Research Note: How modern slavery legislation might reimagine New Zealand companies' supply chains

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Abstract

Following other countries that have introduced or are about to enforce modern slavery legislation, New Zealand is considering a Modern Slavery Act. This research note argues that for such legislation – whether imposing transparency or due diligence requirements – to be effective, it needs to be clear about the reach of those duties with respect to companies' supply chains. This clarity is currently missing in foreign legislation; New Zealand has a chance to rectify this and introduce legislation that stimulates constructive change in the behaviour of organisations.

Keywords: modern slavery, supply chain, legislation, New Zealand

Introduction

The New Zealand Government has committed to eliminating modern slavery. The Combatting Modern Forms of Slavery: Plan of Action against Forced Labour, People Trafficking and Slavery 2020–25, published in March 2021 (MBIE, 2021), contains 17 action points aimed to achieve that. Action point 16 focuses on legislation "requiring businesses to report publicly on transparency in supply chains, to help eliminate practices of modern slavery" (p. 14), and Minister Michael Wood has acknowledged that there is an urgent imperative to act (Ensor, 2021). The urgency is, indeed, there – New Zealand lags behind the UK and Australia in introducing modern slavery transparency legislation, and several European countries are already in the process of introducing due diligence legislation, seen as the next generation of legislation (Stringer et al., 2021).

In this research note, we consider how modern slavery legislation conceptualises supply chains when establishing the boundaries of corporate duties to protect labour. Law is relatively unfamiliar with the supply chain concept, and there is considerable potential for legal innovation in this space. New Zealand is well placed to incorporate recent lessons in the drafting and interpreting modern slavery legislation. This could mean New Zealand companies need to adjust to a regulatory environment breaking new ground concerning due diligence.

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The remainder of this research note unfolds as follows. It briefly explains supply chains and then outlines modern slavery legislation in jurisdictions outside of New Zealand. It then establishes a link between supply chains and legislation in general and modern slavery legislation. The penultimate section discusses the way forward and the research note concludes with summary comments.

What are supply chains?

Most supply chains are amorphous – they are formed through voluntary, often temporary, bilateral engagements between multiple actors rendering their length and membership highly irregular. In management research, supply chains are understood as "a set of three or more entities (organizations or individuals) directly involved in the upstream and downstream flows of products, services, finances, and/or information from a source to a customer" (Mentzer et al., 2001, p.4). This emphasises different responsibilities assumed by actors with respect to flows through the chain and draws attention to the fact that most firms occupy a mid-stream position, given that customers include those buying second-hand or recycled products. Notably, this definition allows for a single organisation to occupy varying positions in multiple supply chains.

Supply chains have become important over the last three decades as companies increasingly outsource production, relying on a succession of legally independent suppliers. This has caused the management of supply chains to become a matter of growing strategic concern. Supply chains can involve extended multi-tiered subcontracting networks of which there can be hundreds, sometimes thousands of suppliers. The suppliers with which a company directly interacts are tier-1 suppliers. Behind tier-1 can be layers of indirect suppliers (tier-2 onwards). The risk of modern slavery is typically greatest in the higher tiers of the supply chain, beyond more transparent tier-1 and tier-2 suppliers and remote from activist consumers and their governments. A company may not know how extensive the sub-contracting networks are for products produced to their specification, so mapping their supply chain is not necessarily straightforward. This complicates the question of accountability of a company for offences in its supply chains.

In the context of most industries or verticals, there is no formal register of supply chain membership or system of classifying firms as members. A single company's supply chain can involve multiple suppliers. For example, Nestlé works with 165,000 tier-1 suppliers and sources directly from more than 626,000 smallholder farmers (Nestlé, 2020). In New Zealand, The Warehouse Group sources from 489 factories (with order values of more than US$50K) behind which are a range of input suppliers (The Warehouse, 2021). As national law seeks to use a company's leverage over suppliers to combat modern slavery, it becomes vital to understand how the law understands the idea of the supply chain itself.

