



**Uniting Church in Australia**  
SYNOD OF VICTORIA AND TASMANIA



## ***Inquiry into the Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020***

**Joint Submission to the Foreign Affairs, Defence and Trade Committee of the Senate**

**The Uniting Church in Australia, Synod of Victoria and Tasmania and The Salvation Army Australia**

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## Statement of Recognition

The Salvation Army and the Uniting Church in Australia acknowledge the Traditional Custodians of the lands and waters throughout Australia. We pay our respect to Elders, past, present and emerging, acknowledging their continuing relationship to this land and the ongoing living cultures of Aboriginal and Torres Strait Islander peoples across Australia.



## 1. Recommendations

The Uniting Church in Australia, Synod of Victoria and Tasmania, and The Salvation Army Australia welcome the opportunity to make a joint submission on the *Customs Amendment (Banning Goods Produced by Uyghur Force Labour) Bill 2020*. We support the intent of the Bill to prohibit the importation of goods produced through forced labour. However, our understanding is that because the Bill discriminates by only targeting goods produced by forced labour from one jurisdiction, it would be open to challenge by the Chinese Government under the World Trade Organisation (WTO) rules.

The submitting bodies, therefore, ask that the Committee make the following recommendations:

1. The Bill be amended to apply a ban on importing goods and services produced with the involvement of modern slavery regardless of which jurisdiction they are imported from. Such a provision would align with Section 307 of the US *Tariff Act 1930*.
2. The Australian Government take the necessary actions to allow importation data from the Australian Government's Integrated Cargo System (ICS) to be publicly accessible to help identify Australian importers that are sourcing goods from businesses overseas involved in modern slavery. The United States, the EU and India have made such data publically available with no significant negative impacts on businesses in their jurisdictions operating lawfully.
3. The Australian Government set up an investigative body with the Australian Border Force dedicated to investigating likely cases of the importation of goods produced with the involvement of modern slavery. Such a section could be modelled on the Forced Labor Division in the US Customs and Border Protection within the Department of Homeland Security.
4. The Australian Government introduce legislation to allow for Withhold Release Orders, as already exist under US law and regulations, specifically 19 C.F.R. § 12.42(e).

We would be happy to provide further clarification if required and would welcome an opportunity to appear before the Committee to discuss this submission in more detail.



## 2. Introduction

In response to the evidence of forced labour of the Uyghur people and other Muslim minorities in China's Xinjiang region, the UK Foreign Secretary announced to the UK House of Commons on 12 January 2021 that the UK Government would be introducing fines for businesses that fail to comply with their transparency obligations under the UK *Modern Slavery Act*.<sup>1</sup> The Australian Government should do the same.

The submitting bodies have a long history of campaigning and advocating for measures to address modern slavery, both in Australia and overseas.

The *Customs Amendment (Banning Goods Produced by Uyghur Force Labour) Bill 2020* appears to follow similar attempts to introduce such legislation in other jurisdictions, such as the US where the *Uyghur Forced Labor Prevention Act* passed the House in September 2020. The Bill was referred to the Senate Foreign Relations Committee. The Bill would ban all imported products from the Xinjiang Uyghur Autonomous Region to address wilful avoidance of US legislation that would prevent the importation of merchandise made with forced labour and capitalises on the opaqueness of business supply chains in China. While this may be a logical step to address high-risk areas such as Xinjiang, there are practical challenges that could limit the Customs Amendment Bill's effectiveness, as currently drafted, in achieving this objective.

There is a real risk that Xinjiang goods produced by Uyghurs or other persecuted minority groups would be 'laundered' to mask the origin of production. Direct shipments from certain banned companies, such as Hefei Bitland (which supplies major companies like Lenovo, HP and Apple) can be tracked with relative ease. On the other hand, *indirect* shipments of items containing cotton along the intra-Asia trade route can be more challenging to follow. One in five cotton garments sold globally contains fibre or yarn sourced from the Xinjiang region of China. Tracing goods to the raw materials level is incredibly difficult if not impossible.<sup>2</sup>

The *Customs Amendment (Banning Goods Produced by Uyghur Force Labour) Bill 2020* provision to ban any product made with forced labour in China would face the same challenge of identifying when goods are likely to have been produced by forced labour. This submission argues there is a need for the Commonwealth Government to allocate resources to investigate cases where imports to Australia have been produced by modern slavery.

The size of the task is significant. As Table 1 illustrates, in 2019, Australian imports from China were worth nearly US\$57 billion<sup>3</sup>, including over US\$2 billion in articles of apparel. Policing this volume of imports would be a massive undertaking.

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<sup>1</sup> Dominic Raab, "Human rights violations in Xinjiang and the government's response: Foreign Secretary's statement", January, 12, 2021.

<sup>2</sup> Lori Ann LaRocco, "Commentary: The fabric of withhold release orders", *American Shipper*, September, 18, 2020, <https://www.freightwaves.com/news/commentary-the-fabric-of-withhold-release-orders>.

<sup>3</sup> <https://tradingeconomics.com/australia/imports/china>.



