

5 February 2021

Committee Secretary
Senate Foreign Affairs, Defence and Trade Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By Email Only: fadt.sen@aph.gov.au

Dear Secretary,

**Submission re: CUSTOMS AMENDMENT (BANNING GOODS
PRODUCED BY UYGHUR FORCED LABOUR) BILL 2020**

Introduction and statement of support

Thank you for the opportunity to provide a submission in relation to the above Bill.

As Australia's first law firm dedicated exclusively to modern slavery issues, we support the passage of the Bill. It marks an important step in building upon Australia's commitment to addressing the scourge of modern slavery, going beyond the foundation laid by the *Modern Slavery Act 2018* (Cth).

After Australia joined only a small number of nations (including the USA and United Kingdom) in requiring in-depth modern slavery reporting for all corporate entities over a certain size, it is an important and logical next step to continue the fight against slavery through the passage of legislation that singles out known slavery hot spots that likely have a direct nexus with Australian trade and commerce. The *Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020* represents such a measure.

The Bill is also an important indication to the world that Australia will not leave its international human rights obligations, reflected in numerous treaties to which Australia is party, at the merely rhetorical level. Through accompanying capacity building, research, investigation and awareness raising, the Bill has real potential to achieve a practical reduction of the importation of products into Australia that have been produced using forced labour in the most unimaginably suppressive and rights-violating conditions.

Whilst ever our global economy is willing to tolerate, turn a blind eye, or even fail to enforce prohibitions on the use of forced labour in the production and manufacturing of goods, such products will continue to find their way into

markets. So long as this occurs, everyday consumers will continue to (for the most part unknowingly) provide financial support to those individuals (whether under the guise of government officials or private citizens involved in organised crime) who willingly exploit their fellow humans in conditions of slavery. Express import prohibitions like those contained in the Bill form part of a multi-faceted, and necessarily ongoing legislative response to a worldwide phenomena that is estimated to enslave a total number of fellow humans that is not all that far short of Australia's total population.

Without in any way intending to detract from our overall support for the Bill, this submission sets out some observations for the Committee's consideration on issues of legality and practicality, including possible complementary steps that might be taken to enhance the practical effectiveness of the provisions contained in the Bill.

Some observations on the breadth of the proposed provisions

It is to be noted that the two substantive portions of the Bill's key provision are vastly different in their potential scope of operation.

The first, proposed s.50A(a), covers all goods produced or manufactured within a distinct geographical area, namely, Xinjiang Uyghur Autonomous Region of the People's Republic of China. Such a blanket ban, without requiring specific proof of forced labour, can readily be justified on the basis of widespread evidence of the extraordinary prevalence of forced labour (and other forms of modern slavery) within that particular geographical area.

The second, proposed s.50A(b), operates to absolutely ban goods produced or manufactured using forced labour *anywhere* in China. The efficacy and consistency of such a blanket national ban, which seemingly operates only in the face of actual proof of forced labour, must be assessed against the prevalence of such slavery practices throughout numerous other nations worldwide, with these countries not being, or currently proposed to be made, subject to the same kind of prohibition on imports under the *Customs Act*.

The provisions, in their current form, will operate on an *at-large* basis, rather than only applying to a specified list or Schedule of goods that are known to offend the subject provisions. This, along with the fact that 'goods' seemingly includes component parts, (e.g. an electronic device that might contain hundreds or thousands of components, but only a single part falling within the proscribed definition), warrants careful consideration of the potential practical operation of the Bill's provisions, along with complimentary capacity building activities or governmental guidance that might accompany the passage of such legislation, to increase the effectiveness and consistency of its operation.

Implications of criminal liability

A breach of either one of the express import prohibitions proposed by the Bill, will amount to a serious criminal offence in contravention of s.233BABA of the *Customs Act 1901*, with a maximum penalty of 1,000 penalty units (currently, \$222,000).

Such serious potential consequences for a breach of the Bill's proposed provisions plainly underscores the importance of sufficient clarity and real-world capacity for an affected individual to be able to practically assess whether any given importation of goods into Australia might fall afoul of the prohibitions.

