claims under Australia's migration laws, particularly the Migration Act 1958 (Cth) and the Migration Regulations 1994 (Cth) (**Migration Regulations**). These laws impose obligations upon those who sponsor migrants. For example, regulation 2.87 of the Migration Regulations prohibits sponsors from seeking to recover various costs from migrants approved to receive visas (for example, costs associated with that migrant's recruitment, sponsorship, and approval). These laws can protect victims of forced labour or trafficking where their traffickers are their visa sponsors.

Migrants or visa holders may bring small claims for compensation;[62] however, only the Australian immigration authorities can prosecute non-compliant visa holders seeking civil penalties.[63]

5.7. Employment Laws and Child Labor

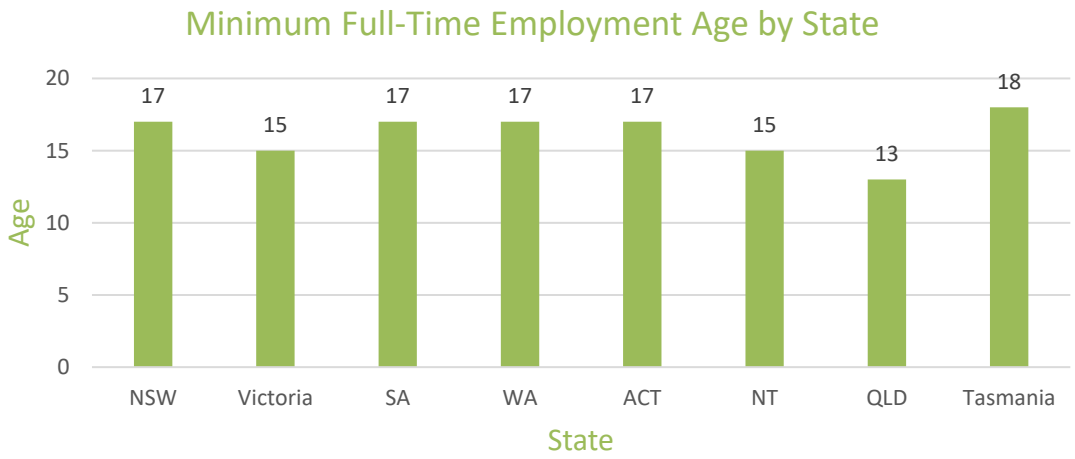
Laws in each state and territory impose a minimum age at which a business may legally employ children. Some jurisdictions prohibit employing children under a certain age; others allow children's employment provided particular conditions are met, for example, parental consent or restrictions on working during ordinary school hours.

[60] *Australia Meat Holdings Pty Ltd v. Kazi* [2004] QCA 147.

[61] *Fair Work Ombudsman v. Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258; *Fair Work Ombudsman v. Shafi Investments Pty Ltd* [2012] FMCA 1150.

[62] Migration Act 1958 (Cth) ss 140S, 140SC.

[63] Migration Act 1958 (Cth) s 486R.



5.7.1. New South Wales

Children under the age of 17 cannot have full-time employment, unless they have completed year 10 of schooling and have permission from the New South Wales Government to leave school early. There is no minimum age for part-time or casual employment, but the regulations[64] made under the Children and Young Persons (Care and Protection) Act 1998 (NSW) (**NSW Care and Protection Act**) apply.

The NSW Care and Protection Act also makes it an offence to cause or allow a child to take part in employment that puts the child's emotional or physical well-being at risk. Businesses seeking to employ children under the age of 15 for more than 10 hours per week must obtain a permit from the NSW Government.

5.7.2. Victoria

Children can work in a full-time capacity after completing year 10 of their schooling. The rules for part-time or casual work prior to this age vary by industry. No minimum age restricts children's employment in the entertainment and advertising industries in Victoria; however, the child's age determines the number of hours that a child may work per day and the hours during which a child can work. A registered nurse must supervise any child under the age of 12 weeks who is employed.

For all other industries, all children employed must be at least 15 years of age, subject to limited exceptions. They can do only light work, defined as work that is not likely to harm children's health, safety, development, or moral and material welfare. Additionally, the work must not affect their ability to attend school or their learning capacity. The Child Employment Act 2003 (Vic) sets out a range of penalties for breaching these restrictions.

5.7.3. South Australia

Children can only legally have full-time work once they have turned 17 years old, or they have turned 16 years old and have obtained either an appropriate qualification from their high school or another approved educational institution, or are completing work as part of that process (for example, as part of an apprenticeship).

[64] Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015 (NSW).

There is no minimum age for the part-time or casual employment of children in South Australia; however, the Education Act 1972 (SA) prohibits and imposes penalties for the employment of children between the age of six and 16 years during school hours and in any role that makes, or is likely to make, children unfit to attend and participate in school.

5.7.4. Western Australia

Children who have completed high school can legally have full-time employment from age 17, or during school year 11 or 12 with the Minister for Education's approval. Children under the age of 17 can have part-time or casual employment with various conditions and restrictions, depending on their age and role. Employing children of compulsory school age during school hours is prohibited, but children of any age can work in a family business, a dramatic performance, or the making of advertisements. Businesses may employ children over the age of 15 without parental consent, subject to restrictions on the hours.

The School Education Act 1999 (WA) makes it an offence to employ children during school hours, unless (in accordance with that Act):

- both the child's school and the child's parent or guardian agree;
- the child is in school year 11 or 12 and the Minister for Education gives permission; or
- the child is in year 11 or 12 and completing an approved course of education.

5.7.5. Australian Capital Territory

Children cannot be employed full-time until they have turned 17 years old or completed year 12 of their schooling.

There is no minimum age for children's employment; however, businesses employing children under the age of 15 cannot require them to work during school hours. Children under the age of 15 require parental permission and can do only light work (including, for example, babysitting, sports umpiring, or clerical work). "Light work" means work that is not contrary to the child's best interest. Work cannot prejudice children's ability to attend school or otherwise harm children's health, safety, personal, or social development. The Children and Young People Act 2008 (ACT) makes it an offence to employ children under the age of 15 for anything other than light work or in a family business.

5.7.6. Northern Territory

Children may work full-time from age 15 onwards, subject to completing year 10 of their schooling.

There is no minimum age at which children can be employed in casual or part-time work; however, the Education Act 2015 (NT) prohibits the employment of children who have not yet completed year 10 of their schooling:

- during school hours, or
- for work that would put children in danger or cause harm that would limit children's ability to attend school.

Children who have not yet completed year 10 may work during school hours if the employment is part of an approved training program or coursework, or with the Minister for Education's approval.

5.7.7. Queensland

Schoolchildren under 16 years of age in Queensland may be employed full-time during a non-school week if they are enrolled in school. The minimum age for working is 13, except for children who volunteer in the entertainment industry and children aged 11 or older who do delivery work, such as delivering newspapers or advertising material.

The Child Employment Act 2009 (Qld) restricts children's work hours, which depend on whether it is a school week.

5.7.8. Tasmania

The Education Act 1994 (Tas) requires children from at least the age of five to be enrolled in school or educated at home until they attain the age of 18 years. Furthermore, children are prohibited from employment during school hours. Otherwise, Tasmania does not govern children's employment.

5.8. Miscellaneous Commonwealth offenses

5.8.1. Migration legislation

The Migration Act 1958 (Cth) (**Migration Act**) sets out offences relating to visa fraud, including the use of forged or false documents and statements to obtain visas, allowing persons to work in contravention of their visa conditions, and offering or providing benefit in return for visa sponsorship. The Migration Act also provides for the recovery of amounts deducted in breach of migration regulations.

5.8.2. Passports

The Foreign Passports (Law Enforcement and Security) Act 2005 (Cth) makes the improper use or possession of foreign travel documents a crime. It carries a maximum penalty of 10 years of imprisonment, 1,000 penalty units, or both.

6. GOVERNMENT PROCUREMENT RULES

6.1. Overview

The Commonwealth Government and some of Australia's state and territory governments are large procurers of goods and services in both Australia and the Asia Pacific region. They have stringent procurement rules and procedures that indirectly touch on supply chain issues relating to modern slavery and human trafficking (with varying degrees of efficacy). Supply chain reporting legislation at the federal level and in New South Wales and other states and territories does not currently provide favourable weightings under procurement tendering rules for companies that have complied with supply chain reporting requirements.

6.2. Commonwealth Procurement Rules

The Commonwealth Procurement Rules (**CPRs**) govern the Commonwealth's procurement.[65] These rules set out the requirements and expectations for spending public money, including ethical sourcing of

[65] Department of Finance, "Commonwealth Procurement Rules," *Department of Finance* (Rules, 1 January 2018), available at: https://bit.ly/2Yy0WPv.

procured goods. Procurement officials from all non-corporate Commonwealth entities and certain corporate Commonwealth entities[66] must comply with the CPRs.

in January 2018, the CPRs were amended to require public officials to make certain reasonable enquiries about tenderers, including their practices regarding labour regulations and ethical employment practices. Parliament criticized these requirements as too discretionary and deficient because, amongst other things, the rules do not expressly refer to human rights issues, such as trafficking, slavery, and slavery-like practices. Following the Joint Select Committee on Government Procurement's recommendations, the Commonwealth Parliament proposed a procurement policy, which the Office of the Commonwealth Attorney General would oversee, requiring Commonwealth agencies to evaluate suppliers' compliance with human rights regulations. As the Committee also observed, the Commonwealth is uniquely able to influence private sector providers given the size of its annual procurement budget.

Acknowledging private sector providers' leverage to drive positive change in supply chains, the Commonwealth Government has since released a "Toolkit" of resources for procurement officers working with Commonwealth entities to assist in assessing and managing modern slavery risks at every stage of the procurement process.[67] This Toolkit is intended to exist within, and be complementary to, the CPRs.

Similarly, the Commonwealth Government launched the Modern Slavery Register on the Australian Border Force website and, subsequently, uploaded its first Modern Slavery Statement on 31 December 2019.[68] This statement conveys relevant analysis and information with respect to public Commonwealth entities in accordance with the Federal Modern Slavery Act.

6.3. State Procurement Rules

6.3.1. New South Wales public procurement rules

The proposed NSW Modern Slavery Act, which is yet to commence, aims to ensure that government procurement in NSW is free from modern slavery.

These provisions would amend (pending commencement) the Public Works and Procurement Act 1912 (NSW) (**NSW Public Works and Procurement Act**) in several ways:

- government agencies would need to take reasonable steps to ensure that their procured goods and services are not the product of modern slavery;[69]
- the NSW Procurement Board's objectives would include ensuring that goods and services procured by and for government agencies are not the product of modern slavery;[70] and

[66] *Public Governance, Performance and Accountability Rule 2014* (Cth) s 30.

[67] Australian Border Force, *Addressing Modern Slavery in Government Supply Chains: A toolkit of resources for Government procurement officers* (Guidance Document, August 2020); "News and Resources," *Australian Border Force* (web page), available at: https://modernslaveryregister.gov.au/resources/.

[68] Australian Government, *Commonwealth Modern Slavery Statement 2019-20* (Annual Modern Slavery Statement, 31 December 2019).

[69] Public Works and Procurement Act 1912 (NSW) s 176(1A).

[70] *Id*. s 171(b1).

- the NSW Procurement Board could issue directions regarding the reasonable steps that government agencies are to take to ensure that their procured goods and services are not the product of modern slavery.[71]

These amendments (as currently drafted) will not apply to local councils and state-owned corporations, which are "government agencies" under the NSW Modern Slavery Act, because the NSW Public Works and Procurement Act does not cover them. However, the NSW Standing Committee on Social Issues has recommended amendments to the Local Government Act 1993 (NSW) to make the procurement and reporting obligations for local councils equivalent to those of government agencies. The Committee also suggested treating state-owned corporations as commercial organisations for purposes of the procurement and reporting regime.[72]

Other amendments to NSW state legislation allow the Auditor General to conduct risk-based audits to determine whether government agencies are ensuring that procurements are not the product of modern slavery and to provide advice to these agencies.[73] Additionally, the proposed amendments will require government departments and statutory bodies to include in their annual reports:

- a statement of action taken in relation to any issue raised by the Anti-Slavery Commissioner; and
- a statement of steps taken to ensure that goods and services procured by and for the department or body were not the product of modern slavery.[74]

Additionally, the Act would require:

- the Anti-Slavery Commissioner to regularly consult with the Auditor General and the NSW Procurement Board to monitor the effectiveness of due diligence procedures;[75]
- the Anti-Slavery Commissioner to keep a register identifying any government agency failing to comply with the NSW Procurement Board's directions concerning procurement of goods and services that are not the product of modern slavery and whether the government agency has taken steps to ensure compliance in the future;[76] and
- the Anti-Slavery Commissioner to prepare an annual report for the Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts describing the Commissioner's activities and progress.[77]

[71] *Id.* s 175(3)(a1).

[72] Standing Committee on Social Issues, Parliament of New South Wales, *Modern Slavery Act 2018 and associated matters* (Report No 56, March 2020) 36 [2.97]–[2.102].

[73] *See* Schedule 5.5 of the NSW Modern Slavery Act, which proposes the inclusion of sections 38F to 38H into the Public Finance and Audit Act 1983 (NSW).

[74] *See* Schedule 5.1 of the NSW Modern Slavery Act, which proposes the inclusion of sections 6(b1) and 6(b2) into the *Annual Reports (Departments) Regulation 2015* (NSW); *see* Schedule 5.2 of the NSW Modern Slavery Act, which proposes the inclusion of sections 8(1)(b1) and 8(1)(b2) into the *Annual Reports (Statutory Bodies) Regulation 2015* (NSW).

[75] Modern Slavery Act 2018 (NSW) s 25.

[76] *Id.* s 26.

[77] *Id.* s 19.

6.3.2. *Victorian public procurement*

The Charter of Human Rights and Responsibilities Act 2006 (Vic) (**Victorian Charter**) sets out the basic rights, freedoms, and responsibilities of all people in Victoria. This statutory bill of rights requires public authorities to act consistently with 20 human rights listed in the Victorian Charter. Those rights include protection from cruel, inhumane, or degrading treatment; the right to freedom from forced work); and the right to freedom of movement. Victorian public authorities (such as state and local departments and agencies) must not knowingly breach these rights and are required to consider them when they create laws, develop policies, and deliver their services.

The Victorian Government's "Supplier Code of Conduct" (**Victorian Supplier Code**) outlines the minimum ethical standards of behaviour that suppliers of goods or services to the State of Victoria should meet when conducting business with, or on behalf of, the State.[78] The Victorian Supplier Code states that Suppliers must:

- provide a fair and ethical workplace, which upholds high standards of human rights and integrates appropriate labour and human rights policies and practices into its business;
- provide goods and services in a manner consistent with any applicable human rights obligations; and
- ensure that all work is undertaken without coercion, without use of forced, bonded, or indentured labour, and only by workers who are the applicable minimum legal age.

Additionally, the Code now explicitly refers to modern slavery legislation (which presumably means the Federal Modern Slavery Act, given that Victoria does not have its own modern slavery legislation). Accordingly, Suppliers are expected to proactively identify, address, and report on modern slavery risks and practices where they arise.

Suppliers are required to sign a letter committing to meet the expectations described in the Victorian Supplier Code and communicate the Victorian Supplier Code to their related entities, suppliers, and subcontractors. The State of Victoria may require the Supplier to provide evidence of its compliance. Failure to meet the Victorian Supplier Code is treated as a breach of contract.

6.3.3. *Queensland public procurement*

The Queensland Government's Supplier Code of Conduct applies to all government procurement activities.[79] It requires suppliers to undertake reasonable efforts to ensure that businesses within their supply chain are not engaged in, or complicit with, human rights abuses, including forced or child labour.