**Table 1. Value of imports to Australia from China in 2019.<sup>4</sup>**

Australia imports from China in 2019	Value (US\$ billions)
<a href="#">Electrical, electronic equipment</a>	\$13.09
<a href="#">Machinery, nuclear reactors, boilers</a>	\$10.40
<a href="#">Furniture, lighting signs, prefabricated buildings</a>	\$3.31
<a href="#">Mineral fuels, oils, distillation products</a>	\$2.67
<a href="#">Articles of iron or steel</a>	\$2.28
<a href="#">Plastics</a>	\$2.25
<a href="#">Articles of apparel, not knit or crocheted</a>	\$2.22
<a href="#">Articles of apparel, knit or crocheted</a>	\$2.08
<a href="#">Toys, games, sports requisites</a>	\$1.82
<a href="#">Vehicles other than railway, tramway</a>	\$1.46

### 3. Forced Labour and Modern Slavery of the Uyghur Ethnic Group

In late April 2020, the Australian Strategic Policy Institute published a report on allegations of forced labour by the Chinese Government of the Uyghur ethnic group.<sup>5</sup>

On 1 July 2020, the US Departments of State, Treasury, Commerce and Homeland Security issued a joint advisory to businesses with supply chain exposure to entities in Xinjiang.<sup>6</sup> The advisory warned of the risk of forced labour in the production of goods in the Xinjiang Uyghur Autonomous Region. The advisory also warned there were credible reports that the Chinese Government had facilitated the mass transfer of Uyghurs and others from Xinjiang to factories across China, including under conditions of forced or involuntary labour.<sup>7</sup>

<sup>4</sup> Ibid.

<sup>5</sup> Danielle Cave, James Leibold, Kesley Munro and Nathan Ruser, *Uyghurs for Sale*, (Australian Strategic Policy Institute, Report No. 26, 2020).

<sup>6</sup> US Department of State, US Department of the Treasury, US Department of Commerce and US Department of Homeland Security, "Xinjiang Supply Chain Business Advisory", July, 1, 2020.

<sup>7</sup> Ibid., 2.



The Australian Strategic Policy Institute reported that at least 27 factories in nine Chinese provinces had used transferred labour since 2017. Those factories claim to be part of the supply chain of more than 80 global brands.<sup>8</sup>

On 30 December 2020, BuzzFeed News reported that the Chinese Government had built more than 100 facilities in the Uyghur Region. These facilities can detain Uyghurs and other ethnic minorities and force them to work at factories on site.<sup>9</sup>

Media reports indicated the presence of forced labour in cotton production in the Xinjiang region of China.<sup>10</sup> The allegation is that hundreds of thousands of people, including a large proportion of Uyghurs, have been forced to harvest cotton. Xinjiang cotton accounts for more than 80% of China's cotton and a fifth of global cotton production.<sup>11</sup> In March 2020, the Fair Labor Association called on the Chinese Government to end forced labour and other human rights abuses in Xinjiang and directed their member businesses to review their sourcing relationships in Xinjiang.<sup>12</sup> Subsequently, the Fair Labor Association banned its member businesses from sourcing, directly or indirectly, products from Xinjiang.<sup>13</sup>

Investigations allege that agricultural products, cotton, textiles, apparel, footwear, electronics, food products, mining, chemicals, and medical equipment are high-risk products in China's production involving forced labour.<sup>14</sup>

On 12 January 2021, the UK Foreign Secretary, Dominic Raab, told the UK House of Commons there was widespread use of forced labour of Uyghurs.<sup>15</sup> He stated the evidence of the human rights violations were supported by a large, diverse and growing body of evidence. That includes:

- First-hand reports from diplomats who visit Xinjiang and the first-hand testimony from victims who have fled the region;
- There is satellite imagery showing the scale of the internment camps, the presence of factories inside them, and the destruction of mosques; and
- There are also extensive and credible third party reports from NGOs such as Human Rights Watch and Amnesty International, with the UN and other international experts also expressing very serious concerns.

<sup>8</sup> Cathleen Cimino-Isaacs, Christopher Casey and Katarina O'Regan, *Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress*, (Washington: Congressional Research Service, December, 7, 2020), 15.

<sup>9</sup> "The factories inside the Chinese government's mass internment camps", *Buzzfeed News*, December, 30, 2020.

<sup>10</sup> Sam Meadows, "Top labels urged to ban Xinjiang cotton", *The Age*, December, 17, 2020.

<sup>11</sup> Cathleen Cimino-Isaacs, Christopher Casey and Katarina O'Regan, *Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress*, (Washington: Congressional Research Service, December, 7, 2020), 16.

<sup>12</sup> "Fair labour Association prohibits member companies from sourcing from Xinjiang, China", *Business and Human Rights Resource Centre*.

<sup>13</sup> Ibid..

<sup>14</sup> Cathleen Cimino-Isaacs, Christopher Casey and Katarina O'Regan, *Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress*, (Washington: Congressional Research Service, December, 7, 2020), 16.

<sup>15</sup> Dominic Raab, "Human rights violations in Xinjiang and the government's response: Foreign Secretary's statement", January, 12, 2021.