Issues in relation to the difficulties that continue to be encountered in determining whether a particular good has its provenance within the Xinjiang Uyghur Autonomous Region, are discussed below.

In consideration of this issue, and the potential for criminal prosecutions flowing from its alleged contravention, it is further noted that the offence under s.233BABA is one of strict liability.

Accordingly, a person would have a complete legal defence for an alleged offence under, for example, s.50A(a) and s.233BABA, if the prosecution was unable to rebut, beyond reasonable doubt, the possibility that the person honestly and reasonably believed that the subject good / product was **not** one that had been produced or manufactured in the Xinjiang Uyghur Autonomous Region of the People's Republic of China.

Is the incidence of forced labour throughout China so prevalent relative to other countries with elevated modern slavery risks so as to justify the national blanket ban proposed by s.50A(b)?

There is simply no question that the prevalence of forced labour throughout China (and well beyond the Xinjiang Uyghur Autonomous Region) is a human rights issue of most pressing concern. A trend towards concrete, practical legislative action in countries such as Australia and the United States to address such issues is undoubtedly a step in the right direction.

However, particular in consideration of the efficacy of proposed s.50A(b), we submit that the germane question is whether the forced labour situation throughout all of China warrants singling out in the manner proposed, to the exclusion of other countries with equally bad (or worse) overall records in relation to the use of forced labour for the production of goods for international export.

It is perhaps axiomatic to note that we do not oppose, in principle, the notion of an absolute legislative prohibition on the importation of goods produced using forced labour from an entire country. Such an approach is concrete manifestation of Australia's human rights commitment, specifically in the area of modern

slavery. However, we submit that if such broad measures are to be enacted, strong consideration should be given to the inclusion of equivalent nation-wide bans in countries that have been identified as having forced labour issues that are as bad, or even worse, than those that are known to exist in China.

For example, we note that the internationally recognised benchmark document, the USA State Department's *Trafficking In Persons Report 2020* (the **TIP Report**)¹, classifies the following nation states at the same (highest) relative level of concern as China in terms of the adequacy of a particular country's government efforts to meet the US Victims of Trafficking and Violence Protection Act's minimum standards for the elimination of human trafficking:²

- AFGHANISTAN, ALGERIA, BELARUS, BURMA, BURUNDI, COMOROS, CUBA, ERITREA, IRAN, NORTH KOREA, LESOTHO, NICARAGUA, PAPUA NEW GUINEA, RUSSIA, SOUTH SUDAN, SYRIA, TURKMENISTAN, VENEZUELA

Whilst it can readily be observed that Australia is not engaged in foreign import/export activity with any other of these countries to anywhere even remotely comparable to unprecedented extent as it is in China, that fact alone does not seem to us to be sufficiently compelling to extend a prohibition of the kind proposed s.50A(b) only to China, and not these other hotspots of forced labour. Further, in its nation-by-nation analysis the TIP Report is replete with examples throughout the world of countries (including those with a higher classification than Tier 3 countries) that have identified incidences of actual forced labour, often marked by a particular industry, or geographical region within a country.

Accordingly, we urge that the Committee, if it is to proceed with state-wide prohibitions of the kind reflected in s.50A(b), as part of the broader process of ensuring human-rights compliant importation activities 'across the board', give priority to the investigation of making other countries subject to analogous importation prohibitions.

Identification of offending goods— methodologies, challenges and capacity building

Whilst the prevalence of forced labour in Xinjiang, is widely accepted, it is equally recognised that verifying the types of companies or factories that may be in operation can be extremely difficult. Access to the internment camps and other suspect facilities in the region is, unsurprisingly, strictly controlled. Xinjiang

¹ Available at <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>

² These countries all have a 'Tier 3' classification, which is defined as representing: *Countries whose governments do not fully meet the TVPA's minimum standards and are not making significant efforts to do so.* The further criteria and the distinction, for example, between 'Tier 2 – Watch List' and Tier 3 are explained in the TIP Report at pp. 40-42

internment camps may either contain factories or detained workers will be transported to industrial parks in close proximity to these camps.³ Another pattern of forced labour involves workers being taken out or “released” from internment camps and placed into employment outside of the camps involuntarily. For example, under the state-sanctioned ‘Xinjiang Aid’ Program. As part of this broader ‘Xinjiang Aid’ scheme, Xinjiang labourers may also be placed in the satellite factories, often in close proximity to where Uyghurs and other minorities reside. The widespread use of Xinjiang labour through these varying methods is means that it is increasingly difficult for global entities sourcing from China to monitor and detect.⁴