6.3.4. *Western Australian public procurement*

The Western Australian Government will put into place a debarment regime under its newly enacted Procurement Act 2020 (**WA Procurement Act**).[80] Although the WA Government has not issued regulations for that debarment regime, materials drafted in connection with the Procurement Bill 2020 (WA) (**WA Procurement Bill**) provide some guidance. The regime would bar a business that acts unlawfully or unethically from access to the Western Australian Government's AUD 27 billion suite of procurement

[78] Victorian Government Purchasing Board, "Supplier Code of Conduct," Victoria State Government (Code), available at: https://bit.ly/2HY2Pzl.

[79] Queensland Government, "Supplier Code of Conduct," Queensland Government (Code), available at: https://bit.ly/2YxUaJJ.

[80] Procurement Act 2020 (WA) s 33.

contracts[81] for goods, services, and works with State agencies[82] and cooperative arrangements with authorised bodies.[83] However, the regime would not apply to certain types of procurement (such as "non-relevant" leases,[84] security interests, and staff employment).[85]

Debarment will be required if a supplier's conduct is likely to have an adverse effect on the public system or on public confidence in the character and integrity of the State and its procurement system.[86]

A supplier may be debarred for up to two years if it has acted unlawfully or unethically within the last three years (which includes failing to meet reporting obligations under the Federal Modern Slavery Act), or up to five years if it has committed a serious offence under the Fair Work Act 2009 (Cth), work health and safety laws, or any other law as specified under the regime.[87] A debarred supplier and its affiliates[88] will be precluded from:

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[81] Western Australia, *Parliamentary Debates*, Legislative Council, 21 May 2020, 3052 (Stephen Dawson).

[82] A "State agency" is defined in the WA Procurement Bill section 5 as including: (a) an agency as defined in the Financial Management Act 2006 (WA) section 3 other than a university listed in Schedule 1 to that Act; (b) an entity controlled by a Minister, or by an agency referred to in paragraph (a), through which that Minister or agency procures goods, services, or works for the performance of the functions of that Minister or agency; and (c) an entity (or an entity of a kind) that is established for a public purpose or is funded by the State and that is prescribed by the regulations to be a State agency. However, this definition excludes: (a) a body established by or under the Electricity Corporations Act 2005 section 4, the Port Authorities Act 1999 section 4, the Water Corporations Act 1995 section 4, or the Western Australian Land Authority Act 1992 section 5 or a subsidiary of any such body; (b) an entity (or an entity of a kind) that is prescribed by the regulations not to be a State agency.

[83] An "authorised body" is defined in the WA Procurement Bill section 6 as a body which has been declared (through a procurement direction) by the Minister responsible for the Act or the head of a State agency to be an authorised body, which may include: (a) a body (whether incorporated or not), or the holder of an office, that is established or continued for a public purpose under a written law or a law of another state, a territory, or the Commonwealth; (b) a local government or a regional local government or a similar local government authority of another state or a territory; (c) a university; (d) a charitable body; or (e) an entity (or an entity of a kind) prescribed by the regulations.

[84] A "relevant lease" is defined in the WA Procurement Bill section 9(1) as: (a) the lease of an office or other space or facility for use by a State agency (including an arrangement for its construction by another party and lease back to a State agency); or (b) the lease of an office or other space or facility of a State agency for use by another party. However, this definition does not include: (a) a lease for social housing purposes, for water supply purposes, for environment protection purposes, or for other public purposes; or (b) a lease of unimproved land; or (c) a lease of Crown land under the Land Administration Act 1997 granted by the Minister administering that Act; or (d) a lease of any other kind prescribed by the regulations to be excluded from this definition.

[85] Pursuant to section 9(2), the WA Procurement Bill does not apply to: (a) the acquisition or disposal of land or of an interest in land, other than a relevant lease; (b) the employment of staff of a State agency or the appointment of a person to a statutory or executive office; (c) an investment, loan, or other financial transaction; (d) a grant of money; (e) the acquisition by a State agency of a thing for resale; (f) procurement between State agencies (other than for the purposes of cooperative arrangements under Part 5); or (g) any procurement (whether of specified things, of any specified kind, or by any specified entity) that the regulations exclude from the application of this Act.

[86] Government of Australia, Department of Finance, *Draft - Western Australian Debarment Regime* (Draft Legislative Regime, June 2020) 2.

[87] *Ibid.* 6–11[6]–[6.4].

[88] An "affiliate" of a supplier is defined in the WA Procurement Bill section 32 and the Draft Western Australian Debarment Regime clause 14 as an entity where, directly or indirectly in relation to the supplier: (a) either one controls or has the power to control the other; or (b) a third party controls or has the power to control both; (c) they have a Senior Officer in common; (d) they are a Related Body Corporate within the meaning of the Corporations Act 2001 (Cth); or (e) one is a Successor Entity to the other. Factors which indicate control are: (i) ownership; (ii) having a common Senior Officer; (iii) being a spouse or relative of the other, or having a Senior Officer who is a relative or spouse of a Senior Officer of the other; or (iv) common board membership.

- any award, or seeking or soliciting an award, of a relevant procurement contract or subcontract;
- acting as an agent or representative of another supplier in relation to a relevant procurement contract; and
- unless the head of a State agency approves, extending the duration or scope of an existing procurement contract.[89]

Additionally, a State agency may terminate any existing contract with a debarred supplier, irrespective of whether the supplier was debarred before or after the contract was executed.[90]

Where a State agency in good faith debars a supplier or terminates its contract, the supplier will have no recourse to damages, and the State agency will not incur civil liability.[91]

6.3.5. South Australian public procurement

South Australia does not have procurement rules addressing modern slavery practices. Similarly to Victoria and Queensland, it enacted the Labour Hire Licensing Act 2017 (SA) after an investigation concluded that exploitation in the labour hire industry was widespread.

This legislation imposes licencing requirements that tangentially address modern slavery. It seeks to ensure that the public and commercial spheres use only vetted and legally compliant labour hirers.

6.3.6. Tasmanian public procurement

The Tasmanian Government tabled the Tasmanian Modern Slavery Bill in Parliament in June 2020 until the harmony issues between the NSW Modern Slavery Act and the Federal Modern Slavery Act are resolved. The Tasmanian Modern Slavery Bill, as currently drafted (and likely to change) proposes several requirements with respect to public procurement:

- the Supply Chain (Anti-slavery) Commissioner (**Commissioner**) appointed under the Bill and the Minister must monitor the effectiveness of due diligence procedures to ensure that goods and services provided by government agencies[92] are not the product of modern slavery;[93]
- the Commissioner must keep (and make publicly available free of charge) a register identifying any "commercial organisation,"[94] and any other entity that has disclosed that modern slavery may be

[89] Government of Australia, Department of Finance, *Draft - Western Australian Debarment Regime* (Draft Legislative Regime, June 2020) 12 [10.1].

[90] *WA Procurement Bill* s 35.

[91] *Id*. s 36(8).

[92] A "government agency" is defined in the Tasmanian Supply Chain Bill section 5(1) as including: (a) a Tasmanian government sector agency; (b) a Tasmanian Government Business Enterprise; (c) a State-owned corporation; (d) a company incorporated under the Corporations Act 2001 of the Commonwealth of which one or more shareholders are a Minister of the Crown; (e) a council, county council owned organisation, or joint organisation within the meaning of the Local Government Act (Tas) 1993; (f) any other public or local authority that is constituted by or under an Act or that exercises public functions; and (g) any public or local authority that is constituted by an Act of another jurisdiction that exercises public functions.

[93] *Tasmanian Supply Chain Bill* s 25.

[94] A "commercial organisation" is defined in the Tasmanian Supply Chain Bill section 24 as any corporation, incorporated partnership, association, or other body of persons that: (a) supplies goods and services for profit or gain, and (b) has a total turnover in a financial year of the organisation of not less than AUD 30 million or such other amount as regulations may prescribe. Commercial organisations are required to make a modern slavery statement for each financial year.

taking place in its supply chain[95] (commercial organisations must submit an annual modern slavery statement, while other entities may voluntarily make such a statement);

- the Commissioner may develop (and make publicly available) a code of conduct to provide guidance for government agencies and non-government entities on identifying, remediating, and monitoring modern slavery risks within supply chains;[96]
- the Commissioner may promote public awareness of, and provide advice on, the identification, remediation, and monitoring of modern slavery risks;[97]
- the Commissioner must prepare and furnish to the relevant Minister (as the final legislation determines) an annual report outlining the Commissioner's activities, progress, and recommendations, as well as evaluating the response of government agencies to the Commissioner's recommendations.[98]

The Tasmanian Supply Chain Bill also requires government agencies and non-government entities to cooperate with the Commissioner and to disclose any information and provide any assistance required by the Commissioner.[99] No criminal or civil liability will arise where a person provides such disclosure in good faith.[100]

6.3.7. Australian Capital Territory public procurement

The Australian Capital Territory Government introduced the Government Procurement (Charter of Procurement Values) Direction 2020 (**ACT Charter**) under the Government Procurement Regulation 2007. The ACT Charter sets the key values for procurement, including transparent and ethical engagement. "Territory Entities"[101] must not knowingly engage with suppliers that demonstrate objectionable, dishonest, unethical, or unsafe business practices (including being aware of modern slavery practices). They should support initiatives to abate these practices. Territory Entities must report (from 1 January 2021) to the Minister for Government Services and Procurement as to how the values within the ACT Charter (including transparent and ethical engagement) have been applied in any procurement process resulting in a "notifiable contract."[102]

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[95] *Id*. s 26.

[96] *Id*. s 27.

[97] *Id*. s 28.

[98] *Id*. s 19.

[99] *Id*. s 14.

[100] *Id.* s 16.

[101] A "Territory entity" is defined in the Government Procurement Act 2001 (ACT), and qualified by the Government Procurement Regulation 2007 (ACT) section 13, as including: (a) an administrative unit; or (b) a Territory entity under the Auditor-General Act 1996; and (c) for an unincorporated Territory entity — includes a member of the entity acting on behalf of the Territory. However, this definition does not include: (a) The University of Canberra; (b) a Territory-owned corporation; (c) another entity established under the Corporations Act; (d) the Office of the Legislative Assembly; or (e) an officer of the Assembly an entity declared under the regulations not to be a Territory entity.

[102] ACT Charter s 4; a "notifiable contract" is defined in the Government Procurement Act 2001 (ACT) section 25, and qualified by the Government Procurement Regulation 2007 (ACT) Part 5, as including any contract entered into by the Territory or a Territory entity with a total consideration that is (or is estimated to be) over AUD 25,000. However, this definition excludes any intergovernmental agreement, as well as any contract for employment or the settlement of legal liability to an individual.

6.3.8. Northern Territory public procurement

In November 2020, the Northern Territory implemented a supplier code of conduct similar to those in Victoria and Queensland. The Northern Territory Procurement Code (**NT Procurement Code**) requires suppliers of goods and services to government agencies[103] to comply with Northern Territory laws, policies, and government terms and conditions. One such policy obligates suppliers to act ethically and "[p]roactively identify and address modern slavery risks in the supply chain, including ensuring all work is undertaken without coercion, providing a fair and ethical workplace, and engaging only workers who are the applicable legal age."[104]

The NT Procurement Code suggests that suppliers' non-compliance could result in measures such as suspending or terminating a contract, a government audit, information sharing to federal, state and territory agencies to inform future tenders, and, if the supplier is accredited by Contractor Accreditation Ltd,[105] sanctions associated with that accreditation.[106]

Additionally, as a supplier will be a "public body" under the Independent Commissioner Against Corruption Act 2017 (NT), a breach of the NT Procurement Code may also amount to "improper conduct" under this Act.[107] Accordingly, a supplier may be subject to audits and investigations by the Independent Commissioner Against Corruption and subsequently be liable for offences associated with improper conduct.

7. RESTITUTION AND VICTIM COMPENSATION

7.1. Overview

Australia does not have a national statutory compensation program for victims of slavery or human trafficking. However, victims of slavery or human trafficking in Australia can seek financial compensation in three ways:

- a restitution or reparation order under Commonwealth, state or territory legislation against the perpetrators of the crime as part of their sentences;
- an award through state-based statutory compensation schemes; or

[103] An "agency" is defined in the Procurement Government Policy (NT) section 7 as including a unit of government administration, or office or statutory corporation, stated in an Administrative Arrangements Order to be an agency for the purposes of the Financial Management Act 1995 (NT).

[104] NT Code cl 4.2.

[105] Contractor Accreditation Ltd is a non-profit company established by the Northern Territory Chamber of Commerce, the Master Builders Association Northern Territory, and the Northern Territory Small Business Association to manage a scheme of self-regulation for the State's building and construction industry.

[106] *See* Procurement Act 1995 (NT), *Procurement Governance Policy 2019* (NT), and *Procurement Rules 2020* (NT).

[107] "Improper conduct" is defined in the Independent Commissioner Against Corruption Act 2017 (NT) section 9 as including: (a) corrupt conduct; (b) misconduct; (c) unsatisfactory conduct; (d) anti-democratic conduct; (e) conduct constituting an offence against this Act; (f) conduct (the secondary conduct) by any person in relation to conduct mentioned in paragraphs (a) to (e) (the primary conduct) as provided by subsection (2). Out of these options, contravening the NT Code would likely amount to "unsatisfactory conduct" under section 12, which substantially involves an illegality or impropriety that is connected to public affairs and results in a public detriment.

- a compensation award in the civil courts (typically through a claim under tort, anti-discrimination, or employment law).

Each avenue presents certain challenges for victims:

- restitution orders generally provide less compensation than civil claims, require the court to find a perpetrator guilty of an offence, and depend on the perpetrator's Australian assets;
- compensation schemes require a court to find the perpetrator guilty of an offence and are only available for victims of state or territory crimes (though modern slavery offences are generally prosecuted under Commonwealth law); and
- compensation awards can be difficult to enforce against sophisticated criminal enterprises involved in human trafficking.

7.2. Restitution and Reparation Schemes

7.2.1. Commonwealth reparation scheme

The Crimes Act 1914 (Cth) allows a court to order persons who are convicted of a Commonwealth criminal offence to make reparations to the victims of their crime for any loss or expense incurred as a result of the offence.[108]

In practice, the requirement for a criminal conviction impedes reparation orders for victims of human trafficking, given the historically low prosecution and conviction rates for slavery and slavery-like offences in Australia.[109]

In December 2017, the Joint Standing Committee on Foreign Affairs, Defence and Trade reported that the Law Council of Australia and Anti-Slavery Australia were unaware of any case where a reparation order had been sought in proceedings relating to human trafficking.[110]

Moreover, reparation orders are discretionary and depend on the offender's financial capacity. No legislation guarantees that reparation payments will be made.[111] This can leave many victims unprotected, particularly if offenders reside outside of, or do not possess assets in, Australia.

7.2.2. State reparation schemes

Courts in all Australian states can require offenders, as part of their sentences, to compensate victims for their loss as a result of the offender's criminal conduct. Currently, state and territory victims' compensation schemes are limited to state and territory offences or acts of violence, such as sexual assault. This precludes eligibility for compensation where an offence or act of violence cannot be proved.

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[108] Crimes Act 1914 (Cth) s 21B(1)(d).

[109] Commonwealth of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, *Parliament of Australia* (Report, December 2017), available at: https://bit.ly/2ycYeR8 182 [7.8].

[110] Commonwealth of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, *Parliament of Australia* (Report, December 2017), available at: https://bit.ly/2ycYeR8 [6.114].

[111] A person cannot be imprisoned for any failure to make the reparation payments they are ordered to pay: Crimes Act s 21B(2).

7.3. Statutory Compensation Schemes

Australia has obligations under various international instruments to provide a national compensation scheme for victims of human trafficking.[112] Although a national scheme has some community support,[113] the Australian Government's position is that, under Australia's domestic legal system, compensation for victims of crime is not a federal matter, and the states and territories are responsible for implementing any such scheme. Accordingly, the Government has no plan to establish a federal compensation scheme for the victims of human trafficking and slavery.