## 4. A General Ban on the Importation of Goods Produced through Modern Slavery

In a November 2020 report, the Policy Department of the Directorate-General for External Policies of the European Parliament assessed that governments are permitted to exercise prescriptive powers when seeking to remedy offences of universal concern. The report expressly referred to slavery, forced labour and human trafficking as issues of universal concern.<sup>16</sup>

Section 307 of the US *Tariff Act 1930* prohibits the importation of goods, wares, articles and merchandise mined, produced, or manufactured, wholly or in part, in any foreign country by forced labour.<sup>17</sup> In 2000, the US Congress amended Section 307 to include “forced or indentured child labor” in its definition of forced labour.<sup>18</sup> In 2016, the US Congress enacted the *Trade Facilitation and Trade Enforcement Act*. Part of the Act amended Section 307 to remove the consumptive demand clause in Section 307, which had permitted the importation of goods produced with the involvement of forced labour if they were not produced “in such quantities in the United States to meet the consumptive demands of the United States.”<sup>19</sup>

The authors respectfully submit that replicating such an approach would be a more effective strategy than what is proposed in the current draft of the *Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020*. Forced labour inflicts significant harm, no matter where goods are produced. A non-discriminatory approach to prohibiting goods and services made with the presence of modern slavery is less likely to be challenged under the WTO rules.

On 12 January 2021, the Canadian Minister for Foreign Affairs, Francois-Philippe Champagne and the Canadian Minister of Small Business, Export Promotion and International Trade, Mary Ng, jointly announced that in response to the use of Uyghur forced labour, the Canadian Government would introduce legislation to prohibit the importation of goods produced wholly or in part by forced labour.<sup>20</sup>

The US Government has shown a higher risk appetite for its laws to be challenged under WTO rules than successive Australian Governments. For example, in August 2017, Congress enacted the *Countering America’s Adversaries Through Sanctions Act* which included provisions that created a rebuttable presumption that significant goods, wares and articles mined, produced or manufactured

<sup>16</sup> Tobias Stoll, Steven Blockmans, Jan Hagemeyer, Christopher Hertwell, Henner Gött, Kateryna Karunska Case and Andreas Maurer, *Extraterritorial sanctions on trade and investments and European Responses*, (Belgium: Policy Department, Directorate-General for External Policies, European Parliament, 2020), 54.

<sup>17</sup> Kimberley Gianopoulos, Adam Cowles, Diana Blumenfeld, Mary Edgerton, Martin De Alteriis, Lilia Chaidez, Bill Johnson, Christopher Keblitis, Aldo Salerno, and Nicole Willems, *Forced Labor Imports. DHS Increased Resources and Enforcement Efforts, but Needs to Improve Workforce Planning and Monitoring*, (Washington: US Government Accountability Office, 2020), 1.

<sup>18</sup> Cathleen Cimino-Isaacs, Christopher Casey and Katarina O’Regan, *Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress*, (Washington: Congressional Research Service, December, 7, 2020), 6.

<sup>19</sup> Kimberley Gianopoulos, Adam Cowles, Diana Blumenfeld, Mary Edgerton, Martin De Alteriis, Lilia Chaidez, Bill Johnson, Christopher Keblitis, Aldo Salerno, and Nicole Willems, *Forced Labor Imports. DHS Increased Resources and Enforcement Efforts, but Needs to Improve Workforce Planning and Monitoring*, (Washington: US Government Accountability Office, 2020), 1.

<sup>20</sup> Francois-Philippe Champagne and Mary Ng, “Canada announces news measures to address human rights abuses in Xinjiang, China”, January, 12, 2021, <https://www.canada.ca/en/global-affairs/news/2021/01/canada-announces-new-measures-to-address-human-rights-abuses-in-xinjiang-china.html>



wholly or in part by North Korean nationals are the products of forced labour and therefore prohibited from importation under Section 307. Goods found to be produced with North Korean labour are subject to detention, seizure and forfeiture. Violations of the Act may result in civil penalties or criminal prosecution.<sup>21</sup> The Policy Department of the Directorate-General for External Policies of the European Parliament assessed that the *Countering America's Adversaries Through Sanctions Act* is likely to violate the US Government's WTO obligations.<sup>22</sup>

## 5. Withhold Release Orders

As noted above, Section 307 of the US *Tariff Act* of 1930 (19 U.S.C. § 1307) prohibits importing merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured labour – including forced child labour.

When information reasonably, but not conclusively, indicates that merchandise within the purview of this provision is being imported, the Commissioner of U.S. Customs and Border Protection (CBP) may issue withhold release orders (WROs) pursuant to 19 C.F.R. § 12.42(e). If the Commissioner is provided with information sufficient to make a determination that the goods in question are subject to the provisions of 19 U.S.C. § 1307, the Commissioner will publish a formal finding to that effect in the Customs Bulletin and in the Federal Register. A formal finding can only be issued with the Secretary of the Department of Homeland Security's approval. The publication of a finding authorises the CBP to seize the unreleased merchandise and commence forfeiture proceedings.<sup>23</sup> On 20 October 2020, the CBP issued its first finding since 1996, to seize stevia imports produced or manufactured in China by the Inner Mongolia Hengzheng Group Baoanzhao Agriculture, Industry and Trade Co Ltd.<sup>24</sup>

CBP regulations state that any person who has reason to believe that merchandise produced by forced labour is being, or is likely to be, imported into the United States may communicate the belief to any Port Director or the Commissioner of CBP (19 C.F.R. § 12.42). This provision enables the US Government to take intelligence from any source, including human rights organisations, non-government organisations, individuals and the media.

