

# Australia heading towards a ban on goods produced by forced labour – Issues for logistics professionals

By RUSSELL WIESE, Director – CGT Law

While we often marvel at the sophistication of modern supply chains, some of the worst historic aspects of supply chains remain. It is estimated that 25 million people worldwide are subject to forced labour. About 16 million of these people are exploited by global supply chains that involve private enterprise. It should come as no surprise then that there is strong support for legislation banning the importation of goods produced by forced labour. However, for that strong support to be transformed into legislation passed by Government, the law will need to be workable for small business and logistics professionals.

## What has been proposed

In August the Senate passed legislation banning products produced by forced labour. The legislation was introduced by an independent senator and passed without the support of the Coalition Government. The legislation has now been sent to the lower house where the Coalition will likely require significant amendments prior to giving the legislation the thumbs up.

The proposed legislation is simple in its operation, it seeks to add into the Customs Act the words:

*“The importation into Australia of goods produced or manufactured, in whole or in part, through the use of forced labour (within the meaning of the Criminal Code) is prohibited absolutely.”*

The Customs Act is also amended so that goods covered by the above definition fit within the meaning “prohibited imports”. This has significant implications as there are many sections of the Customs Act that deal with goods defined as prohibited imports.

## What is a good produced by forced labour?

The proposed bill picks up the following definition of forced labour from the Criminal Code:

*“the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free to cease providing the labour or services, or to leave the place or area where the victim provides the labour or services. The victim may be in a condition of forced labour whether or not escape is practically possible for the victim, or the victim has attempted to escape.”*

Interestingly, it is not clear that all child labour fits into this definition.

A difficult element of the provision is that it applies to goods produced “in whole or in part” through the use of forced labour. The wording “in part” means that a good would be a prohibited import where only a small part was produced via forced labour. A jacket may be comprised of several different outer textiles, buttons, zips and threads. Only one component will need to be produced via forced labour for the jacket to be a prohibited import.

## Implications of being a prohibited import

There are significant consequences that flow from a good being deemed to be a prohibited import. Most significantly, prohibited imports are automatically forfeited to the Commonwealth. This

means that title in the goods passes to the Commonwealth. The Commonwealth will not compensate the importer for the goods it has seized. This can be a massive commercial consequence given the importer will not only lose the value of the goods, but also the profit that would have been made on the sale of the goods and the logistical costs in getting the goods to Australia.

The Customs Act also creates multiple offences that relate to prohibited imports. For instance, section 233 of the Customs Act makes it an offence to import any prohibited imports. The maximum penalty for this offence for a corporation is the greater of 15 times the value of the goods or \$1.1 million. This is on top of the loss of the goods.

## Enforcement issues

To be effective the law needs to be enforceable, and the importing community must be able to comply with the law. The biggest challenge is how the Australian Border Force (ABF) will be able to detect at the time of import whether goods are the product of forced labour. This is not like asbestos where the ABF can simply test the goods.

It is likely the ABF will base its inspections on tip offs or intelligence regarding certain suppliers or goods from certain regions. That is, goods will not be stopped and inspected at random, but rather seizures will be likely be the outcome of an ongoing investigation.

An option proposed by a Parliamentary committee reviewing similar legislation was that the ABF be given the power to issue rebuttable presumptions that the goods were produced by slave labour. Importers may respond to a rebuttable presumption by producing evidence relating to the production of the goods.

Another option is the system currently adopted for goods produced from illegally logged timber. Under this system the primary obligation is on the importer to undertake due diligence as to the source of the timber.



In some ways this is more effective than the ABF focusing on identifying prohibited imports at the border. Under a “due diligence” approach a greater proportion of goods are subject to inquiries as to source of the goods.

### **Issues for Customs Brokers**

The difficult issue for customs brokers will be the risk of making false statements. It is possible that a community protection question could be tied to tariff classifications for clothing and apparel. That question could simply be “are the goods produced in whole or in part from forced labour?”

An importer and customs broker would need a reasonable basis for answering this question. There cannot simply be an assumption that goods were not the product of forced labour, especially if sourced from

an at-risk region. If the ABF approach to asbestos is any guidance, simply relying on a supplier declaration is unlikely to be sufficient. The ABF may require the customs broker to look beyond the declaration and understand what evidence is available to support the truth of the declaration.

Customs brokers that are found to have made a false statement will not have committed an offence if it can be shown that the false statement resulted from a reasonable mistake of fact. Importantly, the broker must actually consider the issue and the mistake cannot be based on ignorance.

Of course, this presents risks for customs brokers, but it also represents an opportunity for customs brokers to better understand their client’s supply chains and demonstrate greater value.

There is benefit in customs brokers starting that conversation now. Ethical clients will want to understand the potential new legislation and how it ties in with the steps they are already taking to remove slavery from their supply chains.

CGT Law and Freight and Trade Alliance (FTA) will keep you updated as this important law progresses through the parliament.