All Australian states and territories have legislation establishing victims' compensation schemes. Each scheme provides victims of violence with financial and practical support. Some schemes also provide for counselling services, financial assistance, and, in some cases, recognition payments. The schemes are not designed to replicate the compensation that might be available to victims through civil claims. Instead, the schemes are designed to provide victims with statutory recognition of their hardship suffered due to the criminal conduct, and assist in their recovery. Recognition payments differ significantly between jurisdictions and can range from AUD 10,000 to AUD 100,000.[114]

At present, the rights and remedies available under applicable state and territory legislation do not specifically apply to victims of human trafficking or slavery. To be eligible, a person must have suffered an act of violence[115] (including an injury as a result). Victims of sexual assault and domestic violence are eligible,[116] but not specifically victims of human trafficking or slavery.

That said, should the NSW Modern Slavery Act come into effect (and assuming that the relevant provisions are retained), it will amend New South Wales' victim compensation scheme so that the definition of "victim of crime" includes a person who suffers harm resulting from modern slavery. Consequently, victims of modern slavery will become eligible for support, financial assistance, and approved counselling.[117]

7.3.1. New South Wales

As the laws in New South Wales currently stand, victims injured as a direct result of an "act of violence" are eligible for compensation. An "act of violence" means an act that:

- apparently occurred in the commission of an offence;
- involved violent conduct; and

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[112] *See* United Nations Convention Against Transnational Organised Crime and United Nations Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003).

[113] *See* Commonwealth of Australia, "National Action Plan to Combat Human Trafficking and Slavery 2015–2019," *Australian Government Department of Home Affairs* (Report, 2014), available at: https://bit.ly/2uv4LYd; Commonwealth of Australia, "Report: An Inquiry into Human Trafficking, Slavery and Slavery-like Practices," *Parliament of Australia* (Report, 2017) [2.130], available at: https://bit.ly/2CIJgHA; Commonwealth of Australia, "Report: Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia," Parliament of Australia (Report, 2017) [6.129], available at: https://bit.ly/2ycYeR8.

[114] Anti-Slavery Australia and Law Council of Australia, "Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime," *Anti-Slavery Australia: Working to Abolish Slavery* (Report, 2016), available at: https://antislavery.org.au/report-on-establishing-a-national-compensation-scheme-for-victims-of-commonwealth-crime/.

[115] Victims Rights and Support Act 2013 (NSW) s 19.

[116] *Id*. s 19(3).

[117] Modern Slavery Act 2018 (NSW) sch 5.7.

- resulted in injury (which can be psychological and psychiatric harm).

There are several barriers to victims receiving compensation under the New South Wales scheme. One barrier is that victims will not be eligible if the act of violence occurred while the victim was engaged in behaviour constituting an offence. Further, the victim must apply within two years of the offence (in most cases) and submit a police or government agency report verifying that the act of violence injured the victim.

The maximum payment under the New South Wales scheme for economic loss is AUD 30,000; however, other types of assistance may be payable (such as a recognition payment, which is capped at AUD 10,000).

7.3.2. Victoria

Compensation is available for victims of an "act of violence," which is defined as a criminal act that occurred in Victoria and resulted in injury or death (although the injury or death does not have to occur in Victoria). Victims may receive up to AUD 60,000 under the Victorian scheme.

A "criminal act" is defined to be:

- certain acts (such as rape, indecent assault, and incest) under the Crimes Act 1958 (Vic); and
- offences that involve injury (injury is broadly defined to include physical harm, mental illness, and pregnancy) and are punishable by imprisonment.

Victims applying for compensation under the Victorian scheme face a number of barriers, including the two-year time limit for submitting applications, the requirement that the "act of violence" must occur in Victoria, and the requirement that the victim must have an injury. Further, the Victims of Crime Assistance Tribunal must consider whether any past criminal activity by the victims could be held against them and whether an "act of violence" occurred.

7.3.3. Western Australia

Victims of crimes occurring in Western Australia may be eligible to apply for compensation of up to AUD 75,000. Applicants must prove that they were injured as a result of an offence committed against them. "Injury" is defined to include bodily harm, mental and nervous shock, or pregnancy, and "offence" is broadly defined to include a crime, misdemeanour, or simple offence committed in Western Australia. Lack of a conviction does not preclude compensation.

Compensation will be denied if the victim fails to take any step that the assessor thinks is reasonable to assist in identifying, apprehending, or prosecuting the offender. For example, compensation may be denied if the victim does not report the crime to the police or if the victim does not cooperate or assist the police at all stages of the investigation. Further, victims are not eligible for compensation if the victim was committing a separate offence at the time of the relevant offence causing the victim's injury. Applications for compensation must be made within three years after the date of the offence.

7.3.4. Queensland

"Primary victims" injured as a direct result of an act of violence committed against them are eligible to receive victim compensation. An "act of violence" is a crime that is committed in Queensland and directly results in the death or injury of one or more persons. "Injury" is broadly defined as including bodily injury, mental illness or disorder, intellectual impairment, pregnancy, and disease. For sexual offences, "injury" includes a sense of violation and reduced self-worth.

Victims may receive financial assistance up to AUD 75,000.

In Queensland, the major barriers to victims receiving compensation are:

- the "act of violence" must occur in Queensland and result in injury or death;
- victims are not entitled to financial assistance, absent a reasonable excuse, if they did not report the act of violence to a police officer, counsellor, psychologist, or doctor;
- victims are not entitled to financial assistance if they did not provide reasonable assistance in the arrest or prosecution of the offender; and
- victims must apply within three years after the act of violence.

7.3.5. South Australia

"Immediate victims" are eligible to receive compensation. "Immediate victims" are either persons who suffer physical injury or psychological injury as a result of the offence (and includes immediate family members of a child or deceased person if an offence was committed against them). "Offence" is broadly defined to include a range of criminal acts (including indictable offences and summary offences). Notably, the offence need not occur in South Australia.

Victims hoping to get compensation through the South Australian scheme must report the crime, cooperate with police, and make the claim within three years after the commission of the offence, or 12 months after the date of death (for an application arising from the victim's death).

The maximum amount of compensation is AUD 100,000.

7.3.6. Australian Capital Territory

Primary victims, persons responsible for the maintenance of primary victims, and relatives of deceased primary victims are eligible to receive compensation for specified "violent crimes," defined by reference to specific offences under the Crimes Act 1900 (ACT) and Criminal Code 2002 (ACT). In practice, this definition precludes compensation for victims of slavery and human trafficking unless they were assaulted, forcibly confined, abducted, sexually assaulted, or subjected to sexual servitude within the meaning of the Crimes Act 1900 (ACT).

A victim may receive between AUD 100 and AUD 50,000 (including "special assistance" of up to AUD 30,000 in cases of sexual assault or "extremely serious" injury resulting in a permanent reduction in the victim's quality of life).

The main barriers precluding compensation are:

- the limitation to particular "violent crimes" within the Crimes Act 1900 (ACT) or Criminal Code 2002 (ACT);
- an application must be made within 12 months of the day the criminal injury was sustained (this period may be extended on application);
- the offence was not reported to the police; and
- the victim was engaged in a "serious crime" at the time the criminal injury was sustained.

7.3.7. Northern Territory

Victims of an "act of violence" may apply for assistance. An "act of violence" includes various "criminal acts" under Northern Territory criminal laws and "criminal acts" that occur in the Northern Territory and directly result in the injury or death of one or more persons.

"Criminal acts" is not defined under the Victims of Crime Assistance Act 2006 (NT) and may include federal crimes of trafficking and slavery under the Criminal Code Act 1995 (Cth). However, victims would need to prove that they suffered injury or death. "Injury" is defined to mean physical illness or injury, a recognisable physiological or psychiatric disorder, or pregnancy.

A primary victim may receive up to AUD 40,000. The main barriers to victims receiving compensation under the Northern Territory scheme are:

- the crime must occur in the Northern Territory;
- the victim must apply within two years after the date of the violent act;
- the victim is obliged to assist the police in a "material way" in the investigation; and
- if the victim has not reported the violent act to the police, the assessor must be satisfied that the victim's reasons prevented the making of a report.

7.3.8. Tasmania

A primary victim who suffers "injury" as a result of the commission of an "offence" can apply for financial assistance. "Offence" is defined to mean an act of violence, so offences under the Criminal Code 1995 (Cth) are arguably not excluded from the definition of "offence" so long as they involve "violence by one person against another." Injury is defined to include impairment of mental health and pregnancy.

While the legislation does not specify where the offence must occur, the Department of Justice application form for victims of crime assistance states that compensation is available to victims of "a violent crime or sexual offence that happened in Tasmania."

The maximum amount of compensation payable is AUD 50,000; however, the Commissioner has discretion to pay certain additional expenses.

The main barriers to victims receiving compensation are:

- the victim must demonstrate a crime involving "violence by one person against another" and resulting in injury;
- the victim must reasonably assist in identifying, apprehending, and prosecuting the alleged offender;
- the victim must apply within three years of the relevant offence (this can be extended under special circumstances); and
- the crime must occur in Tasmania.

7.4. Tortious claims and remedies

Victims can bring civil claims in tort against perpetrators of modern slavery to recover damages.[118] Civil claims in tort do not require that the State has charged the perpetrator with a criminal offence. Civil claims also are separate from Australia's current statutory compensation schemes.

7.4.1. Battery and assault

Perpetrators of almost all forms of modern slavery may be liable in tort for a claim of battery or assault. Battery occurs when a person directly and either intentionally or negligently causes some offensive physical contact with another (for example, physical violence or harassing physical contact). The tort of assault is committed when a person threatens to commit battery. The tort of assault occurs where the threat is conditional (for example, a threat to hit a person unless the person obeys the aggressor's command) and where the threat, once made, remains in effect even though it is not constantly reiterated.

7.4.2. False imprisonment

The tort of false imprisonment occurs when persons are confined against their will. The tort generally requires the offender to prevent the victims from leaving a particular place (for example, because of locked doors or gates); however, it is generally accepted that imprisonment can take place without physical incarceration. For example, threats or an assertion of authority can cause people to believe they cannot leave. The tort of false imprisonment provides a remedy for most victims of trafficking or slavery, because those offences usually restrict freedom of movement.

7.4.3. Deceit

The tort of deceit is committed when a person makes a representation (by words or conduct) that the person knows to be false or where the person is reckless as to the truth of the representation, and another person's reliance on that representation caused loss or damage.

The tort of deceit may offer a remedy to those victims of human trafficking and modern slavery who are induced to cross national borders for purposes of exploitation through deception and misrepresentation, such as for job prospects or the financial rewards available. Successful claimants may recover their economic loss and compensatory damages for personal injury (and, in particularly egregious cases, exemplary damages).

7.4.4. Conspiracy

The tort of conspiracy provides a remedy for victims of trafficking or slavery in cases where two or more persons have been involved in the trafficking and exploitation of the victims.

The tort of conspiracy occurs when two or more people agree to do an unlawful act with intent to harm a person's trade, business, or other economic interest. This type of conspiracy (an "unlawful acts conspiracy") does not require the intention to harm the person to have been the predominant or only intention, and generally, the necessary intention is inferred from the fact that the injury to the person would necessarily follow from the offenders' primary aim of furthering their own interests.

[118] The amount recoverable through a tort claim depends on both the damage suffered by the claimant and the defendant's assets.

7.4.5. Proceeds of Crime

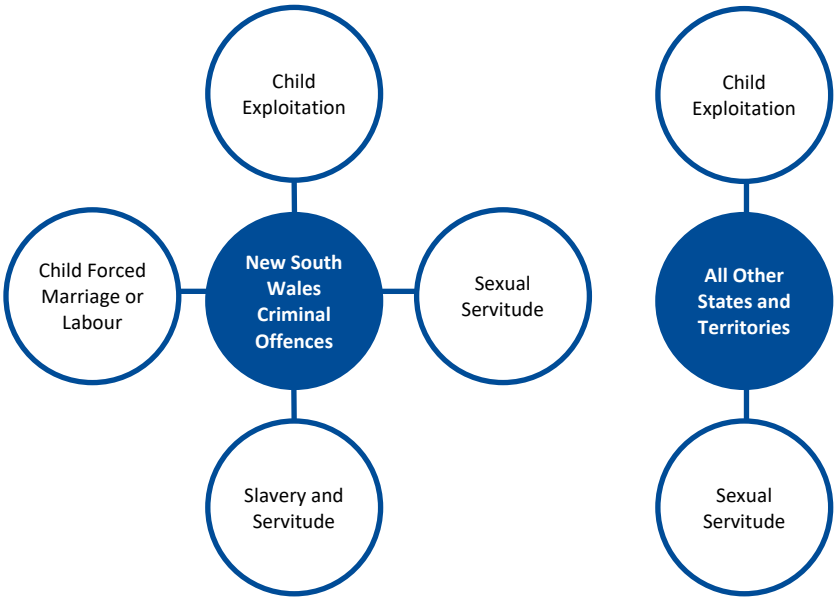
Legislation in the Commonwealth and each Australian state and territory also permits confiscation of the proceeds of crime. This legislation aims to remove the economic incentive for modern slavery and human trafficking. Typically, the confiscated amounts are returned to the community to fund anti-crime initiatives.[119] Given the small number of criminal prosecutions secured for slavery and slavery-like offences so far in Australia, confiscation has not been a frequently applied tool.

8. AUSTRALIAN STATE AND TERRITORY CRIMINAL OFFENSES RELATING TO SLAVERY, SEXUAL SERVITUDE, AND ONLINE CHILD EXPLOITATION

8.1. Overview of Australian State and Territory Criminal Offenses

The Australian States of New South Wales, Victoria, South Australia, and Western Australia, and the Australian Capital Territory and Northern Territory have long had criminal offences for sexual servitude and, in some cases, deceptive recruiting for sexual services. In addition, should the NSW Modern Slavery Act commence in its proposed form, it will become the first Australian state or territory to add criminal offences for slavery, servitude, and child forced labour so as to align with the Commonwealth Criminal Code.

Each of the Australian states also has a criminal offence (either directly or indirectly) for online sexual exploitation of children.



[119] *See* Proceeds of Crime Act 1987 (Cth); Proceeds of Crime Act 2002 (Cth); Confiscation of Criminal Assets Act 2003 (ACT); Criminal Property Forfeiture Act 2002 (NT); Confiscation of Proceeds of Crime Act 1989 (NSW); Criminal Proceeds Confiscation Act 2002 (Qld); Criminal Assets Confiscation Act 2005 (SA); Serious and Organised Crime (Unexplained Wealth) Act 2009 (SA); Crime (Confiscation of Profits) Act 1993 (Tas); Confiscation Act 1997 (Vic); Criminal Property Confiscation Act (WA) 2000.

8.2. New South Wales

8.2.1. Slavery, slavery-like, and forced marriage offense

The NSW Modern Slavery Act, in its current form (noting that it is still subject to change through harmonisation with the Federal Modern Slavery Act) would amend the New South Wales Crimes Act 1900 (NSW) (**NSW Crimes Act**) to add criminal offences for slavery, servitude, child forced labour, and child forced marriage. However, as the NSW Modern Slavery Act has not yet commenced, these proposed amendments are not currently enforceable.

In the proposed amendments to NSW Crimes Act, the terms "servitude" and "slavery" are given the same defined meanings as those terms in the Commonwealth.