Modern slavery legislation in other jurisdictions

In recent years, the UK and Australia have introduced transparency legislation. The UK Modern Slavery Act 2015 requires businesses and organisations doing business in the UK with a global annual turnover of GB£36 million or more to report annually on their actions to address modern slavery in their supply chains. A key criticism of the UK's transparency legislation is that companies can report they have not undertaken any action and thus have fulfilled their legislation obligations. Indeed, the UK Modern Slavery Act 2015, Section 54(5)(e), states a company can report on "its effectiveness in ensuring that slavery and human trafficking is not taking place….*as it considers appropriate*"

[emphasis added]. Another criticism of the legislation is that entities are not required to change their behaviour. Statements filed to the UK Modern Slavery Register by food and tobacco companies have been described as "mixed and rather disappointing" (Monciardini et al., 2021, p.290). Following a 2018 review of the Act, the UK Government stated that in further statutory guidelines, entities would be expected to extend their due diligence measures activities along their supply chains over time (Stringer et al., 2021). In 2021, the UK government announced that companies that did not meet their statutory obligations would face financial penalties.

The Australian Modern Slavery Act 2018 applies to companies with annual revenue over AU$100 million (Commonwealth of Australia, 2018). The Act makes it mandatory for companies to release a publicly available statement every 12 months, beginning in 2020, on the risks of modern slavery occurring within their supply chains and the company's actions to assess those risks (Commonwealth of Australia, 2018), including "risks that may be present deep in supply chains" (Home Affairs, 2018, p.42). This mandatory requirement differentiates the Australian Act from the UK Modern Slavery Act. However, a key criticism is that neither legislation defines 'supply chains'; further, they do not contain human rights due diligence provisions. There is no obligation that companies report modern slavery practices that they identify in their supply chain to authorities in the jurisdiction where exploitation occurs. This can (and often does) lead to non-engagement and ignorance (Christ & Burritt, 2018).

The emerging generation of legislation is centred around due diligence and requires companies to increase their efforts to evaluate human rights violations in their supply chains. In 2021, the German Parliament adopted the Act on Corporate Due Diligence in Supply Chains. The legislation (which comes into effect in 2023) initially applies to companies with more than 3,000 employees. In 2024, the threshold will be reduced to 1,000 employees. Norway and the Netherlands have also introduced legislation. In March 2021, the European Parliament announced proposed legislation that will go further still. It will require member countries to:

> ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions (European Parliament, 2021).

This broader human rights-oriented mandate incorporates a much more comprehensive range of activities than just those associated with modern slavery.

Suppose New Zealand follows legislation in other jurisdictions and imposes duties on companies concerning supply chains, without stipulating their extent or membership. What might this mean for obligated companies? The law may adopt quite a different view of a company's supply chain than its management. Countries passing modern slavery legislation have – to date – been liberal democracies with relatively high per capita incomes. Regulators are sensitive to consumer concerns, so the challenge of modern slavery is perceived in terms of the governance of marketers rather than producers. Indeed, producers exploiting workers in defiance of international norms are presumed to be *elsewhere*, in countries preoccupied with labour-intensive production proximate to natural resources. Marketers are relied upon to exert economic leverage over producers to give extraterritorial effect to domestic legal standards.

The link between supply chains and modern slavery legislation

Supply chains remain something of an unknown quantity to legislators. Governments rarely grapple with supply chains as regulatory objects, but where they have taken the initiative, something is revealed about the legal construction of the concept. Private governance of internationalised supply chains offers a significant opportunity for governments to implement modern slavery legislation. Supply chains implicate firms situated beyond the regulating state's jurisdiction but not beyond the influence of corporations resident in its territory. Through companies resident in their territories, governments can exert pressure on foreign employers to respect labour rights – a vicarious application of regulation.