WROs are not an import ban, but all merchandise subject to the WRO must be destroyed or re-exported if found to have been made with forced labour. Having the WRO mechanism enables the government to take some action whilst investigating reports of forced labour. It also places the onus to contradict those reports onto the importer (see, for example, Reuters' coverage of the Top Glove WRO involving rubber gloves alleged to have been produced with forced labour).<sup>25</sup>

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<sup>21</sup> Kimberley Gianopoulos, Adam Cowles, Diana Blumenfeld, Mary Edgerton, Martin De Alteriis, Lilia Chaidez, Bill Johnson, Christopher Keblitis, Aldo Salerno, and Nicole Willems, *Forced Labor Imports. DHS Increased Resources and Enforcement Efforts, but Needs to Improve Workforce Planning and Monitoring*, (Washington: US Government Accountability Office, 2020), 5.

<sup>22</sup> Tobias Stoll, Steven Blockmans, Jan Hagemeyer, Christopher Hertwell, Henner Gött, Kateryna Karunska Case and Andreas Maurer, *Extraterritorial sanctions on trade and investments and European Responses*, (Belgium: Policy Department, Directorate-General for External Policies, European Parliament, 2020), 56.

<sup>23</sup> Cathleen Cimino-Isaacs, Christopher Casey and Katarina O'Regan, *Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress*, (Washington: Congressional Research Service, December, 7, 2020), 9.

<sup>24</sup> *Ibid.*, 9.

<sup>25</sup> Liz Lee, "UPDATE 1-Top Glove has petitioned against import ban, U.S. Customs says", *Reuters*, July, 30, 2020, <https://www.reuters.com/article/malaysia-glove-labour-idUSL3N2F133J>.



If goods subject to a WRO arrive at a U.S. port of entry, CBP will detain those goods until importers re-export the goods, in accordance with 19 C.F.R. § 12.44, or submit evidence that the goods were not produced with forced labour, in accordance with 19 C.F.R. § 12.43. There are two processes for this:

- (1) providing evidence, or ‘proof of admissibility’, to the relevant Port Director that a particular shipment was not produced with forced labour; and
- (2) providing evidence to the CBP supporting a request to revoke a WRO.

WROs may be revoked or modified if evidence shows the subject merchandise was not made with forced labour, is no longer being produced with forced labour, or is no longer being, or likely to be, imported into the United States.

The CBP provides guidance to assist importers to prepare this evidence, including references to the International Labour Organisation's (ILO) forced labour indicators and publications. The Government also provides examples of helpful documentation, which include:

- copies of policies and evidence of their implementation;
- copies of recent unannounced third-party audits;
- copies of remediation plans;
- supply chain maps that specify locations of manufacturers, factories, farms, and processing centres; and
- pictures of living and working accommodations.<sup>26</sup>

**Table 2. The Number of Withhold Release Orders issued by the US Customs and Border Protection related to forced labour issues 2016 -13 January 2021.<sup>27</sup>**

Year	2016	2017	2018	2019	2020	2021
<b>Number of Withhold Release Orders related to forced labour</b>	4	0	2	7	13	4

Between 1930 and the 1980s, goods were denied entry into the US under Section 307 of the *Tariff Act* at least ten times.<sup>28</sup> The use of Section 307 increased substantially in the early 1990s with an increase in Chinese exports to the US. Between 1991 and 1995, the US CBP issued approximately 27 WROs against manufacturers in China.<sup>29</sup> Between 2000 and 2016, no WROs were issued.<sup>30</sup> Of the WROs issued between 2016 and 2019, six related to China and one was about goods produced in the jurisdictions of Turkmenistan, Brazil, Democratic Republic of Congo, Malaysia, Zimbabwe and

<sup>26</sup> US Customs and Border Protection. Fact Sheet: Helpful Hints for Submitting Proof of Admissibility and WRO Revocation/Modification Requests. [https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints\\_FactSheet\\_508comp\\_2\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints_FactSheet_508comp_2_0.pdf).

<sup>27</sup> Kimberley Gianopoulos, Adam Cowles, Diana Blumenfeld, Mary Edgerton, Martin De Alteriis, Lilia Chaidez, Bill Johnson, Christopher Keblitis, Aldo Salerno, and Nicole Willems, *Forced Labor Imports. DHS Increased Resources and Enforcement Efforts, but Needs to Improve Workforce Planning and Monitoring*, (Washington: US Government Accountability Office, 2020), 22; and US Customs and Border Protection, “CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang”, January, 13, 2021, <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>

<sup>28</sup> Christopher Casey, Cathleen Cimino-Isaacs and Katarina O’Regan, “Section 307 and Imports Produced by Forced Labor”, *Congressional Research Service*, July, 20, 2020, 2.