Some inroads in accurately identifying goods involving forced labour from Xinjiang are being made. For example, the Centre for Strategic International Studies has outlined a number of key indicators or ‘red flags’ that may reveal whether a company is exploiting forced labour in the region and beyond, including:⁵

- Where the company’s factory is located within a detention facility
- Where the company’s factory is located in an industrial park connected to a re- education facility
- Where the company is hiring workers through government recruiters
- Where the Chinese government is providing incentives or subsidies for training supplements ‘vocational training, or ‘aid to Xinjiang’
- Where the company is participating in poverty reduction or pairing assistance programs.

Furthermore, in terms of the identification of actual forced labour facilities, the Australian Strategic Policy Institute⁶ has identified at least 27 factories within nine other Chinese provinces where Uyghur labour is known to be exploited. These Eastern provinces include Jiangsu Province, Anhui Province, Guangdong Province, Hubei Province, Zhejiang Province, Fujian Province, Shandong

³ Adrian Zenz, ‘Beyond the Camps: Beijing’s Long-Term Scheme of Coercive Labor, Poverty Alleviation and Social Control in Xinjiang’ 7(12) *Journal of Political Risk*.

<https://www.jpolrisk.com/beyond-the-camps-beijings-long-term-scheme-of-coercive-labor-poverty-alleviation-and-social-control-in-xinjiang/>

⁴ Ibid.

⁵ Amy K. Lehr and Mariefaye Bechrakis, ‘Connecting the Dots in Xinjiang: Forced Labor, Forced Assimilation, and Western Supply Chains’, Center for Strategic and International Studies, October 2019, 13 cited in [Global Supply Chains, Forced Labor, and the Xinjiang Uyghur Autonomous Region](#) (Staff Research Report, Congressional-Executive Commission on China, March 2020) 6: 1-26.

⁶ Vicky Xiuzhong Xu et al, Uyghurs for Sale: ‘Re-Education’, Forced Labour and Surveillance beyond Xinjiang. (No 26/2020, Australian Strategic Policy Institute (ASPI), 1 March 2020) 4, 31-39: 1-54 . <https://www.aspi.org.au/report/uyghurs-sale>.

Province, Henan Province and Jiangxi Province. Such information is relevant to the broader scope of operation of the prohibition contained in proposed s.50A(b).

The US Department of Labor has, in addition to the most notorious product category of textiles, identified at least 16 other goods that may be produced by forced labour in Xinjiang and other regions of China, including⁷:

- Garments, Gloves and Footwear
- Fish and Tomato products
- Bricks and Coal
- Hair Products, Nail products
- Cotton, Thread/Yarn
- Electronics, Toys,
- Christmas Decorations, Artificial Flowers, Fireworks

Despite this progress in tracing of forced labour products out of Xinjiang in particular, and China more generally, the reality is that there is still much to be done in efforts to identify the full range of offending products.

Perhaps of greatest concern in the Australian context is the fact that Xinjiang is a major producer accounting for approximately 20% of the world's production and at least 80% of China's cotton used in its manufacturing across the country is sourced from the Xinjiang region.⁸ Thus, Australia may be indirectly exposed to Xinjiang-linked labour through the importation of products from China that depends on significant inputs of cotton or yarn.

It remains anywhere from difficult to virtually impossible to obtain clear assurances that products produced in Xinjiang and now other regions of China are free of the forced labour of Uyghur and other ethnic minorities, both within and outside of the Xinjiang region.

In light of these challenges, we respectfully submit that, for maximum effectiveness and fairness, it is essential that the Bill's passage be supported by accompanying guidance on the assessment approach(es) that are advisable for businesses to applying in assessing what goods are likely to involve forced labour in certain regions.

