

「澳洲聯邦2018現代奴役法」(AU Modern Slavery Act 2018)

1、沿革背景

根據國際勞工組織統計 2016 年，全球估計有 4030 萬人受困於現代奴役的折磨，其中約有 2490 萬人受困於強迫勞動，和 1540 萬人深陷於強迫婚姻。這些受害者分佈於各個行業與各個部門，包括製造業、農業、建築、娛樂和居家服務；其中，又以婦女和女童受到強制勞動壓迫的情形最嚴重，佔商業性行業受害人的 99%，其他部門受害人的 58%¹。

有鑑於此，澳洲聯邦政府於 2018 年 12 月 10 日公布，並於 2019 年 1 月 1 日施行《2018 現代奴役法》²。本法是一部具有域外效力的澳洲聯邦法律，效力範圍包括澳洲本島與離島³，以及澳洲領域外所發生的事項⁴。於法案草擬初期，預計有 3000 家以澳洲為營運據點的企業將受到規範，於每個會計年度提出現代奴役報告，以評估企業全球供應鏈下的勞工人權保護情況⁵。澳洲政府期許透過政府部門、跨國企業與公營事業撰擬現代奴役報告，從通報與評估，至逐漸改善與消除，隱藏於澳洲社會各階層的人權侵害，甚至彌補世界各個角落人權侵害所造成的傷疤⁶。

¹ See, International Labour Organization, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage Report (19 September 2017), available at: https://www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm (last visited: 2020/11/17).

² Modern Slavery Act 2018 (Cth) § 2(1).

³ 澳洲目前離島有：諾福克島 (Norfolk Island) 聖誕島 (Territory of Christmas Island) 科克斯 (基靈) 群島 (Territory of Cocos (Keeling) Islands) 亞什摩及卡地爾群島 (Ashmore and Cartier Islands)、珊瑚海群島 (the Coral Sea Islands)、澳大利亞南極領地 (the Australian Antarctic Territory)、赫德島及麥唐納群島 (the Territory of the Heard and McDonald Islands)。

⁴ Modern Slavery Act 2018 (Cth) §§ 9-10.

⁵ Parliament of Australia, Purpose of the Bill, Modern Slavery Bill 2018, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1819a/19bd012#_Toc522195198(last visited: 2020/11/17).

⁶ 國際勞工組織所記錄的全球現代奴役案件報告，以及澳洲聯邦警察資訊系統，所有跟現代奴役

2、重點內容

(1) 澳洲聯邦《2018 現代奴役草案》(Modern Slavery Bill 2018) 澳洲《1995 年聯邦刑法》(Criminal Code Act 1995) 第 270 與 271 分部

澳洲法所定義的「現代奴役」，態樣大致有以下 8 種：包括「人口販運」(human trafficking)、「奴役」(slavery)、「勞役」(servitude)、「強制工作」(forced labour)、「強迫結婚」(forced marriage)、「抵債勞役」(debt bondage) 以及「最殘忍形式下的童工」(the worst forms of child labour)⁷。上述 8 種現代奴役罪行，皆增訂於澳洲《1995 年聯邦刑法》(Criminal Code Act 1995) 第 270 與 271 分部⁸。

澳洲法下，法人主體不會單純因為供應鏈下有現代奴役的情況，即遭受刑事追訴。主要原因在於，刑事責任的成立，首先須落入各個罪名的刑事管轄權；再者，必須符合澳洲刑法下各罪名的客觀行為要

有關的起訴與判決案件，請參見以下資料。*See*, International Labour Organization (ILO) and Walk Free Foundation (WFF), *Global estimates of modern slavery: forced labour and forced marriage*, ILO and WFF, Geneva, 19 September 2017, pp. 9–10; *See also*, WFF, *Global Slavery Index 2018*, Minderero Foundation Pty Ltd, 2018, pp. 180–1. *See*, the annual reports of the Interdepartmental Committee on Human Trafficking and Slavery, Department of Home Affairs, ‘Australia’s response to human trafficking’, available at: <https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/human-trafficking> (last visited: 2020/11/17).