<sup>29</sup> *Ibid.*, 2.

<sup>30</sup> *Ibid.*, 2.



Malawi.<sup>31</sup> Of the 13 WROs issued in 2020, eight were concerning goods made by forced labour in China.<sup>32</sup>

Since 2016, the CBP has issued four WROs that have targeted specific products from an entire region, rather than targeted at one particular business. One was to ban the importation of cotton from Turkmenistan, and another was to ban tobacco from Malawi.<sup>33</sup> Concerns have been raised about the lack of enforcement relating to the WRO issued targeting Turkmenistan cotton.<sup>34</sup> The final one was issued on 13 January 2021, to detain cotton products and tomato products produced in the Xinjiang Uyghur Autonomous Region through a WRO.<sup>35</sup> The CBP stated that the WRO was issued on the basis that there were reasonable indications the goods in question were being made with the use of detainee or prison labour and situations of forced labour. The CBP stated it had identified the following forced labour indicators in its investigation: debt bondage, restriction of movement, isolation, intimidation and threats, withholding of wages, and abusive living and working conditions.

## 6. Transparent Customs Import Data

Making key data about imported products publically available would improve Australian stakeholders' capacity to detect where Australian importers are dealing with suppliers where there is modern slavery, and the source jurisdiction has failed to take effective action to stop the criminal abuse. Transparency in customs data would have a deterrent impact on the risks Australian importers are willing to take in dealing with suppliers where there is a significant risk of human trafficking or forced labour being present, out of concern of reputational risk.

The international trading community is required to provide the Australian Government with information about the importation of goods to Australia. This information is captured through the Australian Government's Integrated Cargo System (ICS) and includes details such as the nature and quantity of the product, the supplier and the intended recipient. In other jurisdictions, including the United States, the EU and India, this data is made publically available. However, import data collected through ICS is only currently available in detail to entities directly involved in the importation of the specific product. Limited statistical data from ICS is also made available to the Australian Bureau of Statistics for research purposes.

Making key data about imported products publically available on request would be relatively low cost. However, it may involve changes to systems and processes within the Department of Home Affairs. A nominal fee could be charged for any public request for data to cover these costs. The change would not impose a regulatory impost on business.

Consultation with the US Department of Homeland Security has indicated that business concerns about customs data being accessible can be effectively addressed in practice. In the jurisdictions

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<sup>31</sup> Kimberley Gianopoulos, Adam Cowles, Diana Blumenfeld, Mary Edgerton, Martin De Alteriis, Lilia Chaidez, Bill Johnson, Christopher Keblitis, Aldo Salerno, and Nicole Willems, *Forced Labor Imports. DHS Increased Resources and Enforcement Efforts, but Needs to Improve Workforce Planning and Monitoring*, (Washington: US Government Accountability Office, 2020), 23.

<sup>32</sup> <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings>

<sup>33</sup> Cathleen Cimino-Isaacs, Christopher Casey and Katarina O'Regan, *Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress*, (Washington: Congressional Research Service, December, 7, 2020), 7.

<sup>34</sup> *Ibid.*, 26.

<sup>35</sup> US Customs and Border Protection, "CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang", January, 13, 2021, <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>

where customs data is publicly available, there is no evidence of any significant impact on commercial activities or the proper functioning of markets. To the contrary, there is evidence that it has assisted importers in those jurisdictions to be made aware of risks of modern slavery concerning suppliers they are sourcing from.

## 7. Government Investigations of Modern Slavery

The Committee should recommend that the Australian Government follow the lead of the US Government and establish specialised staff to investigate suspected cases of imports having been produced through forced labour. The US Customs and Border Protection within the Department of Homeland Security established a Forced Labour Division in 2018.<sup>36</sup> The Forced Labour Division was provided with US\$1.4 million in the 2019 US fiscal year.<sup>37</sup> As of mid-2020, the Forced Labour Division had 13 full-time staff.<sup>38</sup> It initiated more than 100 investigations between 2018 and March 2020.<sup>39</sup> The majority of active cases focused on goods manufactured in China.<sup>40</sup>

Few companies and organisations currently do serious investigations into the risks of modern slavery in their supply chains. Many rely on contract clauses that suppliers certify their products or services are free of modern slavery. For suppliers wilfully and knowingly benefiting from modern slavery in their production, they are also willing to lie to customers. The Commonwealth Government could improve the situation by investigating high-risk products and services coming into Australia within the limits of dedicated resources to do so. The outcome would assist reporting entities under the *Modern Slavery Act*, including the Commonwealth itself which also reports under the Act. It would increase the risk for businesses willingly or recklessly involved with modern slavery that they will not find customers for their products and services.