In our experience, operating in the modern slavery space for a wide range of private clients who are earnestly seeking to go beyond their obligations under the

⁷ U.S. Department of Labor, *2020 List of Goods Produced by Child Labor or Forced Labor* (2020) 31: 1-94.
https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPRAList_Online_Final.pdf

⁸ Darren Byler, 'How Companies Profit from Forced Labor in Xinjiang', *SupChina* (online, 4 September 2019). <https://supchina.com/2019/09/04/how-companies-profit-from-forced-labor-in-xinjiang/>

Modern Slavery Act, multi-regional input-output analysis is a well-suited analytical approach for assessing impacts along supply chains in complex economic systems.

Such data-based analytics have been applied to quantify ‘slavery’/’bad labour’ risks embodied in various global trades. More specifically, this approach identifies the inputs required from different industries in different countries around the world to produce the demand represented by the first tier spend or investment of an entity, and then estimates the probable forced labour associated with the value spent at each tier, industry and country throughout the supply chain.

To quantify the probable forced labour associated with the goods from Xinjiang as well as other parts of the People’s Republic of China, bottom-up information collected from a wide range of sources is required. Critical datasets include existing NGO and other related projects including⁹:

- Xinjiang Victims Database;
- The Xinjiang Data Project;
- ASPI ICPC Xinjiang re-education camp database;
- International Labor Organisation Databases;
- Global Slavery Index;
- Global Estimates of Modern Slavery

Additional inputs on the top-down multi-regional input-output data on the background economy are also required for such an analytical approach.¹⁰ One of the key outcomes of such a methodology is that it allows the probable forced labour risks borne by specific entities can be assessed using their expenditure data.

We strongly urge the Committee to consider the preparation of urgent and detailed accompanying guidance on the assessment approach(es) that entities should be undertaking by way of due diligence to satisfy themselves that they are not unknowingly importing products of a kind proscribed by the Bill.

We also submit that it is important that there be widespread industry awareness raising and education efforts in relation to the Bill’s passage and operation. In contrast with the earlier discussion in relation to availability of honest and reasonable mistake of fact as a defence, no such legal excuse is available in relation

⁹ Alsamawi, A., Murray, J. and Lenzen, M. (2014), The Employment Footprints of Nations. *Journal of Industrial Ecology*, 18: 59-70. <https://doi.org/10.1111/jiec.12104>

Simas, M.S.; Golsteijn, L.; Huijbregts, M.A.J.; Wood, R.; Hertwich, E.G. The “Bad Labor” Footprint: Quantifying the Social Impacts of Globalization. *Sustainability* 2014, 6, 7514-7540. <https://doi.org/10.3390/su6117514>

Simas, M., Wood, R. and Hertwich, E. (2015), Labor Embodied in Trade. *Journal of Industrial Ecology*, 19: 343-356. <https://doi.org/10.1111/jiec.12187>

Jorge Gómez-Paredes, Eiji Yamasue, Hideyuki Okumura & Keiichi N. Ishihara (2015) THE LABOUR FOOTPRINT: A FRAMEWORK TO ASSESS LABOUR IN A COMPLEX ECONOMY, *Economic Systems Research*, 27:4, 415-439, DOI: 10.1080/09535314.2014.998173

to an individual who is ignorant of the provisions that will be enacted through the Bill's passage into law.

Recommendations

1. The first, proposed s.50A(a), covers all goods produced or manufactured within a distinct geographical area, namely, Xinjiang Uyghur Autonomous Region of the People's Republic of China be passed and come into effect immediately.
2. That supplementary guidance material be published in relation to s50A(a) for stakeholders affected by s50A(a).
3. That a proscribed methodology be drafted in relation to s50A(b) for determining the prevalence of forced labour in the supply chain of a good or service from China before s50A(b) is passed.
4. That in circumstances where s50A(b) is passed, it is amended to include (but not limited) to including the following countries: Afghanistan, Algeria, Belarus, Burma, Burundi, Comoros, Cuba, Eritrea, Iran, North Korea, Lesotho, Nicaragua, Papua New Guinea, Russia, South Sudan, Syria, Turkmenistan, Venezuela.

Please do not hesitate to contact me if you have any questions.

Sincerely,

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Executive Director and Principal Lawyer
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