Once it commences, it will be an offence under the NSW Crimes Act (punishable by a maximum penalty of 25 years of imprisonment) for a person to:

- hold another person in slavery or servitude in circumstances where the person knows or ought to know that the victim is held in slavery or servitude; or
- require a child to perform forced or compulsory labour[120] in circumstances where the person knows or ought to know that the child is being required to perform forced or compulsory labour.[121]

In determining whether a person is being held in slavery or servitude under the proposed amendments to the NSW Crimes Act, the fact-finder can consider all relevant circumstances, including those indicating the victim's exploitation in providing work or services, and any coercion, threat, or deception (including in relation to the supply or sale of the person's tissue).[122]

It will also be a separate offence under the NSW Crimes Act (punishable by a maximum penalty of nine years of imprisonment) for a person to intentionally or recklessly cause a child to enter into a forced marriage, or knowingly have a child enter into a forced marriage.[123]

8.2.2. Sexual servitude offenses

The NSW Crimes Act contains several offences for threats or other coercion used against a victim in circumstances involving "sexual servitude." The NSW Crimes Act defines this term as the condition of a person who provides sexual services[124] and who, due to the use of force or threats,[125] either is:

- not free to cease providing sexual services; or

[120] "Forced or compulsory labour" will be defined in the NSW Crimes Act 93AB(2) so that it *excludes* work or service that forms part of normal civil obligations.

[121] *See* section 93AB.

[122] *See* section 93AB(3) and (4).

[123] *See* section 93AC.

[124] "Sexual services" is defined in the NSW Crimes Act section 80B(2) as the commercial use or display of the body of the person providing the service for the sexual arousal or sexual gratification of others.

[125] "Threat" is defined in the NSW Crimes Act section 80B(1) as a: (a) threat of force; (b) threat to cause a person's deportation; or (c) threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of commercial sexual services.

- not free to leave the place or area where the person provides sexual services.[126]

It is an offence under the NSW Crimes Act (punishable by a maximum penalty of 20 years of imprisonment for an aggravated offence, and 15 years of imprisonment otherwise) for a person to intentionally or recklessly cause another person to enter into or remain in sexual servitude.[127]

The NSW Crimes Act also makes it a separate offence (punishable by a maximum penalty of 19 years of imprisonment for an aggravated offence, and 15 years of imprisonment otherwise) for a person to knowingly or recklessly conduct a business[128] that involves the sexual servitude of other persons.[129]

8.2.3. Online child exploitation offenses

8.2.3.1 Grooming, procuring, and meeting offenses

It is an offence to procure, groom, or meet a child (under the age of 16) following grooming. Persons over 18 years of age will be liable for a "grooming" offence if they expose a child to indecent material, provide a child with an intoxicating substance, or provide any financial or other material benefit, with the intention of making it easier to procure the child for unlawful sexual activity.[130]

The maximum penalty for "procuring" and "meeting" a child for unlawful sexual activity is 12 years of imprisonment and 15 years of imprisonment for the aggravated offence of conduct involving a person under the age of 14. "Grooming" a child for unlawful sexual activity carries a maximum penalty of 10 years of imprisonment and 12 years of imprisonment for the aggravated offence of grooming a child under the age of 14.

It is also an offence for a person over 18 years of age to provide financial or material benefit to another person with the intention of expediting the procurement of a child under that person's authority for unlawful sexual activity.[131] This offence is punishable by five years of imprisonment where the child is at or above 14 years of age, and six years of imprisonment where the child is younger than 14 years of age.

Additionally, it is an offence to use, procure the use of, or consent[132] to the use of a child for "child abuse material." Material is deemed "child abuse material" if it depicts or describes content in a way that a reasonable person would regard as being offensive, including:

- a child being tortured or abused;
- a child engaged in a sexual pose or activity;
- a child in the presence of another person who is engaged in a sexual pose or activity; or

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[126] *See* section 80B(1).

[127] *See* section 80D.

[128] "Conducting a business" is defined in the NSW Crimes Act section 80E(3) to include: (a) taking any part in the management of the business; (b) exercising control or direction over the business; or (c) providing finance for the business.

[129] *See* section 80E.

[130] *See* section 66EB.

[131] *See* section 66EC.

[132] An offence occurs when a child is under the "care" of a person, and that person consents or allows the child's use in child abuse material. Under section 91G(4), a person may have the "care" of a child without being entitled by law to have custody of that child.

- depicting a child's private parts.

This offence has a maximum penalty of 10 years of imprisonment where the child is at or above the age of 14, and 14 years of imprisonment where the child is under the age of 14. Under proposed amendments to the NSW Crimes Act by the NSW Modern Slavery Act, the commission of this offence in "circumstances of aggravation" will have a maximum penalty of 20 years of imprisonment.[133]

8.2.3.2 Child abuse material and digital platform offenses

The NSW Crimes Act makes it an offence to produce, disseminate, or possess child abuse material.[134] This offence is punishable by a maximum penalty of 10 years of imprisonment. However, an exception to this offence exists if the accused was under 18 years of age and a reasonable person would consider that person's possession of the material to be acceptable with regard to: the material's nature and content, circumstances surrounding the relevant conduct, the accused's relationship with the depicted child, and the age, intellectual capacity, and vulnerability of the accused and depicted child.

The NSW Crimes Act specifies several defences to the child abuse material offence:

- the offence was committed innocently;[135]
- the offence was solely for public benefit;[136]
- the offence was by law enforcement officers acting in the course of their duties;[137]
- the material is classified under the Classification (Publications, Films and Computer Games) Act 1995 (Cth) (**Commonwealth Classification Act**) as a category other than "refused classification" (**Classification Defence**);
- the relevant conduct was necessary for or assisted research approved by the Attorney General;[138] or
- the accused proves, on the balance of probabilities, that the accused committed the offence when they were under 18 years of age and the relevant material only depicts the accused.[139]

[133] "Circumstances of aggravation" is defined in the NSW Crimes Act section 91G(3) as circumstances in which the child: is under 10 years of age, is in the company of another person(s), has a serious physical or cognitive disability, or is under the authority of the offender. An aggravated offence also occurs where the offender: takes advantage of a child who was under the influence of drugs or alcohol to commit the offence, breaks and enters into a building with the intention of committing the offence, deprives the child's liberty, or inflicts or threatens to inflict actual bodily harm on the child before committing the offence.

[134] *See* section 91H.

[135] *See* section 91HA(1).

[136] Conduct for "public benefit" is defined in the NSW Crimes Act section 91HA(3) as conduct that is necessary for or assists in enforcing, administering, monitoring compliance with, or investigating contraventions of the law. This definition also covers any conduct which is otherwise necessary for or assists in the administration of justice.

[137] *See* section 91HA.

[138] *See* section 91HA(7) – (8).

[139] *See* section 91HA(10) – (12).

The NSW Modern Slavery Act also would insert an offence within the NSW Crimes Act to prohibit the administration[140] of a digital platform that intentionally or knowingly deals with child abuse material for use by another person.[141] This offence attracts a maximum penalty of 14 years of imprisonment. A defence to this offence is that, on becoming aware of this illegal use of their digital platform, an administrator took reasonable steps to prevent other persons from using the platform to access such material.[142]

The NSW Modern Slavery Act also proposes to include an offence for persons 18 or more years of age to encourage another person to use a digital platform that deals with child abuse material, with the intention that the other person use that platform.[143] This offence involves a maximum penalty of 14 years of imprisonment.

The NSW Modern Slavery Act also would add an offence for intentionally providing information to another person about how to avoid detection of, or prosecution for, an offence relating to digital platforms.[144] This offence will be punishable by a maximum penalty of 14 years of imprisonment.

8.2.4. Extraterritorial application of New South Wales criminal laws

The NSW Crimes Act extends all criminal offences (including those relating to slavery, sexual servitude, and online exploitation) to conduct that occurs wholly outside of New South Wales but that has an effect occurring within the state.

The NSW Modern Slavery Act*,* in its current form, which will introduce criminal offences relating to slavery, servitude, child forced labour, and child forced marriage, expressly intends the Act to operate extraterritorially to the fullest extent possible, including to govern conduct and transactions that occur, and people and things located, outside the geographical limits of New South Wales.

8.3. Victoria

8.3.1. Sexual servitude offenses

The Victorian Crimes Act 1958 (VIC) (**Victorian Crimes Act**) has three offences for threats or other coercion used against a victim to provide sexual services, or the deceptive recruiting of a victim for commercial sexual services.

It is an offence under the Victorian Crimes Act for a person to use force, threaten, fully detain, engage in fraud or misrepresentation, or use a manifestly excessive debt owed or purported to be owed, in such a way that intentionally or knowingly causes a victim to either:

- provide or continue to provide commercial sexual services;[145] or

[140] An "administrator" will be defined in the NSW Crimes Act section 91HAA(3) as anyone who, with respect to the digital platform or a function of the platform: designs, creates, manages, or maintains the platform or function; provides a device to host the platform or function; or otherwise facilitates the operation and use of the platform or function.

[141] *See* section 91HAA.

[142] *See* section 91HA(1A).

[143] *See* section 91HAB.

[144] *See* section 91HAC.

[145] "Commercial sexual services" has the same definition in the Victorian Crimes Act section 53A as "sexual services" in the NSW Crimes Act; *see* section 53B.

- not be free to leave the place or area where the victim provides sexual services ("sexual servitude").[146]

It is also an offence under the Victorian Crimes Act for a person to conduct a business[147] involving sexual servitude.[148]

These offences all have a maximum penalty of 15 years of imprisonment. However, where the victim is under 18 years of age and the accused knows that the victim is (or probably is) under this age, the offence has an aggravated maximum penalty of 20 years of imprisonment.[149]

The Victorian Crimes Act makes it a separate offence for a person to deceive another person (the victim) about the fact that an engagement will involve the victim providing commercial sexual services.[150] This offence is punishable by a maximum penalty of 10 years of imprisonment for an aggravated offence where the victim is under 18 years of age and the accused knows that the victim is (or probably is) under this age,[151] and five years of imprisonment otherwise.

8.3.2. Online child exploitation offenses

8.3.2.1 Child abuse material offenses

Involving a child (persons under 18 years of age)[152] in the production of child abuse material, or producing, distributing, possessing, or accessing (by viewing or displaying) child abuse material has a maximum penalty of 10 years of imprisonment (**Class One Offences**).[153] The definition of "child abuse material" is substantially the same as that in the NSW Crimes Act.[154]

Similar to the proposed amendments to the NSW Crimes Act, the Victorian Crimes Act makes it a crime for websites to deal with child abuse material (**Class Two Offences**). It is an offence to engage in the administration[155] of a website used to deal with child abuse material.[156] Intentionally encouraging another person to use a website to deal with child abuse material also constitutes an offence.[157] These Class Two Offences carry a maximum penalty of 10 years of imprisonment.

The Victorian Crimes Act specifies that it is also an offence to intentionally provide information to another person with the intention that the person use the information to avoid or reduce the likelihood of the person's apprehension for committing either a Class One or Class Two Offence.[158] The comparable defence

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146 *See* section 53C.

147 "Conducting a business" has the same definition in the Victorian Crimes Act section 53D(3) as in the NSW Crimes Act.

148 *See* section 53D.

149 *See* section 53E.

150 *See* section 53F.

151 *See* section 53G.

152 *See* section 51A(1)(a).

153 *See* sections 51B, 51C, 51D, 51G, and 51H.

154 *See* section 51A(1)(a).

155 "Administer" is defined in the Victorian Crimes Act section 51A(1) as building, developing, and maintaining the website but does not include hosting the website. This is much more restrictive than the definition provided in the NSW Crimes Act.

156 *See* section 51E.

157 *See* section 51F.

158 *See* section 51I.

in the NSW Crimes Act only applies to Class Two Offences. This offence attracts a maximum penalty of 10 years of imprisonment.

Several statutory exceptions and defences apply both to Class One Offences and Class Two Offences:

- the accused has an applicable role connected with the administration of law[159] and committed the offence in good faith throughout the course of official duties;[160]
- the relevant material satisfies the Classification Defence;[161]
- the material possesses artistic merit and was not produced with the involvement of a person under 18 years of age at the time of production;[162] or
- the material is of public benefit.[163]

Mistaken but honest and reasonable belief that the relevant child abuse material would not reasonably be considered offensive is not a defence to either Class One or Class Two Offences.[164]

There is also an exception and several defences available only to Class One Offences. The exception covers situations where the accused offenders are children and the relevant material is an image either depicting themselves alone or themselves being a victim of a criminal offence punishable by imprisonment.[165] Several defences also exist where the relevant material is an image, does not depict a criminal offence punishable by imprisonment, and either:

- the accused is a child and, at the time of commissioning the offence, the accused was not more than two years older than the youngest child depicted in the image;[166]
- the image depicts the accused as a child and is not distributed by the accused;[167]
- the depicted child was at least 16 years of age and not under the accused's care, supervision, or authority. In these circumstances, the accused must not have distributed the image to anyone but the

[159] Applicable roles as defined in the Victorian Crimes Act section 51J include those concerning the investigation or prosecution of offences and employees of the Department of Justice and Regulation who are authorised to engage in that conduct by the Secretary to that Department.

[160] *See* section 51J.

[161] *See* section 51K.

[162] *See* section 51L(a).

[163] "Public benefit" is defined in the Victorian Crimes Act section 51L(2) as including genuine medical, legal, scientific, or educational purposes. Demonstrative examples of "public benefit" which are provided within the statute include textual material used by a psychology professor that illustrates an abnormal psychological profile or a picture of a child torture victim in a war zone which was taken and submitted for publication by a photojournalist; *see* 51L(1)(b).

[164] *See* section 51U.

[165] *See* section 51M.

[166] In these circumstances, the defence can be made out where the accused reasonably believed that the relevant image did not depict a criminal offence punishable by imprisonment or where the accused reasonably believed they were not more than two years older than the youngest child depicted in the image; *see* section 51N.

[167] *See* section 51O.

depicted child, been not more than two years older than that child, and at the time of committing the offence reasonably believed that the child consented to the conduct;[168] or

- the accused has not distributed the image to any person other than the depicted child, and at the time of the image being taken, the child was at least 16 years of age; and the accused and child were either legally married; or domestic partners, and the accused was no more than two years older than the child. Additionally, at the time the offence was committed, the parties were in such a relationship and the accused reasonably believed the child consented to the relevant conduct.[169]

It is also a defence to the possession of child abuse material that the accused did not intentionally come into possession of the material and, on becoming aware of possessing this material, took all reasonable steps to cease such possession.[170]

With respect to Class Two Offences, it is a defence to administering a website that deals with child abuse material if, on becoming aware that the website was being used to deal with child abuse material, the accused took reasonable steps[171] to prevent other persons from using the platform to access such material.

8.3.2.2 Procurement and grooming offences

It is an offence for a person who is 18 years or older (the adult) to encourage a person under 16 years old (the child) to engage in sexual activity for the adult's sexual gratification. This offence carries a maximum penalty of 10 years of imprisonment. However, the Victorian Crimes Act specifies that attempting to commit this offence does not amount to a separate offence. A defence exists to this charge where the accused reasonably believed at the time of the relevant conduct the child was 16 years of age or more. However, the accused cannot argue a mistaken but honest and reasonable belief that the encouraged activity was not sexual.

It is also an offence for an adult to engage in this prohibited conduct with respect to a person aged 16 or 17 years old where that person is in the adult's care, supervision, or authority. This offence is punishable by a maximum penalty of five years of imprisonment. Similar to the previous offence, attempting to engage in such conduct does not amount to an offence under the Victorian Crimes Act. Similarly to the previous offence, the accused cannot argue that they were under a mistaken but honest and reasonable belief that the encouraged activity was not sexual. One exception and one defence may apply to this offence:

- the exception exists where the accused and child were either validly married to each other under the Marriage Act 1961 (Cth) or the accused was not more than five years older than the child and they were in a domestic partnership, which commenced before the child came into the accused's care, supervision, or authority (**Marriage or Partnership Circumstances**); and

- the defence is available where the accused reasonably believed either that the child was 18 years of age or more, the Marriage or Partnership Circumstances were satisfied, or the child was not under the accused's care, supervision, or authority.