In addition to the budget of the Forced Labour Division, the US Government Accountability Office reported that in 2019 Immigration and Customs Enforcement spent US\$40 million to investigate allegations of forced labour, including those related to US imports.<sup>41</sup> The amount was a 50% increase over the spending on such investigations in 2016. Of the \$40 million, \$23.4 million was spent investigating reports of forced labour in the US and \$16.7 million on cases of forced labour in overseas supply chains.<sup>42</sup>

Immigration and Customs Enforcement (ICE) reported 560 criminal arrests, 88 indictments, 92 convictions, 1,275 seizures and US\$1.4 million seized related to forced labour cases in 2018. ICE forced labour investigations have not led to any prosecutions of importers for criminal violations of 18 USC § 1589, specifically for forced labour. However, there have been prosecutions and

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<sup>36</sup> Kimberley Gianopoulos, Adam Cowles, Diana Blumenfeld, Mary Edgerton, Martin De Alteriis, Lilia Chaidez, Bill Johnson, Christopher Koblitis, Aldo Salerno, and Nicole Willems, *Forced Labor Imports. DHS Increased Resources and Enforcement Efforts, but Needs to Improve Workforce Planning and Monitoring*, (Washington: US Government Accountability Office, 2020).

<sup>37</sup> Ibid.

<sup>38</sup> Cathleen Cimino-Isaacs, Christopher Casey and Katarina O'Regan, *Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress*, (Washington: Congressional Research Service, December, 7, 2020), 12.

<sup>39</sup> Kimberley Gianopoulos, Adam Cowles, Diana Blumenfeld, Mary Edgerton, Martin De Alteriis, Lilia Chaidez, Bill Johnson, Christopher Koblitis, Aldo Salerno, and Nicole Willems, *Forced Labor Imports. DHS Increased Resources and Enforcement Efforts, but Needs to Improve Workforce Planning and Monitoring*, (Washington: US Government Accountability Office, 2020), 20.

<sup>40</sup> Ibid., 21.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., 33.

convictions for other related crimes, such as fraud and smuggling.<sup>43</sup> ICE has not identified any investigations or resulting criminal charges related to Section 307 cases handled by CBP.<sup>44</sup>

The Forced Labor Division also performs outreach with foreign governments, international NGOs and US Government representatives stationed overseas. The outreach is to raise awareness about Custom and Border Protection’s authority to enforce the prohibition on the importation of goods produced with forced labour.<sup>45</sup> The Forced Labor Division conducted 18 outreach trips to 15 countries between 2018 and October 2020.<sup>46</sup>

On 12 January 2021, the Canadian Government announced it would conduct a study on forced labour and supply chain risks in response to the forced labour imposed on the Uyghur people in China.<sup>47</sup>

## 8. WTO Problems for the current Bill

The submitting bodies believe the *Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020* is currently drafted in a way that would allow the Chinese Government to challenge the legislation before the WTO Appellate Body (WTOAB). A November 2020 report by the Policy Department of the Directorate-General for External Policies of the European Parliament assessed that the Chinese Government is encouraging its companies to actively pursue litigation to protect their rights.<sup>48</sup>

The Bill could be amended in ways that would minimise the possibility that a foreign government could mount a successful challenge to the WTOAB. Article XX paragraph (a), (b) and/or (e) of the General Agreement on Tariffs and Trade (GATT) constitutes an exception to WTO rules that would allow a law to ban the importation of all goods produced with forced labour, regardless of their origin. The Australian Government may also need to demonstrate that any goods made with forced labour in Australia cannot be sold in Australia.

The fact that Section 307 of the US *Tariff Act 1930*, which bans the importation of all goods produced with the involvement of forced labour, has not been subject to a WTOAB challenge indicates that Australia would be able to safely adopt a similar approach.

Decisions by the WTO panel and WTOAB indicate that Article XX is a sufficiently broad exception to allow legislation to be adopted that prohibits the importation of goods on the grounds of forced labour and modern slavery. However, the prohibition needs to be applied in a non-discriminatory manner. In other words, it should not seek to single out a particular country.

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<sup>43</sup> Ibid., 36.

<sup>44</sup> Ibid., 36.

<sup>45</sup> Ibid., 14.

<sup>46</sup> Ibid., 14.

<sup>47</sup> Francois-Philippe Champagne and Mary Ng, “Canada announces news measures to address human rights abuses in Xinjiang, China”, January, 12, 2021, <https://www.canada.ca/en/global-affairs/news/2021/01/canada-announces-new-measures-to-address-human-rights-abuses-in-xinjiang-china.html>

<sup>48</sup> Tobias Stoll, Steven Blockmans, Jan Hagemeyer, Christopher Hertwell, Henner Gött, Kateryna Karunska Case and Andreas Maurer, *Extraterritorial sanctions on trade and investments and European Responses*, (Belgium: Policy Department, Directorate-General for External Policies, European Parliament, 2020), 21.

Article XX provides for exceptions whereby the state is permitted to deviate from Articles I, XI and XIII of the GATT when pursuing legitimate social or political objectives.<sup>49</sup> Article XX is a defence that may be invoked by a responding party in the event a WTOAB has found the party to be in breach of its WTO obligations.