⁷ *Ibid*, § 4, ‘modern slavery means conduct which would constitute: (a) an offence under Division 270 or 271 of the Criminal Code; or (b) an offence under either of those Divisions if the conduct took place in Australia; or (c) trafficking in persons, 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 Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27); or (d) the worst forms of child labour, 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, done at Geneva on 17 June 1999 ([2007] ATS 38).’

⁸ 然而，澳洲現代奴役罪的刑事審判權，依照罪刑差異，各不相同。奴役罪的刑事審判權，採取「國際管轄」又稱「世界原則」，規定於澳洲《1995 年聯邦刑法》第 15.4 條以及第 270.3A 條。人口販運、勞役、強制工作、強迫結婚、抵債勞役以及最殘忍形式下的童工等，其餘七種現代奴役罪採取「領域管轄」與「國籍管轄」又稱「屬地原則」與「屬人原則」規定於澳洲《1995 年聯邦刑法》第 15.2 條與第 271.10 條。換句話說，除了奴役罪以外的現代奴役罪行，必須案件的一部份或全部發生於澳洲境內，或是犯罪行為人為澳洲籍，澳洲聯邦刑事法律才享有管轄權，案件才有在澳洲被進一步受到刑事追訴的可能。*See*, Criminal Code Act 1995 (Cth) sch 2 ch 8 divs 270–271.

件與主觀要件，在法人刑事責任的情況下，應採「識別法則」（identification principle）又稱「歸責法則」，亦即證明法人內存在一位或多位「有權作出指示或決定之人」（directing mind and will）⁹，三者缺一不可。有鑒於管轄權與嚴格的構成要件限制，澳洲現代奴役的刑事責任並非外國投資人的法律遵循重點，故不在此贅述，以下將重點內容放在《2018 現代奴役法》供應鏈透明制度的揭露義務。

（2）澳洲聯邦《2018 現代奴役法》（Modern Slavery Act 2018）

A. 概要

澳洲《2018 現代奴役法》主要的規範內容是，要求負擔揭露義務的權利主體，提出現代奴役報告，經過負責人簽核後，於該會計年度終了後六個月內，上傳於中央資料庫。報告的應記載事項有七點，大致以「評估供應鏈下的現代奴役情況」、「因應對策」與「補償措施」等內容為主。違反揭露義務者，將被澳洲政府於公開資訊網站上公布

⁹ 樂購案（*Tesco v. Natrass*）是用來判斷「行為人是否屬於公司內『有權作出指示或決定之人』（directing mind and will）」的著名判例。本案爭點在於「經理是否屬於公司內『有權作出指示或決定之人』，而得將經理沒有更換商品標示的行為，導致標示價格與商品實際價格不符，使消費者負擔比標示價格高的費用購買商品，視同樂購公司的行為，使樂購公司依照《1968 商品標示法》（Trade Descriptions Act 1968）負擔廣告不實的責任？」針對經理是否為『有權作出指示或決定之人』主要有兩個判斷標準：一、依照樂購公司的章程、董事會或股東常會等組織決議下，經理能否代表公司？二、經理的行為，是否在其職務權限範圍內？最後，法院認為該名經理僅屬一般員工，不是以公司章程決議選任授權的代表。此外，經理的職務權限只有實地查核盡職調查，不包括預防消費者買到與架上標示不符的商品，因此經理於本案不是有權作出指示或決定之人，故不得將經理的行為視同公司的行為。*Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 'In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise or due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.'; *See also, R. v Andrews Weatherfoil* [1972] 56 C.App.R. 31 CA, 'It is not every responsible agent or high executive or agent acting on behalf of a company who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law make their acts in the matter under consideration the acts of the company, so that the natural person is to be treated as the company itself. It is necessary for the judge to invite the jury to consider whether or not there are established those facts which the judge decides, as a matter of law, are necessary to identify the person concerned with the company.'