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[168] *See* section 51P.

[169] *See* sections 51Q and R.

[170] *See* section 51T.

[171] Determining whether the accused has taken "reasonable steps" as defined in the Victorian Crimes Act section 51S(2) will be determined with regard to whether the accused has: (a) shut the website down; (b) adequately modified the website's operation to prevent its use to deal with child abuse material; (c) notified the police and subsequently complied with reasonable directions issued by the police; and (d) notified the relevant industry regulatory authority and subsequently complied with reasonable directions issued by that authority.

Additionally, it is an offence for an adult to communicate with a child or someone who has care, supervision, or authority with respect to the child, with the intention to facilitate the commission of a sexual offence either by the adult or another adult. However, this intention will not be found where the adult would satisfy a relevant exception or defence if the intended sexual offence was actually committed. This offence carries a maximum penalty of 10 years of imprisonment.

8.3.2.3 Other child exploitation offenses

The Victorian Crimes Act also has several offences for sexual performances (defined as a live performance in person or by electronic communication that is or could reasonably be considered to be, for the sexual arousal or sexual gratification of any person) involving a person under 18 years of age. It is an offence to intentionally cause, allow, or invite a person to take part in a sexual performance (or otherwise offer to a third party that the person will take part), in circumstances where any person receives payment, reward, or other benefit for the performance. These offences all carry a maximum penalty of 10 years of imprisonment.

It is a defence to these charges that the child was 12 years of age or older and the accused reasonably believed the child was at least 18 years of age. However, the accused cannot argue a mistaken but honest and reasonable belief that a sexual performance, or associated invitation or offer, did not involve any payment, reward, or other benefit.

Persons who occupy a position within a relevant organisation, such as a school or religious organisation, will commit an offence where they negligently fail to reduce or remove a substantial risk that an adult associated with the institution will commit a sexual offence against a person under 16 years of age who is under the institution's care, supervision, or control. Negligence is determined by an objective test: whether the relevant "failure involv[ed] a great falling short of the standard of care that a reasonable person would exercise in the circumstances." This particular offence is punishable by a maximum penalty of five years of imprisonment.

Additionally, it is an offence for a person to intentionally aid, facilitate, or contribute in any way to a third party's sexual conduct against a child (either within or outside Victoria), for the purpose of receiving a benefit from that third party. The conduct relevant to this offence includes making travel arrangements for the third party and causing a child to enter premises that the accused owns, occupies, manages, or assists in managing. This offence is punishable by a maximum penalty of 20 years of imprisonment. The accused cannot argue that they were under a mistaken but honest and reasonable belief that the relevant conduct of the third party did not constitute sexual conduct or, if such conduct took place outside Victoria, would not constitute an offence under the Victorian Crimes Act.

8.3.3. Extraterritorial application of Victorian criminal laws

The Victorian Crimes Act does not have general rules extending its operation beyond the state's boundaries, nor does it have specific provisions extending the territorial application of sexual servitude offences. However, with respect to distributing or possessing child exploitation material,[172] either the accused or the electronic material (but not both) may be located outside Victoria when some or all of the unlawful conduct occurred.

Similarly, with intentionally encouraging another person to use a website to deal with child abuse material[173] or providing information to assist someone to avoid apprehension for a child exploitation

[172] *See* sections 51D(4)–(5) and 51G(4)–(5).

[173] *See* section 51F(5)–(6).

offence,[174] either the unlawful conduct or the person being encouraged or informed (but not both) can be outside Victoria at the time of the offence.

Finally, regarding the administration of a website used to deal with child abuse material, either the unlawful conduct or the person or device using the website (but not both) can be outside Victoria at the time of the offence.[175]

8.4. South Australia

8.4.1. Sexual servitude offenses

The South Australian Criminal Law Consolidation Act 1935 (SA) (**South Australian Criminal Law**) has several offences penalizing sexual servitude. With respect to these offences, a "child" is defined as any person under 18 years of age.[176]

"Sexual servitude" is defined in the South Australian Criminal Law as the condition of a person who provides commercial sexual services[177] under compulsion. It is an offence to compel[178] another person to provide or continue to provide commercial sexual services.[179] This offence is punishable by maximum penalties of life imprisonment if the victim is under 14 years of age, 19 years of imprisonment if the victim is under the age of 18 and, in any other case, 15 years of imprisonment.

It is a lesser offence to get another person, by undue influence,[180] to provide commercial sexual services.[181] This offence has a maximum penalty of life imprisonment if the victim is under 14 years of age, 12 years of imprisonment if the victim is under the age of 18, and seven years of imprisonment in any other case. The use of compulsion or undue influence is a factual question based on the circumstances of a particular case, but relevant evidence can include (for example) the use of threats or force, restrictions on freedom of movement, and other forms of unreasonable or unfair pressure.[182]

It is also an offence under the South Australian Criminal Law (punishable by maximum penalties of 12 years of imprisonment if the victim is a child and seven years of imprisonment in any other case) for a person to offer another (the victim) employment or some other form of engagement to provide personal services where the person knows at the time that the offer is made:

- that the victim will, in the course of or in connection with the employment or engagement, be asked or expected to provide commercial sexual services; and

[174] *See* section 51I(4)–(5).

[175] *See* section 51E(4)–(5).

[176] *See* section 65A(1).

[177] "Commercial sexual services" has the same definition in the South Australian Criminal Law section 65A(1) as "sexual services" in the NSW Crimes Act.

[178] "Compulsion" is defined in the South Australian Criminal Law section 65A(1) as occurring if the offender controls or influences the victim's conduct by means that effectively prevent the victim from exercising freedom of choice.

[179] *See* section 66(1).

[180] "Undue influence" is defined in the South Australian Criminal Law section 65A as occurring if the offender uses unfair or improper means to influence the victim's conduct.

[181] *See* section 66(2).

[182] *See* section 66(3)–(5).

- that the victim's continued employment, engagement, or advancement will depend on the victim providing commercial sexual services,

- without disclosing this information at the time the victim is offered the employment or engagement.[183]

The South Australian Criminal Law also has several offences associated with the use of children in sexual services. Asking a child to provide sexual services carries a maximum penalty of nine years of imprisonment if the victim is under 14 years of age and three years of imprisonment in any other case.[184] Employing, engaging, causing, or permitting a child to provide, or to continue to provide, commercial sexual services is punishable by maximum penalties of life imprisonment if the victim is under 14 years of age and nine years of imprisonment in any other case.[185] Additionally, having a commercial arrangement for a child to provide sexual services on a regular or systemic basis or otherwise knowingly receiving the proceeds of such services is an offence that carries a maximum penalty of five years of imprisonment where the child is under 14 years of age and two years of imprisonment in any other case.[186]

It is a defence to these charges that the accused reasonably believed that the child was at least 18 years of age when the offence was committed.[187]

8.4.2. Online child exploitation offenses

"Child exploitation material" is limited to material depicting a "child" (any person under the age of 17) engaged in a sexual activity or containing an image of the bodily parts of a child that is of a pornographic nature.[188] Unlike most other jurisdictions, this definition does not impose an objective requirement that the material be "offensive" to a reasonable person.

It is an offence to produce and disseminate (basic maximum penalty of 12 years of imprisonment),[189] as well as possess (basic maximum penalty of five years of imprisonment)[190] child exploitation material if the accused knows of its "pornographic nature."[191] If material is inherently pornographic, then the circumstances of its production and use are irrelevant.[192]

A person accused of possession has a defence if the accused did not solicit the offending material and took reasonable steps to cease possession once aware of the material or its pornographic nature.[193]

The South Australian Crimes Act also establishes several offences, all of which carry a maximum penalty of 10 years of imprisonment, for websites dealing with child exploitation material. The offence of

[183] *See* section 67.

[184] *See* section 68(2).

[185] *See* section 68(1).

[186] *See* section 68(3).

[187] *See* section 68(5).

[188] *See* section 62.

[189] *See* section 63.

[190] *See* sections 63A(1) and (3).

[191] Material of a "pornographic nature" is defined in the South Australian Criminal Law section 62 as material intended (or apparently intended) to: (a) excite or gratify sexual interest; or (b) excite or gratify a sadistic or other perverted interest in violence or cruelty.

[192] *See* section 63C(1).

[193] *See* section 63A(2).

administering[194] such a website is similarly phrased as the comparable offence in the proposed NSW Crimes Act.[195] Additionally, the "reasonable steps"[196] defence as articulated in the NSW Crimes Act is also available to website administrators.[197]

Similarly, it is an offence to intentionally encourage another person's use of such a website to deal with child exploitation material (punishable by a maximum penalty of 10 years of imprisonment).[198]

The South Australian Crimes Act also sets out several offences relating to "procurement." These offences (all punishable by a basic maximum penalty of 10 years of imprisonment) include:

- inciting a child under the "prescribed age"[199] to commit an "indecent act;"[200]
- causing children under the prescribed age to expose their body with the purpose of satisfying the accused's or another's sexual desires (a **prurient purpose**);[201]
- procuring (or communicating with the intention of procuring) a child under the prescribed age to engage in a sexual activity;[202]
- communicating for a prurient purpose and with the intention of making a child under the prescribed age amenable to a sexual activity;[203] and
- making a reproducible record that contains an image(s) of a child under 17 years of age engaged in a "private act"[204] with a prurient purpose.[205]

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[194] "Administering a website" is defined in the South Australian Criminal Law section 62 as including: (a) building, developing, or maintaining the website; (b) moderating contributions to, or content on, the website; (c) managing or regulating membership of, or access to, the website; (d) monitoring traffic through the website; and (e) an activity or function of a "prescribed kind." Whether an activity or function is of a "prescribed kind" or explicitly excluded from the ambit of this definition is subject to regulations, none of which have been passed.

[195] *See* section 63AB(1), the Victorian Crimes Act section 51E; the proposed NSW Crimes Act section 91HAA.

[196] "Reasonable steps" is defined in the South Australian Criminal Law in a similar way and using the same examples as the Victorian Crimes Act section 51S(2). However, pursuant to the Criminal Law Consolidation (General) Regulations 2006 (SA), the reference to "a relevant regulatory authority" has been specified as including the eSafety Commissioner appointed under the Enhancing Online Safety Act 2015 (Cth).

[197] *See* section 63AB(3).

[198] *See* section 63AB(5).

[199] "Prescribed age" is defined in the South Australian Criminal Law section 63B(7) as: (a) 18 years of age if the offence is committed by a person in a "position of authority" (*see* below); and (b) 17 years in any other case.

[200] "Indecent act" is not defined in the South Australian Criminal Law. However, jurisprudence of the South Australian Supreme Court suggests that "indecent act" somewhat mirrors the definition of "private acts" in the South Australian Law section 62 (*see* below). For example, the court in *R v. Clarke* [2008] SASC 100 held that the performance of cunnilingus by two girls under 14 years of age amounted to an "indecent act" for the purposes of the South Australian Criminal Law; *see* section 63B(1)(a).

[201] *See* section 63B(1)(b)(i).

[202] *See* section 63B(3)(a).

[203] *See* section 63B(3)(b).

[204] "Private act" is defined in the South Australian Criminal Law section 62 as an act that: (a) is sexual; (b) involves an intimate bodily function such as using the toilet; (c) involves undressing to a point where the body is only clothed in undergarments; or (d) involves nudity or exposure or partial exposure of sexual organs, pubic area, buttocks, or female breasts.

[205] *See* section 63B(1)(b)(ii).

Apart from the last offence concerning reproducible records, it is a defence that, on the date of the offence, the child was above 16 years of age and the accused was either under 17 years of age or reasonably believed the child was at or above 17 years of age.[206] However, this defence is not available if the offender was in a "position of authority"[207] in relation to the child.[208]

Reminiscent of the Victorian Crimes Act, it is an offence to intentionally provide information to other persons so that they can avoid, or reduce the likelihood of, apprehension for an offence under Division 11A.[209] This offence carries a maximum penalty of 10 years of imprisonment.

Apart from this last offence concerning the provision of information, several defences are available for offences under Division 11A. There is no offence where:

- the relevant material:
- was used or possessed in good faith and for the advancement or dissemination of legal, medical, or scientific knowledge;[210]
- is (in part or whole) a work of artistic merit if, considering the work's artistic nature and purposes, there is no undue emphasis on aspects that could otherwise be considered to have a "pornographic nature;"[211]
- satisfies the Classification Defence or is possessed for the purposes of obtaining classification under the Commonwealth Classification Act;[212] or
- the accused did the relevant conduct in good faith while:

[206] *See* section 63B(4).

[207] "Position of authority" is defined in the South Australian Law section 63B(6) as encompassing several types of relationships: (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; (b) the person is a parent, step-parent, guardian, or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian, or foster parent of the child; (c) the person provides religious, sporting, musical, or other instruction to the child; (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; (e) the person is a health professional or social worker providing professional services to the child; (f) the person is responsible for the care of the child and the child has a cognitive impairment; (g) the person is employed or providing services in a correctional institution (within the meaning of the Correctional Services Act 1982) or a training centre (within the meaning of the Young Offenders Act 1993), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; (h) the person is employed or providing services in a licensed children's residential facility (within the meaning of the Children and Young People (Safety) Act 2017), or a residential care facility or other facility established under section 36 of the Family and Community Services Act 1972, or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or (i) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

[208] *See* section 63B(4).

[209] *See* section 63B(7).

[210] *See* section 63C(2).

[211] *See* section 63C(3).

[212] *See* section 63C(4).

- acting in the course of duties as a law enforcement officer or any other position associated with the administration of the criminal justice system;[213] or
- acting reasonably for the purpose of providing genuine child protection or legal advice.[214]

Unless the legislation otherwise specifies (such as procurement offences when the child is above 16 years of age), an honest and reasonable mistake in believing that a child is over the required age would almost certainly not amount to a defence for any offence under Division 11A.[215]

8.4.3. Extraterritorial application of South Australian criminal laws

Similar to the law of New South Wales, the South Australian Criminal Law extends its offences for sexual servitude and online child exploitation to conduct that occurs outside the state's geographic boundaries.[216] Accordingly, South Australia could prosecute a person for those offences, even if none of the unlawful conduct occurred within South Australia.

In circumstances where it is not possible to establish whether any of the conduct constituting an offence occurred within or outside the state, it must only be established that the conduct caused either harm or a threat of harm within the state to extend the operation of the law to that conduct. In circumstances where none of the relevant conduct occurred within the state, it must be established that the conduct caused harm or a threat of harm within the state and that the conduct gave rise to an offence against the laws of the jurisdiction in which the conduct occurred.

8.5. Western Australia

8.5.1. Sexual services offenses

The West Australian Criminal Code 1913 (WA) (**WA Criminal Code**) has offences that penalize the compulsion of sexual services, conducting business relating to sexual services, and deceptive recruiting of victims to provide commercial sexual services. With respect to these offences, a "child" is defined as a person under 18 years of age.[217]

The WA Criminal Code defines "sexual services" as the use or display of the body of a person providing the service for the sexual arousal or sexual gratification of others.[218]

It is an offence under the WA Criminal Code for a person to compel another person (the victim) to provide or continue to provide a sexual service.[219] Similarly, it is an offence to conduct a business[220] that compels

[213] *See* section 63C(2a).

[214] *See* section 63C(2b).

[215] The court in *R v. Clarke* [2008] SASC 100 at [59] and [105] determined that the defence of honest and reasonable mistake of fact was not available with respect to the production and dissemination of child exploitation material, as well as the procurement offences. Although this judgment was provision-specific, it heavily relied on the statutory objectives and purpose, the absolute liability regime underlying Division 11A, and the South Australian Criminal Law as a whole. Accordingly, a similar argument against the defence existing with respect to other offences in Division 11A would almost certainly prevail.