The ‘necessity test’ for applying the exceptions clause is derived from the US - Standards for Reformulated and Conventional Gasoline (Gasoline) case and was reaffirmed in the Shrimp - Turtle case.<sup>50</sup> Using this test, the measure’s design and objective must first fall properly under one of the enumerated paragraphs in Article XX. Secondly, if a measure is found to be within the scope of one of the exceptions, then the measure must not be discriminatory between members as enshrined in the Article XX chapeau.<sup>51</sup> In this determination the Panel or Appellate body will balance “the right of a member to invoke an exception under Article XX with the duty of the same member to respect the treaty rights of other members.”<sup>52</sup>

Restrictions on trade that are on the grounds of modern slavery could in theory fall under paragraphs (a), (b) or (e) of Article XX.<sup>53</sup> The latter paragraph has been described as applicable only to the products of prison labour rather than the broader conditions in which the products were made.<sup>54</sup> However, some scholars argue that governments may rely on paragraph (e) to ban the trade of products of slave labour, child labour or forced labour.<sup>55</sup> Paragraph (a) on the other hand allows for restrictions to protect public morals. In 2005 the UN High Commissioner noted that member states’ obligations towards their own population could fall within public morals or public order.<sup>56</sup>

Importantly, there is a significant disparity in the approach adopted by the panel and/or the WTOAB in Tuna - Dolphin<sup>57</sup> and in subsequent disputes. For example, the panel in Tuna –Dolphin case held that measures involving unilateral action or means of reaching beyond a state’s territory were unnecessary and beyond the scope of Article XX (b).<sup>58</sup> The panel reasoned that unilateral measures

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<sup>49</sup> Matthew T Mitro, “Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions”, *American University Law Review* 51 (2001), 1223, 1235.

<sup>50</sup> United States – Import prohibition of certain shrimp and shrimp products, Report of the Appellate Body (WT/DS58/AB/R), 12 October 1998. This concerned an action brought by India, Malaysia, Pakistan and Thailand in response to a ban imposed by the US on the importation of certain shrimp and shrimp products. The US argued that the ban aimed to protect sea turtles and was therefore legitimate under article XX (g) of the GATT. The WTOAB ultimately struck down the ban since they held that while the “measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of article XX of the GATT 1994”, the measure was applied by the United States in a discriminatory manner which is “contrary to the requirements of the chapeau of Article X” (para 186).

<sup>51</sup> Ibid. paragraph 186.

<sup>52</sup> Ibid. paragraph 156.

<sup>53</sup> Paragraph (a) allows for restrictions necessary to protect public morals, paragraph (b) provides for restrictions necessary to protect human, animal or plant life or health, while paragraph (e) provides for restrictions relating to the products of prison labour.

<sup>54</sup> Matthew T Mitro, “Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions”, *American University Law Review* 51 (2001), 1223, 1231.

<sup>55</sup> Ibid. 1223-1273.

<sup>56</sup> Office of United Nations High Commissioner for Human Rights publication “Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights”(2005) accessible at <http://www.ohchr.org/Documents/Publications/WTOen.pdf>

<sup>57</sup> Restrictions on Imports of Tuna (DS21/R), Report of the Panel, Sept. 3, 1991.

<sup>58</sup> Matthew T Mitro, “Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions”, *American University Law Review* 51 (2001), 1223, 1249.

unfairly coerce other members to adopt similar policies, which would ultimately result in the collapse of the multilateral trading system.<sup>59</sup> However, the necessity of a unilateral objective under Article XX (b) was reconsidered in the Asbestos case.<sup>60</sup> Here the WTOAB found the objective of banning asbestos was “important in the highest degree” and stated that such objectives to protect human life were “easily justifiable”.<sup>61</sup> Further, the WTOAB in Asbestos showed openness towards unilateral sanctions under Article XX (b) even though the measure here was non-coercive.<sup>62</sup>

Subsequent practice has indicated that the WTOAB or panel will allow for a government to impose sanctions under a balancing approach where they determine whether the import ban is justified as necessary. For instance, the panel in the retreaded tyres dispute between Brazil and the European Communities described this determination as balancing the contribution of the restriction “to its stated objective against its trade restrictiveness, taking into account the importance of underlying interests or values.”<sup>63</sup> Some scholars go as far as asserting that the decision in the Shrimp - Turtle case indicates a unilateral import ban aimed at coercing nations to enforce their own laws pertaining to human rights abuses such as child labour may be justifiable.

Although the Shrimp - Turtle mainly concerned the application of paragraph (g) rather than (b), the case is useful to indicate where the WTOAB will find a state’s restriction to apply in a discriminatory manner. For example the WTOAB has found that applications of restrictions that lack:

- a degree of flexibility in standard setting,
- cooperation and negotiation between the parties involved, and
- a level of procedural protection given to applicants,

indicate restrictions that are applied in a discriminatory manner.<sup>64</sup>

In the Shrimp - Turtle case, the WTOAB found that the US discriminated unjustifiably through exercising insufficient flexibility in its requirements of applicant states.<sup>65</sup> The initial 1996 guidelines and US State Department administrators required applicants to adopt turtle safe fishing methods in order to receive an import license. It was found that while Section 609 appeared non-discriminatory, the guidelines failed to consider — or make provisions to consider — the varying conditions in other countries. Thus this discrimination rendered the standards for certification insufficiently flexible.<sup>66</sup>

Following this however, the US revised these certification guidelines in order to allow nations to demonstrate a regulatory program “comparable in effectiveness.”<sup>67</sup> The WTOAB contrasted this standard to the US’ initial approach which conditioned markets to adopt policies much like their own. Rather than providing import licenses subject to the adoption of “essentially the same” policies

<sup>59</sup> Ibid., 1223, 1257.