名稱。違反揭露義務雖不會受到罰鍰處罰，但公布姓名的處罰方式，可能會造成被公布者的商譽受挫，或者打擊投資人信心等間接負面效果。以下將詳細介紹澳洲《2018 現代奴役法》外國投資人應注意的部分。

B. 負擔揭露義務的主體

以下四種主體，不論為公法人或私法人、亦不論是否以營利目的¹⁰，皆負有揭露義務：一、澳洲籍實體或於澳洲從事業務活動的外國實體，且單一會計年度合併營收一億元澳幣以上；二、澳洲聯邦政府¹¹；三、由澳洲政府設立或持股的公營事業¹²，且單一會計年度合併營收一億元澳幣以上；四、澳洲籍實體或於澳洲從事業務活動的外國實體，且自願申請負擔揭露義務¹³。

a 澳洲籍實體或於澳洲從事業務活動的外國實體

澳洲籍實體，包括依照澳洲法律設立登記的法人，以及主要營業位於澳洲的非法人團體。依照澳洲聯邦《1936 年所得稅評估法》

¹⁰ Australian Border Force, Department of Home Affairs (Cth), ‘Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities’ (26 September 2019), p.18, available at: <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf> (last visited: 2020/11/17).

¹¹ See Modern Slavery Act 2018 (Cth) § 15(1), ‘The Minister must prepare a modern slavery statement for the Commonwealth, for a reporting period, covering all non-corporate Commonwealth entities within the meaning of the Public Governance, Performance and Accountability Act 2013.’

¹² See, Public Governance, Performance and Accountability Act 2013 (Cth) §§ 11(a), 89(1), ‘a corporate Commonwealth entity, which is a Commonwealth entity that is a body corporate;’ ‘A Commonwealth company is a Corporations Act company that the Commonwealth controls. However, it does not include a company that is a subsidiary of: (a) a Commonwealth company; or (b) a corporate Commonwealth entity; or (c) the Future Fund Board of Guardians.’

¹³ Modern Slavery Act 2018 (Cth) § 5(1), ‘(1) Each of the following is a reporting entity in relation to a reporting period: (a) an entity which has a consolidated revenue of at least \$100 million for the reporting period, if the entity: (i) is an Australian entity at any time in that reporting period; or (ii) carries on business in Australia at any time in that reporting period; (b) the Commonwealth; (c) a corporate Commonwealth entity, or a Commonwealth company, within the meaning of the Public Governance, Performance and Accountability Act 2013, which has a consolidated revenue of at least \$100 million for the reporting period; (d) an entity which has volunteered to comply with the requirements of this Act under section 6 for that period.’

(Income Tax Assessment Act 1936) 規定應負擔所得稅的法人，如股份有限公司、信託機構，或是有限責任合夥企業即屬之¹⁴。

於澳洲從事業務活動的外國實體，是指符合澳洲聯邦《2001年公司法》第21條之定義的外國法人或非法人團體¹⁵，也就是外國法人或非法人團體在澳洲設有營業辦事處，或是在澳洲管理不動產¹⁶。實務上，已於澳洲證券交易委員會 (Australian Securities & Investments Commission) 登記註冊的外國股份有限公司，皆屬於在澳洲從事業務活動的法人¹⁷。

b. 單一會計年度合併營收的計算方式

澳洲籍實體或於澳洲從事業務活動的外國實體，單一會計年度合併營收是否達到一億元澳幣，計算標準應依照澳洲會計準則

¹⁴ Ibid, § 4, ‘Australian entity means: (a) a company which is a resident within the meaning of subsection 6(1) of the Income Tax Assessment Act 1936; or (b) a trust, if the trust estate is a resident trust estate within the meaning of Division 6 of Part III of the Income Tax Assessment Act 1936; or

(c) a corporate limited partnership which is a resident within the meaning of section 94T of the Income Tax Assessment Act 1936; or (d) any other partnership, or other entity, whether incorporated or unincorporated, if: (i) the entity is formed or incorporated within Australia; or (ii) the central management or control of the entity is in Australia.’

¹⁵ Ibid, §5(2), ‘An entity carries on business in Australia if the entity: (a) in the case of a body corporate—carries on business in Australia, a State or a Territory within the meaning of the Corporations Act 2001 (see section 21 of that Act); or (b) in any other case—would be taken to do so within the meaning of that Act if the entity were a body corporate.’