[216] *See* sections 5F and 5G.

[217] *See* section 331A.

[218] *See* section 331A.

[219] *See* section 331B.

[220] "Conducting a business" has the same definition in the WA Criminal Code as in the NSW Crimes Act.

the victim to provide or continue to provide a sexual service.[221] Both these offences have maximum penalties of 20 years of imprisonment if the victim is a child or "incapable person,"[222] and 14 years in any other case.

The WA Criminal Code also makes it an offence for a person to intentionally offer another person employment or a commercial opportunity without disclosing that the engagement will involve or depend on providing a commercial sexual service. The offence in the WA Criminal Code for such deceptive recruiting is the same as the South Australian Criminal Law.

8.5.2. Online child exploitation offenses

Chapters XXII and XXV of the WA Criminal Code set out online child exploitation offences.

Adults[223] will commit an offence and be liable for five years of imprisonment if they use electronic communication with the intent of procuring a person (the "victim") under 16 years of age (or a person who is representing themselves as, and whom the accused believes to be, a person under that age)[224] to engage in "sexual activity"[225] or exposing such a person to any "indecent matter."[226] If the victim is or appears to be under the age of 13 years, the penalty is increased to 10 years of imprisonment.[227]

It is a defence that the accused reasonably believed that the victim was at or over 16 years of age.[228] However, mere ignorance of the victim's age is not a defence.[229]

The WA Criminal Code also establishes several offences relating to "child exploitation material," which covers pornography[230] involving a child (defined as persons under 16 years of age) or material which is likely to offend a reasonable person and depicts a child (or someone appearing to be a child) either in an offensive or demeaning context or subjected to abuse, cruelty, or torture.[231]

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[221] *See* section 331C.

[222] An "incapable person" is defined in the WA Criminal Code section 330 as a person whose mental impairment makes them incapable of: (a) understanding the nature of the act that is the subject of the charge against the accused person; or (b) guarding themselves against sexual exploitation.

[223] Although "adult" is not defined in the WA Criminal Code, it presumably refers to persons who are at or above 18 years of age, given that: (a) the common definition of the term "child" (other than Chapter XXV) throughout the legislation concerns persons under 18 years of age; and (b) the section itself does not define persons 16 years or younger as a "child."

[224] *See* section 204B(8).

[225] Engaging in "sexual activity" is defined in the WA Criminal Code section 204B(4) and (5) as: (a) allowing a sexual act to be done to the person's body; or (b) doing a sexual act to the person's own body or the body of another person; or (c) otherwise engaging in an act of an indecent nature. These acts are not limited to penetration and do not need to involve physical contact.

[226] "Indecent matter" is defined in the WA Criminal Code section 204B(1) as including an indecent film, videotape, audiotape, picture (computer generated or otherwise), photograph, or printed or written matter; *see* section 204B(2).

[227] *See* section 204B(3).

[228] *See* section 204B(10).

[229] *See* section 205.

[230] "Child pornography" is defined in the WA Criminal Code section 217A as material that, in a way likely to offend a reasonable person, describes, depicts, or represents a person, or part of a person, who is, or appears to be a child: (a) engaging in sexual activity; or (b) in a sexual context.

[231] *See* section 217A.

It is an offence (punishable with a maximum penalty of 10 years of imprisonment) to invite, procure, or offer a child for the purpose of producing child exploitation material, or otherwise cause them to be involved in producing such material.[232]

It is also an offence (punishable by a maximum penalty of 10 years of imprisonment) to produce, distribute, or possess with the intention to distribute this material.[233] The possession of this material also has a maximum penalty of seven years of imprisonment.[234] However, there is no offence if a member or officer of a law enforcement agency[235] or a person intending to classify the offensive material under the Classification (Publications, Films and Computer Games) Act 1995 (Cth) engages in the otherwise criminal conduct.[236]

There is an additional defence to a possession charge where the accused did not solicit the pornographic material and took reasonable steps to cease possession once aware of it or its pornographic nature.[237]

Several defences are generally available to those accused of offences associated with child exploitation material. These defences include where:

- the relevant material:
- satisfies the Classification Defence;[238]
- was of recognised literary, artistic, or scientific merit or of a genuine medical character, and the relevant conduct can be justified as being for the public good;[239] or
- the accused:
- was acting reasonably for the purpose of providing genuine child protection or a legal purpose;[240] or
- was acting under an honest and reasonable, but mistaken, belief in the existence of any other state of things (excluding facts mentioned below).[241]

It is not a defence to these offences that the accused did not know the child's age, or believed the child was at or over 16 years of age.[242]

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[232] *See* section 217.

[233] *See* sections 218 and 219.

[234] *See* section 220.

[235] "Law enforcement agency" is defined in the WA Criminal Code section 221A(4) as: (a) the Police Force of the State; (b) the Police Service of the State; (c) the Office of the Director of Public Prosecutions of the State; (d) the Corruption and Crime Commission; or (e) any entity of another state or a territory, the Commonwealth, or another country that has functions similar to those already listed.

[236] *See* section 221A(3).

[237] *See* section 221A(2).

[238] *See* section 221A(1)(a).

[239] *See* section 221A(1)(c).

[240] *See* section 221A(1)(d).

[241] *See* section 24.

[242] *See* section 221A(1A).

8.5.3. Extraterritorial application of West Australian criminal laws

No element of the conduct giving rise to an offence under the WA Criminal Code need occur within the state's territorial border. Western Australia may prosecute individuals for offences involving sexual services or online child exploitation, provided that an event, circumstance, or state of affairs caused by relevant conduct occurs in the state. This includes if the offence was aided, counselled, or procured by someone outside of the state.[243]

8.6. Australian Capital Territory

8.6.1. Sexual servitude offenses

The Australian Capital Territory Crimes Act 1900 (ACT) (**ACT Crimes Act**) has offences for sexual servitude and the deceptive recruiting of sexual services.

The definitions of "sexual servitude" and "sexual services" in the ACT Crimes Act are substantially the same as the definitions given to those terms in the NSW Crimes Act and WA Criminal Code.[244]

It is an offence under the ACT Crimes Act for a person to intentionally or recklessly cause another person to enter into or remain in sexual servitude, or to knowingly or recklessly conduct a business that involves the sexual servitude of others.[245] These offences carry a maximum penalty of 19 years of imprisonment in aggravating circumstances in which the accused intentionally or recklessly committed the offence against a person under 18 years of age, or 15 years of imprisonment otherwise.[246]

The ACT Crimes Act also makes it an offence for persons to intentionally induce another person (punishable by maximum penalties of nine years of imprisonment in aggravating circumstances and seven years of imprisonment otherwise) to enter into an engagement to provide sexual services where they have deceived the victim about the fact that the engagement will involve providing sexual services.[247]

8.6.2. Online child exploitation offenses

Part 3 of the ACT Crimes Act sets out offences associated with online child exploitation.

The ACT Crimes Act makes it an offence to use, offer, or procure a child (defined as a person under 18 years of age) for the production of child exploitation material or a pornographic performance. Similar to the South Australian Criminal Law, "child exploitation material" is not determined with reference to what a reasonable person would consider to be offensive. Rather, it is defined as material that shows a child's sexual parts, a child engaged in sexual activity, someone else engaged in sexual activity in the presence of a child, or material that is otherwise created for the sexual gratification of somebody other than the child.[248] "Pornographic performance" comprises performances of a sexual nature done either by a child or someone

[243] *See* sections 12, 13, and 14.

[244] *See* section 78.

[245] *See* section 79.

[246] *See* section 81.

[247] *See* section 80.

[248] *See* section 64(5).

else in the presence of a child that are substantially for the sexual arousal or gratification of someone other than the child.[249]

Additionally, intentionally possessing pornographic child exploitation material carries a maximum penalty of seven years of imprisonment and 700 penalty units (which at the time of writing was equal to AUD 105,000).[250] This offence is subject to absolute liability,[251] except that it is a defence that the accused had no reasonable grounds for suspecting that the pornography was child exploitation material.[252]

Moreover, the ACT Crimes Act also outlaws grooming and depraving children in two ways:

- First, it is an offence to encourage a person under 16 years of age to engage (or watch another person engaging) in sexual intercourse or an act of indecency, or otherwise engage in acts (either with the youth or a person with whom the youth has a relationship) with the intention of increasing the likelihood of such engagement.[253] The general principles of criminal responsibility in Chapter 2 of the Criminal Code 2002 (ACT) (other than the "applied provisions")[254] do not apply to these offences.[255] The maximum penalty for these offences depends on the victim's age and whether the accused has committed the offence before. If it is the first time the accused is faced with this offence, there will be a maximum penalty of nine years of imprisonment where the victim is under 10 years of age and seven years otherwise. Alternatively, if this is a subsequent offence, the accused will incur a maximum penalty of 12 years if the victim is under 10 years of age and 10 years otherwise.

- Second, it is an offence to make pornographic materials available to a person under 16 years of age.[256] This offence carries a maximum penalty of seven years of imprisonment and 700 penalty units (which at the time of writing is equal to AUD 105,000). However, it is a defence in these circumstances that the accused is an internet service provider and did not know that its facilities were used to commit the offence.[257]

Although it is not a defence to the grooming and depraving offences to suggest that the victim consented in part or whole to the accused's conduct,[258] it is a defence that the accused believed on reasonable grounds that the victim was at least 16 years old.[259]

The ACT Crimes Act also creates various obligations to report, and protect children from, the offences discussed above in this Section 8.6.2.

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[249] *See* section 64(5).

[250] *See* section 65(1).

[251] *See* section 65(2).

[252] *See* section 65(3).

[253] *See* section 66(1).

[254] The applied provisions listed in the Criminal Code 2002 (ACT) section 10(1) are: (a) section 15(5) (Evidence of self-induced intoxication); (b) division 2.3.1 (Lack of capacity—children); (c) division 2.3.2 (Lack of capacity—mental impairment); (d) division 2.3.3 (Intoxication); (e) part 2.4 (Extensions of criminal responsibility); (f) part 2.5 (Corporate criminal responsibility); (g) part 2.6 (Proof of criminal responsibility); and (h) part 2.7 (Geographical application).

[255] *See* section 66(2).

[256] *See* section 66(3) and (7).

[257] *See* section 66(4).

[258] *See* section 66(5).

[259] *See* section 66(6).

It is an offence for adults not to report to police, as soon as practicable, information that makes them believe a sexual offence has been committed against a person under 18 years of age.[260] The offence carries a maximum penalty of two years of imprisonment. Interestingly, the clergy of a religious denomination are not entitled to refuse disclosure of such information, even if it was communicated during a religious confession.[261] However, this offence does not apply where:

- the alleged victim is no longer a child and has inferred that the accused should not disclose such information to the police;
- the information would endanger the safety of a person other than the accused;
- the accused reasonably believes the police to have the information;
- the accused is a mandated reporter under the Children and Young People Act 2008 and has (or reasonably believes someone has) duly reported the information;
- a privilege other than religious confession protects the information;
- the information is generally available in the public domain; or
- the accused has another reasonable excuse.[262]

Moreover, persons in a position of authority within institutions[263] such as schools or religious organisations commit an offence where they intentionally or negligently fail to reduce or remove a substantial risk, of which they are both aware and in a position to address, that a sexual offence will be committed: by a person associated[264] with the institution against a person under 16 years of age who is under the institution's care, supervision, or control; or by another person in authority against a person between 16 and 18 years of age who is under the institution's care, supervision, or control.[265] With respect to this offence, negligence has an objective test: whether the relevant "failure involve[ed] a great falling short of the standard of care that a reasonable person would exercise in the circumstances."[266] This offence carries a maximum penalty of five years of imprisonment.

[260] *See* section 66AA(1).

[261] *See* section 66AA(3).

[262] *See* section 66AA(2)(a)–(g).

[263] "Relevant institution" is defined in the ACT Crimes Act section 66A(5) as: (a) an entity, other than an individual, that operates facilities for, engages in activities with, or provides services to children under the entity's care, supervision, or control; or (b) a group of entities mentioned in paragraph (a) if the entities: (i) interact with each other, share similar characteristics, and collectively have a sense of unity; or (ii) are controlled, managed, or governed by another entity. With respect to entities referred to in item (a), the section specifies that schools, religious organisations, hospitals, child care centres, out-of-home caregivers, sports clubs, and youth organisations are included. Regarding groups referred to in item (b), the section specifies that a group of schools controlled by a religious organisation, a group of youth centres operated by a company, and a group of churches sharing the same religious philosophy are included.

[264] A person "associated" with a relevant institution is defined in the ACT Crimes Act section 66A(5) as including a person over 18 years of age who: (a) owns, manages, or controls the institution; (b) is employed or engaged by the institution; (c) works as a volunteer for the institution; or (d) engages in a regulated activity with or for the institution.

[265] *See* section 66A(1).

[266] *See* section 66A(3).

This offence has two important qualifications. First, it is not necessary to prove that a sexual offence had actually been committed.[267] Second, following a similar theme as the prior offence, it does not matter that the accused became aware of the risk through information communicated in a religious confession.[268]

It is important to note that the sexual offences with respect to children discussed so far do not have the array of defences available within other jurisdictions. However, unlike similar laws in other jurisdictions, the ACT Crimes Act also establishes a separate offence for distributing an intimate image of a person under 16 years of age, to which there are multiple defences.[269] This offence carries a maximum penalty of 500 penalty points (which at the time of writing is AUD 80,000) and five years of imprisonment.

The defences available to this offence are:

- at the time of the offence:
- the accused reasonably believed that the alleged victim was at least 16 years old; or
- the alleged victim was at least 10 years old, not more than two years younger than the accused, and consented to distribution of the intimate image;[270] or
- the intimate image was distributed:
- by a law enforcement officer or a security provider licensed under the Security Industry Act 2003 (ACT) acting reasonably in the course of their duties;
- by the accused in the course of reasonably protecting premises which they owned;
- for the purpose of practicing law enforcement (inclusive of criminal reporting and legal procedure) or reporting unlawful conduct to a law enforcement officer, as well as any scientific, medical, or educational purpose (such as sending diagnostic images between doctors); or
- in circumstances where the child was incapable of giving consent and a reasonable person would consider such distribution acceptable (such as sharing an image of a naked newborn relative).[271]

8.6.3. Extraterritorial application of ACT criminal laws

The ACT Crimes Act does not apply extraterritorially to the sexual servitude offences discussed in this section.

However, for an offence relating to the failure of a person in a position of authority to reduce or remove a substantial risk that a sexual act will be committed against a child, it does not matter if an act or omission constituting a potential sexual offence is at risk of happening outside the ACT if either the prospective victim or prospective offender was in the ACT at any time after the accused became aware of the risk.[272]

[267] *See* section 66A(2)(b).

[268] *See* section 66A(2)(c).

[269] *See* section 27D(1).

[270] *See* section 72D(2).

[271] *See* section 72G(1)(a)–(g).

[272] *See* section 66A(2)(a).

8.7. Northern Territory

8.7.1. Sexual servitude offenses

Division 6A of the Northern Territory Criminal Code Act 1983 (NT) (**NT Criminal Code**) specifies offences for sexual servitude and the deceptive recruiting of sexual services.

The definitions of "sexual servitude" and "sexual services" in the NT Criminal Code are substantially the same as the definitions given to those terms in the NSW Crimes Act and WA Criminal Code.[273]

It is an offence under the NT Criminal Code for a person to cause a victim to enter into or continue in sexual servitude or for a person to conduct a business involving the sexual servitude of others.[274] These offences are punishable by maximum penalties of life imprisonment for an offence involving a child under 12 years of age, 20 years of imprisonment for an offence involving a person over the age of 12, and 15 years of imprisonment for an offence involving an adult.