<sup>60</sup> EC – Measures affecting asbestos and asbestos-containing products, Report of the Appellate Body (WT/DS135/AB/R), 12 March 2001.

<sup>61</sup> Matthew T Mitro, “Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions”, *American University Law Review* 51 (2001), 1223, 1250.

<sup>62</sup> Ibid., 1260.

<sup>63</sup> Appellate Body Report, Brazil – Retreaded Tyres, WT/DS332 paragraph 210. A similar conclusion was reached by the Appellate Body in the European Communities – Measures Affecting Asbestos and Products Containing Asbestos, WT/DS134/R/AB paragraph 168.

<sup>64</sup> Matthew T Mitro, “Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions”, *American University Law Review* 51 (2001), 1223, 1262.

<sup>65</sup> Ibid ,1263.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

as the US, the revised guidelines allowed for applicants to implement different — but equally effective — measures which would accommodate their specific conditions. It was held that this “comparably effective” test did not discriminate unjustifiably.<sup>68</sup>

In order to secure compliance with Article XX, a government must attempt to find a solution at international law before the enactment of a restrictive measure in domestic legislation.<sup>69</sup> While the importance of the objective to reduce modern slavery would weigh in favour of the measures meeting the necessity test, this would be balanced against the possibility of other less trade restrictive measures that would achieve the same outcome. In the case of modern slavery, the Australian Government would be able to argue that it has already taken a number of measures to address modern slavery, as well as ratifying a number of treaties combating slavery and trafficking. As these measures have failed to prevent the importation of goods and services produced with modern slavery, further domestic legislation is justified.

Lastly, the WTOAB has indicated that legislation which fails to afford a level of procedural protection to applicants may be regarded as a restriction applying in a discriminatory manner.<sup>70</sup> In *Shrimp-Turtle*, the US provided no review or access to a forum where the application for state certification was considered. Further, it was found that an applicant was not entitled to an explanation or an opportunity to appeal the decision regarding certification.<sup>71</sup> Here the WTOAB found that — because of a lack of transparency and due process — the application of the legislation resulted in arbitrary discrimination. Following the Panel’s ruling, the US agreed to provide notice of the steps needed for certification and the opportunity to submit additional information if desired. Ultimately the WTOAB held that such measures satisfied the requirement of due process.<sup>72</sup>

Ultimately, legislation that provides a degree of flexibility, cooperation and negotiation between the parties involved and a level of procedural protection given to applicants will satisfy the two-limbed test of Article XX and will be upheld by the WTO.

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid., 1223, 1266.

<sup>70</sup> Ibid., 1268-1269.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.





## 9. About Us

### [The Uniting Church in Australia, Synod of Victoria and Tasmania](#)

The Synod of Victoria and Tasmania is part of the Uniting Church in Australia, the country's third largest Christian denomination. The Uniting Church in Australia was formed in 1977, when three congregations – the Methodist Church of Australasia, the Presbyterian Church of Australia and the Congregational Union of Australia – came together.

We are one of six Synods, comprising 600 congregations and more than 60,000 members. We also have 12 schools. We worship every week in more than 40 languages. Through worship, sharing the story of Jesus, and service in the community, we witness to the belief that life is most fully found in God.

Through UnitingCare, the Uniting Church in Australia is the largest non-government provider of community services in Australia, employing more than 70,000 Australians.

We have formal partnerships with 32 churches in Asia and the Pacific and have also been instrumental in pioneering interfaith relationships, including other Christian denominations.

We have a strong sense of social justice and actively campaign on a range of issues, including the environment, modern slavery, asylum seekers, fair work and gambling.

We have campaigned against modern slavery in seafood production and processing from Thailand, garment production in India, cotton production out of Uzbekistan, palm oil production from Malaysia and on Australian farms.



## The Salvation Army

The Salvation Army is an international Christian movement with a presence in 128 countries. Operating in Australia since 1880, The Salvation Army is one of the largest providers of social services and programs for people experiencing hardship, injustice and social exclusion.

The Salvation Army Australia has a national operating budget of over \$700 million and provides more than 1,000 social programs and activities through networks of social support services, community centres and churches across the country. Programs include:

- Financial inclusion, including emergency relief.
- Homelessness services.
- Youth services.
- Family and domestic violence services.
- Alcohol, drugs and other addictions.
- Chaplaincy.
- Emergency and disaster response.
- Aged care.
- Employment services.
- Modern Slavery

As a mission driven organisation, The Salvation Army seeks to reduce social disadvantage and create a fair and harmonious society through holistic and person-centred approaches that reflect our mission to share the love of Jesus by:

- Caring for people.
- Creating faith pathways.
- Building healthy communities.
- Working for justice.

We commit ourselves in prayer and practice to this land of Australia and its people, seeking reconciliation, unity and equity.