¹⁶ Corporations Act 2001 (Cth) §21, ‘(1) A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be. (2) A reference to a body corporate carrying on business in Australia, or in a State or Territory, includes a reference to the body: (a) establishing or using a share transfer office or share registration office in Australia, or in the State or Territory, as the case may be; or (b) administering, managing, or otherwise dealing with, property situated in Australia, or in the State or Territory, as the case may be, as an agent, legal personal representative or trustee, whether by employees or agents or otherwise. (3) Despite subsection (2), a body corporate does not carry on business in Australia, or in a State or Territory, merely because, in Australia, or in the State or Territory, as the case may be, the body: (a) is or becomes a party to a proceeding or effects settlement of a proceeding or of a claim or dispute; or (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs; or (c) maintains a bank account; or (d) effects a sale through an independent contractor; or (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia, or the State or Territory, as the case may be; or (f) creates evidence of a debt, or creates a security interest in property, including PPSA retention of title property of the body; or (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts; or (h) conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or (j) invests any of its funds or holds any property.’

¹⁷ Australian Border Force, *supra* 8, at p 20.

(Australian Accounting Standards)，合併計算該公司(下稱「控制公司」)與旗下子公司的營收¹⁸。控制公司對於被投資公司是否存在「控制力」，而為母子公司關係，應參照澳洲財務報告準則(Australian Accounting Standard AAS 10 Consolidated Financial Statements)¹⁹，判斷控制公司對於被投資公司是否存在「控制三要素」：包括一、控制公司對被投資公司有權力；二、控制公司享有來自被投資公司的變動報酬；三、控制公司能使用對被投資公司之權力，以影響投資者報酬金額之能力²⁰。值得注意的是，澳洲聯邦《2018 現代奴役法》單一會計年度合併營收的計算方向，只會往下合併計算子公司的營收，並不會往上算入非澳洲籍且不在澳洲運作的母公司營收²¹。

c. 自願申請負擔揭露義務的主體

自願申請負擔揭露義務的主體，是指澳洲籍實體或於澳洲從事業務活動的外國實體，單一會計年度收入沒有達到一億元澳幣的經濟門檻，但基於公共利益，或是想落實企業的社會責任，有意願參加提出年度現代奴役報告之人²²。要成為自願申請負擔揭露義務的主體，必須先上澳洲政府的官網登記。登記完成，而且收到回覆確認後，而且

¹⁸ Australian Border Force, Department of Home Affairs (Cth), 'Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities' (26 September 2019), p.19, available at: <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf> (last visited 2020/11/17).

¹⁹ 由於澳洲財務報告準則是以國際財務報告準則(International Financial Reporting Standards, 簡稱 IFRS)作為藍本，再依澳洲國內需求作些微更動的會計規則，因此澳洲財務報告準則內容與國際財務報告準則，兩者內容大致相同。澳洲財務報告準則對於「控制從屬關係」的認定與國際財務報告準則一致。See, Australian Accounting Standards Board, Consolidated Financial Statements AASB 10, available at: https://www.aasb.gov.au/admin/file/content105/c9/AASB10_07-15_COMPdec15_01-18.pdf (last visited 2020/11/17).

²⁰ Australian Accounting Standards Board, Consolidated Financial Statements AASB 10, 5-16.

²¹ Australian Border Force, *supra* 8, at p 20.

²² Modern Slavery Act 2018 (Cth) § 5(1)(d), 'an entity which has volunteered to comply with the requirements of this Act under section 6 for that period'.