Today, lead firms in almost every industry claim to tolerate only the highest standards of conduct from their supply chain members. Multinationals and large domestic corporations concerned about reputational damage have codes of conduct and statements of principle meant to reassure stakeholders that labour rights along the chain are a priority. These have not proved to be especially effective (Rühmkorf, 2018). An illustrative example is that of the European retailer Lidl. In 2012, Lidl was embarrassed by its claim to responsible supply chain governance leadership when NGOs discovered labour rights violations were the norm among its suppliers. It proved far less costly for Lidl to back away from the advertised claim than seek to enforce compliance by third parties half a world away (Dove, 2010). Indeed, despite efforts by civil society, it seems that companies have yet to be given sufficient incentive (or subjected to sufficient disincentive) to attend and respond to labour rights abuses where their own employees are not involved. This is where modern slavery legislation enters the picture.

Knowing that companies can exert leverage over their supply chain partners but prefer not to exhaust that leverage by seeking guarantees regarding labour rights, governments have experimented with imposing legal duties to do so. As discussed above, these have so far been too tentative to make much difference. The failure to apply penalties for non-compliance has meant that the lack of clarity around the legal meaning of 'supply chain' remains problematic. If robust sanctions are attached to due diligence failures, the question of exactly to whom the relevant standard of care is owed becomes critical. If the legislation does not provide explicit guidance as to the extent of a given company's supply chain, obligated companies will face considerable uncertainty concerning how far to go and how much to do. To play safe, until courts apply common law principles to clarify the rules, companies may need to attend to everything: from the provenance of their office stationery and furniture, flooring, and staff uniforms, to the eventual use of retired company assets such as vehicles and computers.

Looking ahead: issues to consider in New Zealand's legislation

Supply chain definition alternatives

As both the Australian and UK Modern Slavery Acts leave it to regulated companies to determine the extent of their supply chains for transparency reporting purposes, corporations tend not to report on chains receding into the industrial and geographical distance. Instead, they favour a review of a supply 'constellation'. This positions the company as a direct recipient of inputs from suppliers in different industries and locations. These suppliers are only the most proximate members of multiple supply chains intersecting the obligated company as a goods or service producer. Should New Zealand's prospective modern slavery law take the approach favoured in other common law jurisdictions, local companies might get away with a brisk scan of their most amenable first-tier suppliers – and even

then, only those from which the company receives a physical product. This may frustrate the intent of the law, as, from the perspective of companies in high-standard jurisdictions like New Zealand, the most severe abuses of labour rights are likely to occur further out in the chain, obscured behind more respectable contractors. To be effective, modern slavery laws need to recognise obligations to report or effect remedies reaching beyond the first tier of supply.

Another aspect of supply chains that future modern slavery laws might seek to disambiguate is their downstream component. As discussed above, supply chains run both to and from companies, and there is no theoretical reason to limit the duty to protect only those employed upstream. Existing legislation and commentary reveal that regulators expect labour rights abuses to occur on the ground, where work implies dirt and exposure to the elements. These are the places where virtually every form of production traces its beginnings, but they are by no means the only places modern slavery occurs. Another reason for the law's upstream fixation is that private initiatives to govern working conditions through the supply chain are prevalent among lead buyer firms in industries like apparel and chocolate. Taking the form of codes of conduct and supplier audits, these private monitoring initiatives serve in the absence of state-imposed supply chain liability and shape the discussion about legal parameters when governments become engaged with the issues. However, evidence of labour rights violations in the retail sector suggests companies will not, in the future, be given leave to ignore downstream labour practices.

An advantage to this approach is that influential seller firms can use their influence through distribution networks where buyers might be relatively powerless. This is especially important for service providers that are not commonly understood as members of supply chains, although they most certainly are. While logistics service companies are obviously intrinsic to supply chains, so are financial institutions, insurance providers, telecommunications companies, law and accounting partnerships, and consultancies.

One advancement that the next generation of modern slavery legislation might make is defining corporate liability in value chains rather than supply chains. In that case, the risk faced by regulated companies is enlarged in one dimension but potentially reduced in another. Risk magnification involves extending the chain through the focal firm and out towards the consumer. For example, manufacturers will need to monitor the routes products take to end-users and even beyond if products are resold or journey on through different stages of waste disposal and recycling. This would be an extraordinary expansion of the compliance challenge for manufacturers of raw materials and intermediate goods.