The NT Criminal Code also makes it an offence for a person to intentionally induce another person (punishable by maximum penalties of 15 years of imprisonment if the victim is a child, and 10 years of imprisonment otherwise) to provide sexual services where they have deceived the victim about the fact that the engagement involves providing sexual services.[275]

It is not a defence to these offences that the accused did not know the victim was of a certain age or otherwise believed they were of a different age.[276]

8.7.2. Online child exploitation offenses

Division 2 of the NT Criminal Code regulates online child exploitation offences. A "child" is defined as a person under the age of 18.

The NT Criminal Code has several offences relating to child abuse material. The definition of "child abuse material" covers material that is likely to offend a reasonable adult and depicts (or appears to depict) a child in a sexual, offensive, and demeaning context, otherwise engaging in sexual activity, or being subjected to torture, cruelty, or abuse.[277] However, the definition excludes material that satisfies the Classification Defence, or is exempted under Part X of the Commonwealth Classification Act.[278]

It is an offence to possess, distribute, sell, advertise, or offer child abuse material. This offense carries a maximum penalty of 10 years of imprisonment for individuals and 10,000 penalty units for corporations (which at the time of writing is AUD 1,580,000).[279] Where such material is found in a place that the accused occupies, manages, or controls, the accused will be guilty of possession unless the accused neither knew nor had reason to suspect the material was in that place.[280] Contrary to most criminal offences in Australia,

[273] *See* section 202A(1).

[274] *See* sections 202B and 202C.

[275] *See* section 202D.

[276] *See* section 202E.

[277] *See* section 125A.

[278] *Id.*

[279] *See* section 125B.

[280] *See* section 125B(3).

the accused bears the burden to prove this defense.[281] If an accused is found guilty of this offence, the court must order the forfeiture and destruction of the relevant material.[282]

It is not an offense when either a member of a law enforcement agency in the course of exercising their duties, or a person whose function or duty includes the classification of materials pursuant to an applicable law, engages in the conduct.[283] Additionally, it is a defence that the accused was using the material for legitimate medical or health research purposes.[284]

Using, offering, or procuring a child for the production of child abuse material is also an offence punishable by 14 years of imprisonment for individuals, and 15,000 penalty units for corporations (which at the time of writing is AUD 2,370,000).[285]

The NT Criminal Code also contains offences relating to indecent articles. The definition of "indecent article" covers anything that wholly or in part[286] contains, records, or embodies something to be looked at or any items that can be used to manufacture such a thing, and depicts a person who is (or appears to be) under 16 years of age in a manner that is likely to offend a reasonable adult (sexual or otherwise).[287] However, similar to the definition of child exploitation material, this does not include material classified or exempted[288] under the Commonwealth Classification Act.[289]

It is an offence to publish an indecent article,[290] unless for the purposes of applying for classification under the Classification (Publications, Films and Computer Games) Act 1995 (Cth) or by members of a law enforcement agency in the course of their duties.[291]

An executive officer of a corporation (which includes the director or another person concerned with managing the corporation) who has committed one of these offences will incur criminal liability and face the maximum penalties for individuals.[292] Although this offence will apply irrespective of whether the corporation is prosecuted for (or found guilty of) the offence, it will not apply where the corporation would have an available defence.[293]

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[281] *Id.*

[282] *See* section 125B(6).

[283] *See* section 125B(2).

[284] *See* section 125B(4).

[285] *See* section 125E.

[286] *See* section 125C(3).

[287] *See* section 125A.

[288] The classifications/exemptions that apply under the NT Crimes Act section 125A are: "(e) a film that is classified (other than as RC) under the Commonwealth Act; (f) a publication that is classified Unrestricted, Category 1 restricted or Category 2 restricted under the Commonwealth Act; (g) a computer game that is classified (other than as RC) under the Commonwealth Act; or (h) a film, publication or computer game that is the subject of an exemption under Part 10 of the Classification of Publications, Films and Computer Games Act 1985."

[289] *See* section 125A.

[290] *See* section 125C(1).

[291] *See* section 125C(2).

[292] *See* section 125D(1) and 125D(9).

[293] *See* section 125D(6)–(7).

It is a defence to such criminal liability that the accused either was not in a position to influence the corporation's contravening conduct, took reasonable steps to prevent the contravention, or did not know (and could not reasonably have known) that the contravention would occur.[294]

The NT Criminal Code also has several general offences that could apply to online child exploitation.

It is an offence for a person to attempt to procure another person under 16 years of age to have sexual intercourse (in the NT or otherwise) or commit, perform, or engage in an act of gross indecency.[295] This offence carries a maximum penalty of five years of imprisonment if the accused is over 18 years of age and five years of imprisonment otherwise.[296] However, it is a defence to this offence if the victim was at or above 14 years of age and the accused reasonably believed that the victim was 16 years of age or older.[297]

Additionally, several offences prohibiting indecent dealing with children under 16 years may also apply. It is an offence to procure a person under 16 years of age to perform an indecent[298] act,[299] intentionally exposing such a person to an indecent object, film, video tape, audio tape, photograph, or book,[300] or intentionally recording an indecent visual image of such a person.[301] These offences carry a maximum penalty of 14 years of imprisonment if the victim is under 10 years of age, and 10 years of imprisonment otherwise.[302] The same defence applies to this offence as is available for attempted procurement.[303] However, the defence will not apply if the victim is a relative of the accused.[304]

Unless stated otherwise (as done in the previous two general offences), it is not a defence to the offences in this Division to claim that the accused did not know that a child was of a specific age or believed otherwise.[305] However, other than with respect to a child's age, the defence of honest and reasonable mistake of fact applies.[306]

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[294] *See* section 125D(3).

[295] *See* section 131(1).

[296] *See* section 131(1) and (2).

[297] *See* section 131(3).

[298] Although "indecent" is not defined in the NT Crimes Act, it can be presumed that "indecent" acts, objects, and films refer to subject matter similar to that covered by "indecent article" in section 125A. If this interpretation is correct, then it would cover acts, objects, and films that: (a) promote crime or violence, or incite or instruct in matters of crime or violence; or (b) concern, in a manner that is likely to offend a reasonable adult: (i) the use of violence or coercion to compel a person to participate in, or submit to, sexual conduct; (ii) sexual conduct with or on the body of a dead person; (iii) the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; (iv) bestiality; (v) acts of torture or the infliction of extreme violence or extreme cruelty; or (vi) a person (whether or not engaged in sexual activity) who is a child who has not attained the age of 16 years or who looks like a child who has not attained that age.

[299] *See* section 132(2)(d).

[300] *See* section 132(2)(e).

[301] *See* section 132(2)(f).

[302] *See* section 132(2) and (4).

[303] *See* above paragraph and section 132(5).

[304] *See* section 132(6).

[305] *See* section 139.

[306] *See* section 32.

8.7.3. Extraterritorial application of NT criminal laws

The NT Criminal Code extends its operation beyond the boundaries of the Northern Territory. Provided that all other elements of an offence regarding sexual servitude exist, if the offence occurred partly within the Northern Territory (even if the conduct had no effect within the Northern Territory) or if the offence was committed completely outside of the Northern Territory but had an effect within the Northern Territory, then the Northern Territory may prosecute the offence.[307]

8.8. Queensland

8.8.1. Sexual servitude offenses

The Queensland Criminal Code Act 1899 (Qld) (**Queensland Criminal Code**) does not penalize sexual servitude. Cases involving servitude in Queensland are often prosecuted under the Commonwealth Criminal Code.[308]

However, some commentators have suggested that the provision in the Queensland Criminal Code prohibiting the procurement of sexual acts by coercion may apply to sexual servitude.[309] That provision makes it an offence to knowingly entice or recruit another person to engage in a sexual act either through the use of threats or intimidation of any kind or by false pretence (irrespective of whether it occurs in Queensland or elsewhere).[310] Similarly, it is illegal to administer a substance to another person with the intent to stun or overpower the other person to enable a sexual act.[311] A "sexual act" with respect to these offences need not involve the victim's body, sexual intercourse, or acts involving physical contact.[312]

The maximum penalty for these offences is imprisonment for 14 years. However, the accused faces an aggravated penalty where the accused participates in a criminal organisation and knew (or ought to have reasonably known) that the offence was committed at the direction of a criminal organisation (either the one in which they are involved or another), in participation with other participants in such an organisation, or for the direct or indirect benefit of such an organisation (**Criminal Organisation Circumstances**).[313]

8.8.2. Online child exploitation offenses

Part 4, Chapter 22 of the Queensland Criminal Code sets out online child exploitation offences. A "child" is commonly defined in this chapter as a person who is, or appears to be, under the age of 16 years.

Several offences address "child exploitation material," which is defined in the same terms as the NT Criminal Code.[314] All of the penalties associated with these offences are aggravated by Criminal Organisation Circumstances.

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[307] *See* Division 7.

[308] *See* "Sexual servitude and organised prostitution charges, Brisbane," *myPolice Queensland Police News* (Update, 12 February 2021), available at: https://mypolice.qld.gov.au/news/2021/02/12/update-sexual-servitude-and-organised-prostitution-charges-brisbane/.

[309] Nicole Dixon, *Human Trafficking: Australia's Response* (Research Brief No 2011/08, June 2011) 63.

[310] *See* section 218(1)(a)–(b) and 218(4).

[311] *See* section 218(1)(c).

[312] *See* section 218(2) and (3).

[313] Section 218(3A); Penalties and Sentences Act 1992 (Qld) s 161Q.

[314] *See* section 207A.

It is an offence to make, or involve a child, in child exploitation material, or attempt to engage in such conduct.[315] This offence carries a maximum penalty of 25 years of imprisonment where the accused has used a hidden network or anonymising service in committing the offence (**Hidden or Anonymous Circumstances**), or 20 years of imprisonment otherwise.

The NT Crimes Act also makes it an offence to administer[316] a website while knowing that it is being used to distribute child exploitation material.[317] This offence has a maximum penalty of 20 years of imprisonment in Hidden or Anonymous Circumstances, or 14 years of imprisonment otherwise. However, similar to the NSW Crimes Act, it is a defence to this charge that an administrator, on becoming aware of the website's unlawful use, took all reasonable steps[318] necessary to prevent access to the child exploitation material on the website.[319]

Similarly, it is an offence to encourage someone to use, or otherwise promote or advertise the use of, a website that is used to distribute child exploitation material.[320] This offence carries the same penalties as those associated with administering such a website.

Additionally, the Queensland Criminal Code makes it an offence to distribute information about how to avoid detection of, or prosecution for, conduct constituting an offence associated with child exploitation material.[321] Perpetrators will attract a maximum penalty of 20 years of imprisonment in Hidden or Anonymous Circumstances, or 14 years of imprisonment otherwise.

There are several defences to child exploitation material offences, including if:

- the allegedly unlawful conduct was committed:
- for a genuine artistic, educational, legal, medical, scientific, or public benefit purpose, and the person's conduct was, in the circumstances, reasonable[322] for that purpose;[323] or

[315] *See* section 228A(1) and 228B(1).

[316] "Administer" is defined in the Queensland Criminal Code section 228DA(5) as including: (a) designing, creating, managing, or maintaining the website, part of the website, or a function of the website; or (b) providing a device to host the website, part of the website, or a function of the website; or (c) facilitating the operation and use of the website, part of the website, or a function of the website.

[317] *See* section 228DA(1).

[318] Examples of "reasonable steps" in the Queensland Criminal Code section 228DA(4) include: (a) telling a police officer that the website is being used to distribute child exploitation material and complying with any reasonable instructions given by the police officer; (b) shutting the website down; and (c) modifying the website's operation so it cannot be used to distribute or access child exploitation material.

[319] *See* section 228DA(4).

[320] *See* section 228DB(1).

[321] *See* section 228DC(1).

[322] An example of reasonable conduct for a public benefit purpose, as provided in the Queensland Criminal Code section 228E(2)(b), is a current affairs television program showing children being tortured during a civil war.

[323] *See* section 228E(2).

- by law enforcement officers or inspectors responsible for classification[324] acting reasonably[325] in the course of their duties,[326] except where their conduct is directed at gaining evidence that a particular person committed an offence;[327] or
- the relevant material:
- was subject to a "conditional cultural exemption" under the Commonwealth Classification Act and the allegedly unlawful conduct was associated with exhibiting or screening the material as part of a registered event;[328] or
- satisfies the Classification Defence.[329]

The Queensland Criminal Code also establishes several procurement and grooming offences.

It is an offence to knowingly entice or recruit a child (either in Queensland or elsewhere) to engage in sexual penetration, and is punishable by 14 years of imprisonment.[330]

Similarly, it is a separate offence for any person over the age of 18 to use electronic communication with intent to procure a child (or someone they believe to be a child) to engage in a "sexual act," irrespective of whether the act will occur in Queensland or elsewhere.[331] This offence carries a maximum penalty of 14 years of imprisonment if the child is (or appears to be) under 12 years old and the accused goes to a location with the intention of meeting the child, or 10 years of imprisonment otherwise.[332]

It is a defence that the accused reasonably believed that the person was at least 16 years old, and a defence to the aggravating circumstance that the accused reasonably believed the child was at least 12 years old.[333] However, the accused can rely on a child's representation to prove a reasonable belief of a child's age, absent contrary evidence.[334]

It is an offence to act with the intention of procuring a child (or someone believed to be a child) or with the person who has the care of a child (or believed to have care of a child) [335] for the child to engage in a

[324] "Inspector" is defined in the Queensland Criminal Code section 228H(3) as including an inspector under the Classification of Computer Games and Images Act 1995 (Cth), the Classification of Films Act 1991 (Cth), and Classification of Publications Act 1991 (Cth).

[325] Examples of reasonable conduct, as provided in the Queensland Criminal Code section 228E(3)(b), are: (a) copying child exploitation material for the purposes of preparing a brief for police prosecutors; (b) supplying child exploitation material to the Classification Board established under the Commonwealth Classification Act for classification under that Act or to the Office of the Director of Public Prosecutions for use during the prosecution of a person for an offence; and (c) keeping child exploitation material obtained during an investigation for legitimate intelligence purposes.

[326] *See* section 228E(3).

[327] *See* section 228H(2).

[328] *See* section 228E(3).

[329] *See* section 228E(4)–(5).

[330] *See* section 217.

[331] *See* section 218A(1).

[332] *See* section 218A(2).

[333] *See* section 218A(9)–(9A).

[334] *See* section 218A(9).

[335] A "person who has care of a child" is defined in the Queensland Criminal Code section 218B(12) to include a parent, foster-parent, step-parent, guardian, or other adult in charge of the child, whether or not the person has lawful custody of the child.

sexual act or to expose, without legitimate reason, a child to indecent material (either in Queensland or elsewhere).[336] The penalty qualifications and the available defences are much the same as those with respect to procuring a child with electronic communication, with the exception that the maximum penalty is 10 years of imprisonment for an offence involving a child who is (or appears to be) under 12 years old, and five years of imprisonment otherwise.[337]

Additionally, unless otherwise excluded, the defence of honest and reasonable mistake of fact applies to these offences.[338]

8.8.3. Extraterritorial application of Queensland criminal laws

The Queensland Criminal Code extends to conduct occurring wholly outside Queensland's territorial borders, where the conduct has an effect within Queensland. Conversely, the Queensland Criminal Code also extends to unlawful conduct that has no impact within Queensland, but that occurs within Queensland. These provisions apply to the online child exploitation and sexual servitude offences.

8.9. Tasmania

8.9.1. Sexual servitude offenses

The Tasmanian Criminal Code Act 1924 (Tas) (**Tasmanian Criminal Code**) does not penalize sexual servitude, but it has three offences punishing forced sexual intercourse that resemble sexual servitude offences.