應提出報告的會計年度已經開始²³，自願申請負擔揭露義務的主體，就如同本法第五條其他三款的揭露義務主體，所負擔的義務程度、內容皆相同。換言之，自願申請負擔揭露義務的主體，所提出的現代奴役報告同樣應具備七點應記載事項；如有違反，甚至是無法提出現代奴役報告，仍然會遭受公布姓名的懲罰²⁴。

C. 現代奴役報告的內容

現代奴役報告須符合以下七點應記載事項：一、標明該份現代奴役報告的揭露義務主體；二、描述揭露義務主體的「組織結構」、「營運」以及旗下「供應鏈」的組成²⁵；三、描述揭露義務主體的旗下組織和供應鏈，可能有現代奴役問題的風險部分；四、闡明揭露義務主體就旗下組織和供應鏈的現代奴役問題，所進行之盡職調查（due diligence）與補償程序（remediation processes）；五、描述揭露義務主體採取何種關鍵績效指標，衡量預防現代奴役的相關政策的有效性；六、描述揭露義務主體，如何與旗下組織和供應鏈接洽與磋商。此外，如果是聯合現代奴役報告，應載明如何與報告所涵蓋的各個主體接洽與磋商；七、最後，揭露義務主體得補充任何有助於改善現代奴役問題的資訊。如果揭露義務主體認為，前六項已能夠充分評估，以及逐

²³ 如果在應提出現代奴役報告的會計年度開始前，自願加入者隨時能夠撤回申請。See, Australian Border Force, *supra* 8, at p 22

²⁴ Australian Border Force, *supra* 8, at pp 22-25

²⁵ 注意，澳洲政府對於現代奴役報告中所指的「組織結構」、「營運」以及「供應鏈」，有非常特定的要求。「組織結構」是指揭露義務主體的法律上組織結構；「營運」是指揭露義務主體於澳洲境內與境外，依照其業務性質的整體營運情況。例如，使用勞工的工廠應闡明員工組成、提供產品的企業應闡明商品從原物料到成品的製程、提供金融服務為主的企業，應闡明企業與顧客的關係等。「供應鏈」是指一切有助於揭露義務主體，順利提供主產品或主服務，而自全球參與生產的產品或勞力服務，而且不限於直接供應商。例如，建造房子的建設公司，有義務去調查，生產建材原物料的工廠（例如，磚塊）是否有使用奴工的情況。See, Australian Border Force, *supra* 8, at pp 33-36.

漸改善旗下組織與供應鏈的現代奴役問題，亦應附具體理由說明前六項何以完備地評估。

3、簡析建議

澳洲聯邦《2018 現代奴役法》與英國或是美國加州的供應鏈透明制度相較，影響的權利主體較具有可預見性。原因在於，外國公司只要於英國或美國加州境內提供產品或服務，就有可能受到規範；反觀澳洲，必須是依照澳洲聯邦《2001 年公司法》於澳洲設置營運辦事處，或於澳洲置產的外國公司，才會有可能受到澳洲聯邦《2018 現代奴役法》的規範。然而，英國正在考慮修正現行供應鏈透明制度，修正方向與澳洲聯邦《2018 現代奴役法》的內容相似²⁶，因此澳洲法的規範將更具參考價值。

澳洲法下的揭露義務主體多元，而且揭露義務的彈性內容較少，強制性要求多。舉例而言，澳洲法下的現代奴役報告設有應記載事項，現代奴役報告應統一上傳中央線上資料庫，而且違反揭露義務者，將直接被政府公布名稱。企業在法規遵循的執行層面上，供應鏈越是廣布全球的跨國企業，越需要耗費大量成本執行供應鏈的盡職調查（due diligence）。在企業大量委外分工雇用外部廠房，而且沒有辦法直接控制外部廠房營運的情況下，或是企業本身對於人權評估業務較不熟悉的情況下，與相關非營利組織、全球供應鏈下的在地勞工組織合作，將會有助於企業評估與有效解決現代奴役問題²⁷。此外，澳洲邊防部

²⁶ Transparency in supply chains consultation—Government response, UK Home Office, 22 Sep.2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf (last visited: 2020/11/16).

²⁷ See, Marley S. Weiss, Human Trafficking and Forced Labor: A Primer, 31 ABA J. Lab. & Emp. L. 1

隊 (Australian Border Force) 於 2019 年有提供官方的現代奴役報告指南²⁸，內容載有法規的詳細解說，以及實務上的各種案例說明，值得參考。

(2015).

²⁸ See, Australian Border Force, *supra* 8.