However, focusing on the idea of value addition offers a means to restrict the focus of due diligence. If a regulated company only has to account for those other enterprises supplying or buying goods or services to which that company adds value, a great many potential third parties immediately fall off the radar. For example, the typical company need no longer concern itself with suppliers of office stationery, computer or telecommunications equipment, or cleaning services. Significantly, this exclusion might extend to recruitment agencies in that an employer can plausibly argue it does not 'add value' to an employee.

Corporate liability remodelling the supply chain

It is likely that legislation being considered in New Zealand will adopt terminology common to other jurisdictions, which suggests 'supply chain' might, at first, be no more usefully defined here than elsewhere. However, if there are meaningful penalties attached to non-compliance, whether in respect of transparency reporting or a more substantial due diligence requirement, employers should recall the judiciary's role in giving substance to statutory provisions. New Zealand courts may be prepared

to construe 'supply chain' more broadly than regulated companies might. For example, they could take inspiration from the UN Guiding Principles on Business and Human Rights, which attribute responsibility to corporations where they are linked through a business relationship to the commission of human rights violations. In this context, responsibility for rights infringements extends beyond subsidiaries or contractors.

As New Zealand's government contemplates modern slavery legislation, it will have recourse to pioneering legislation in other jurisdictions and a number of court decisions where the questions of justification and extent of supply chain liability are considered. In 2019, in *Vedanta Resources Plc v Lungowe* [2019] and in *Okpabi* v *Royal Dutch Shell PLC* [2021], the UK's Supreme Court found it plausible that a parent company might owe a duty of care to individuals for human rights abuses committed by its foreign subsidiary. Human rights lawyers seek to go further, urging courts to extend the scope of duties of care along the supply chain beyond subsidiaries based on vicarious liability or organisational/enterprise liability (Rott & Ulfbeck, 2015). Meanwhile, activist investors use company law to punish businesses failing to keep their corporate social responsibility promises, as in the Australian Centre for Corporate Responsibility's suit against major oil and gas Santos (Grieve & Toscano, 2021).

A particularly interesting case in the UK common law might influence the imposition of supply chain due diligence beyond subsidiaries or first-tier suppliers. In *Chandler* v *Cape* [2012], the English Court of Appeal held that a parent company was liable for harm suffered by the employee of a subsidiary. In so doing, it relied not on the ownership relation but on the superior business knowledge of the parent company underpinning interventions in the subsidiary's business. Although in that case, the relevant knowledge pertained to health and safety, the court in *Vendanta* found no reason to limit knowledge giving rise to a duty of that kind. Thus, a company with superior knowledge of the market, product, regulatory environment, and supply chain itself, which other supply chain members depend on, is responsible for harm if that knowledge is not employed to prevent it. It may transpire that superior ethical knowledge about international normative standards also renders a company liable for harm along the chain.

Judicial recognition in other common law jurisdictions of corporate liability for harm inflicted on workers by third parties is unlikely to have gone unnoticed by New Zealand's legislation drafters. Furthermore, if modern slavery law in New Zealand imposes supply chain due diligence, New Zealand courts will, before long, take note of decisions of this kind in setting the relational limits of liability and, in effect, the legal extent of the supply chain itself.

Conclusion

Whether New Zealand companies face a transparency requirement or a more arduous due diligence law, questions arise as to the relational scope of these obligations. That is, how far from the obligated company should we expect its supervision and/or intervention to extend, in what direction, and over whom is the company thought to exercise the powers implicit in its duties legitimately? These problems should be resolved in the way the law understands the company's supply chain, but here we find one of the least-developed concepts in existing foreign legislation. If New Zealand legislation is similarly offhand about the nature of supply chains, it will burden the compliance process with considerable uncertainty. While it is not certain what form modern slavery legislation might take if implemented in New Zealand, domestic firms are advised to make workers' rights in their supply chains their business.

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