It is an offence under the Tasmanian Criminal Code for a person to take away or detain another person against that other person's will with the intent that the other person be married to, or have sexual intercourse with, any person. A parallel offence adds the element of force to the act of taking away or detaining.

It is also an offence (procuring by threats or fraud) for a person to procure another person to have unlawful sexual intercourse, either in Tasmania or elsewhere, through the use of threats or intimidation of any kind, or by any false pretence or false representation.

Tasmania's Criminal Code does not prescribe maximum penalties for specific crimes. The maximum prison term for any crime in Tasmania is 21 years and a fine.

8.9.2. Online child exploitation offenses

Chapter XIX of the Tasmanian Criminal Code deals with online child exploitation offences.

Several offences address child exploitation material, which is defined in the exact same terms as the NT Criminal Code. Involving a child in, possessing, producing, or distributing child exploitation material is an offence where the accused knows (or ought to have known) that the material was of that nature.[339] Intentionally accessing such material is also an offence.[340]

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[336] *See* section 218B(2).

[337] *See* section 218B(3)–(11).

[338] *See* section 24.

[339] *See* section 130, 130A, 130B, and 130C.

[340] *See* section 130D.

It is a defence to the charge of possession that the accused did not solicit the offending material and took reasonable steps to cease possession once aware that it was child exploitation material. There are also general defences available for all the offences associated with child exploitation material, including:

- If the allegedly unlawful conduct was committed:
    - for a genuine child protection, scientific, medical, legal, artistic, or public benefit purpose, and the person's conduct was, in the circumstances, reasonable for that purpose;[341]
    - by federal or state police officers or persons responsible for classification under the Commonwealth Classification Act acting reasonably in the course of their duties, except where their conduct is directed at gaining evidence that a particular person committed an offence;[342] or
    - the relevant material depicts sexual activity between the accused person and a person that is above the age of 18 and does not have a mental impairment, and the material does not otherwise depict incest or rape.[343]

The Tasmanian Criminal Code has several procurement offences.

Procuring a person under the age of 17 years to have sexual intercourse or commit an indecent act, or procuring someone else to engage in such conduct with that person is an offence. However, it is a defence to this charge that the person who was procured consented and was either at or above the age of 15 years and the accused person was not more than five years older, or the procured person was at or above the age of 12 years and the accused was not more than three years older.[344]

It is an offence to communicate by any means with the intention of procuring a person who is (or appears to be) under the age of 17 years to engage in an "unlawful sexual act"—which includes penetrative or persistent sexual abuse, indecent assault, incest, or rape.[345] Communicating with such a person with the intention of exposing them, without legitimate reason, to any indecent material is also an offence.[346]

The same age ranges for the person being procured and the accused provide a defense to these charges, too.[347] However, evidence that the child represented to be a certain age will prove (in absence of contrary evidence to the contrary) that the accused believed the child was that age.[348]

Another defence to these procurement offences is that the accused had an honest and reasonable but mistaken belief as to the child's age.[349] However, this defence does not apply where the child was under 13 years of age, or the accused failed to take all reasonable steps to ascertain the child's age, or the accused was in a state of self-induced intoxication and the mistake would have been made even if sober.[350]

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[341] *See* section 130E(1)(b).

[342] *See* section 130E(1)(c)–(d).

[343] *See* section 130E(2).

[344] *See* section 125C(4).

[345] *See* section 125D(1)–(2).

[346] *See* section 125D(3).

[347] *See* section 125D(5).

[348] *See* section 125D(7).

[349] *See* section 14B(4).

[350] *See* section 14B(2)–(3).

It is an offence for persons, without reasonable excuse,[351] to fail to promptly disclose to police information that leads them reasonably to believe an offence discussed in this section has been committed (excluding the distribution or possession or, or access to, child exploitation material).[352] Similar to the ACT Crimes Act, a member of the clergy is not entitled to refuse disclosure on the basis that the information was communicated during a religious confession.[353]

A defence to this charge is that the accused obtained the information when under 18 years old or the accused reasonably believed that the victim, who was at least 18 years old, did not wish the accused to report the information to a police officer.[354]

Additionally, unless otherwise excluded with respect to age, the defence of honest and reasonable mistake of fact applies to these offences.[355]

8.9.3. Extraterritorial application of Tasmanian criminal laws

The Tasmanian Criminal Code does not generally apply to conduct beyond territorial boundaries, though some particular laws extend extraterritorially. The Tasmanian Criminal Code does not extend the offences for forced sexual intercourse and child exploitation material; however, the procurement offences extend to intended conduct both within and outside Tasmania.[356]

[351] "Reasonable excuse" is defined in the Tasmanian Criminal Code section 105A as including: (a) the person reasonably fears that disclosing the information would endanger the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the child abuse offence); or (b) subject to subsection (5), a lawful claim or right of privilege protects disclosure of the information; or (c) the person reasonably believes that: (i) another person has already reported the information to a proper authority; or (ii) a proper authority already has the information; or (d) the information is generally available to members of the public.

[352] *See* section 105A(2).

[353] *See* section 105A(5).

[354] *See* section 105A(3).

[355] *See* section 14.

[356] *See* sections 125C(2)–(3) and 125D(1)–(3).

APPENDIX 1. INTERNATIONAL INSTRUMENTS RELATING TO MODERN SLAVERY

Status of International Obligations

Key

✓ Full participation (ratified/acceded where applicable and incorporated into domestic law if necessary)
! Imperfect participation (signed but not ratified/acceded and not incorporated into domestic law)
✕ Not a party
— Examples of other jurisdictions that the Compendium may cover

Fundamental human rights

	Universal Declaration of Human Rights (1948)	International Covenant on Civil and Political Rights (1966)	International Covenant on Economic, Social and Cultural Rights (1966)	Convention on the Elimination of All Forms of Discrimination against Women (1979)
Australia	N/A	✓	✓	✓

Slavery and trafficking

	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)	Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000)	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)	Worst Forms of Child Labour Convention (1999)
Australia	✓	✕	✓	✓	✓

	Slavery Convention (1926)	Protocol amending the Slavery Convention (1953)	Forced Labour Convention (1930)	Protocol of 2014 to the Forced Labour Convention (2016)	Abolition of Forced Labour Convention (1957)
Australia	✓	!	✓	✕	✓

Overview Of International Instruments

1. Fundamental human rights

Universal Declaration of Human Rights (1948) (**UDHR**)

The UDHR contains 30 articles that affirm a number of fundamental individual rights. These include legal rights, rights to free movement, the "constitutional liberties" such as freedom of thought and association, economic, social, and cultural rights, including healthcare, and the prohibition on slavery and torture. The UDHR does not have legal force in and of itself but was explicitly adopted for the purpose of defining "fundamental freedoms" and "human rights" in the United Nations Charter, which is binding on all member states. Numerous binding international instruments have elaborated on these fundamental rights.

The UDHR, ICCPR, and ICESCR make up the International Bill of Human Rights.

International Covenant on Civil and Political Rights (1966) (**ICCPR**)

The ICCPR commits state parties to respect the civil and political rights of individuals, including freedom from torture or cruel, inhumane, or degrading treatment or punishment; the right to life, a fair trial, and privacy; freedom of thought, conscience, and religion; freedom of expression; freedom of assembly; and the right to equal protection of the law.

International Covenant on Economic, Social and Cultural Rights (1966) (**ICESCR**)

The ICESCR commits parties to work towards economic, social, and cultural rights for individuals and the Non-Self-Governing and Trust Territories. The ICESCR recognizes the right of all people to self-determination and to not be deprived of subsistence, and obliges parties responsible for non–self-governing and trust territories to encourage and respect their self-determination. The covenant also establishes the principle of "progressive realization," which includes individual rights to work in just conditions, social security, family life, adequate standard of living, health, education, and participation in cultural life. The articles also provide specific steps needed to realise those rights.

Convention on the Elimination of All Forms of Discrimination against Women (1979) (**CEDAW**)

CEDAW defines discrimination against women, enumerates the rights of women, and mandates parties to implement domestic legislation giving effect to those rights. The articles concern non-discrimination, sex stereotypes, and sex trafficking; the rights of women to specific public, economic, and social rights; and the right to equality in marriage, family life, and the law.

2. Slavery and trafficking

2014 Protocol to the Forced Labour Convention (1930)

The 2014 Protocol to the Forced Labour Convention (1930) requires ratifying states to take effective measures to prevent and eliminate the use of forced labour, to protect victims and provide them with access to appropriate and effective remedies such as compensation, and to sanction the perpetrators of forced or compulsory labour. The protocol also seeks to reinforce the state's obligations to educate, investigate, and prosecute instances of forced labour.[357]

The Forced Labour Convention (1930) is one of the eight fundamental conventions of the International Labour Organisation (**ILO**). The ILO, originally formed in 1919 under the League of Nations, is now a UN agency that sets

[357] International Labour Organization, Protocol P029 of 2014 to the Forced Labor Convention of 1930, ILO Doc P029 (entered into force 11 June 2014) arts 1–4.

labour standards and develops policies within a unique tripartite structure consisting of government, employer, and employee representatives.

Abolition of Forced Labour Convention (1957)

The Abolition of Forced Labour Convention (1957*)* is another fundamental ILO convention. The convention prohibits certain forms of forced labour allowable under the Forced Labour Convention (1930), including prohibiting forced labour as a means of political coercion or discrimination, economic development, or punishment for strikes.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) (**Sale and Prostitution of Children Protocol**) requires state parties to prohibit the sale of children, child prostitution, and child pornography, and to pass domestic laws to that effect. The Sale and Prostitution of Children Protocol complements certain articles of the Convention on the Rights of the Child (1989), which require parties to take "appropriate measures." To that end, the protocol outlines the standards for enforcement, including jurisdictional factors, extradition, mutual assistance, and seizure of assets.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1958)

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1958) aims to abolish all forms of slavery, including enforced marriage and government support for or acquiescence to the trade in slaves. It also requires state parties to make acts of slavery or servitude crimes.

Worst Forms of Child Labour Convention (1999)[358]

The Worst Forms of Child Labour Convention (1999) (**WFCL Convention**) aims to protect the rights of children by requiring ratifying states to take immediate and effective measures to prohibit and eliminate the worst forms of child labour as a matter of urgency. The worst forms of child labour include the trafficking in, enslavement of, and sexual, physical, or other abuse of children.[359] Ratifying states are required to take all necessary measures to give effect to and enforce the WFCL Convention, including creating penal sanctions.[360] The convention is a fundamental ILO convention.

Convention Against Transnational Organised Crime (2004), including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2005)

The Convention Against Transnational Organised Crime (**CATOC**) [361] (and its two related protocols: the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (**Trafficking Protocol**), and the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air) aims to promote cooperation to prevent and combat transnational organized crime more effectively.[362] It focuses on organised non-state actor criminal enterprises and enforcing criminal offences for money laundering

[358] Worst Forms of Child Labour Convention, opened for signature 17 June 1999, 38 ILM 1207 (entered into force 19 November 2000).

[359] *Id*. art 3.

[360] *Id*. art 7(11).

[361] United Nations Convention Against Transnational Organised Crime and the Protocols Thereto, opened for signature 14 December 2000, 2225 UNTS 209 (entered into force 29 September 2003).

[362] *Id.* art 1.

operations and corruption, since money changing hands provides key evidence of the start and end points of transnational crime.

The CATOC provides for international cooperation in the extradition of suspects[363] and the transfer of sentenced persons, [364] promotes international cooperation and information sharing, [365] and facilitates mutual legal assistance in investigations, prosecutions, and judicial proceedings. [366] Articles 27–30 provide for law enforcement cooperation and information sharing between member states.

The Trafficking Protocol[367] is to be interpreted together with the CATOC. [368] The purpose of the Trafficking Protocol is to prevent and combat the trafficking in persons, with particular focus on women and children. The protocol requires state parties to aim high; to do everything in their power to defeat the trafficking in persons; to prosecute those responsible; and to share information, technology, and know-how amongst member states. [369]

The Trafficking Protocol complements the CATOC by recognising that inter-state and inter-agency support is needed to detect and prevent trafficking in persons, which usually involves transnational criminal syndicates.

Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime (2018)

The Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime (2018) encourages cooperation and information and capacity sharing[370] amongst the 49 state members to the Bali Process (a regional forum co-chaired by Indonesia and Australia) in an effort to interdict the trafficking and smuggling of persons in South-East Asia. In the spirit of international cooperation, the Bali Process has developed best practice policy guides and handbooks in relation to information sharing, identification of victims, providing criminal offences for human trafficking and slavery-like offences, and methods to address irregular migration. [371]

The responsible ministers in member states, as well as annual Senior Officials' Meetings and Ministerial Conferences, oversee the Bali Process. [372] Each year, the Ministerial Conference puts out a statement summarising proceedings. In 2018, the plenary of the Seventh Ministerial Conference of the Bali Process

[363] *Id.* art 16.

[364] *Id.* art. 17.

[365] *Id.* arts 7, 9, 11, 13, 15.

[366] *Id.* art. 18.

[367] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) (**Trafficking Protocol**).

[368] *Id.* art 1(1).

[369] *Id.* arts 2, 10.

[370] The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, "Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime," *The Bali Process* (Report, 23 March 2016), available at: https://bit.ly/2TDsbVb.

[371] The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, "Regional Support Office Resources," *The Bali Process*, available at: https://bit.ly/2FE2Y8j.

[372] For information relating to all proceedings arising from the Bali Process from 2018, *see* The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, "Ministerial Conferences & Senior Officials Meetings," *The Bali Process*, available at: https://bit.ly/2JO6Okn.

promised continued international collaboration, information, and technology sharing, and cooperation to prevent trafficking in and smuggling of persons in South-East Asia.[373]

[373] The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, "Declaration of the Seventh Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process)," *The Bali Process* (Report, 7 August 2018), available at: https://bit.ly/2TGcQTN.

APPENDIX 2. PROSECUTIONS FOR OFFENSES UNDER THE CRIMINAL CODE

CRIMINAL CODE S 270.3

Prosecutions for offences under *Criminal Code* s 270.3				
No.	**Case name**	**Court**	**Offence**	**Outcome**
1.	*R v. Tang* (2008) 237 CLR 1	HCA	S 270.3(1)(a)	Successful
2.	*R v. Kovacs* (2008) 192 A Crim R 345	QCA	S 270.3(1)	Successful at first instance, overturned on appeal, sent for retrial. Cannot find the outcome of retrial.
3.	*Director of Public Prosecutions (Cth) v. Kam Tin Ho* [2009] VSC 437	VSC	S 270.3(1)(a) and (c)	Successful
4.	*R v. McIver and Tanuchit* (2010) 12 DCLR (NSW) 77 (sentencing judgment)	NSWDC	S 270.3(1)(a)	Successful[374]
5.	*R v. DS* (2005) 191 FLR 337 (appeal decision reducing sentence)	VSCA	S 270.3(1)(a) and (b)	Successful
6.	*Watcharaporn Nantahkum v. the Queen* [2013] ACTCA 40	ACTCA	S 270.3(1)(a)	Successful
7.	*DRJ v. Commissioner of Victims Rights; DRK v. Commissioner of Victims Rights; DRL v. Commissioner of Victims Rights; DRM v. Commissioner of Victims Rights; DRN v. Commissioner of Victims Rights* [2019] NSWCATAD 195	NSWCATAD	S 270.3(1)	Unsuccessful
8.	*R v. Kanbut* [2019] NSWDC 931 (sentencing)	NSWDC	S 270.3(1)(a)	Successful

[374] NB: the trial at first instance is unreported; the convictions were quashed in the NSWCCA and remitted for retrial in the NSWDC, where the offenders were found guilty under s 270.3(1)(a) and sentenced.

herein are the personal views of the authors and do not necessarily reflect those of Rotary International/Rotary Action Group Against Slavery or of any contributing entity.