

Legal Studies 2019 v.1.1

IA3 high-level annotated sample response

November 2018

Investigation — argumentative essay (25%)

This sample has been compiled by the QCAA to assist and support teachers to match evidence in student responses to the characteristics described in the instrument-specific marking guide (ISMG).

Assessment objectives

This assessment instrument is used to determine student achievement in the following objectives:

1. comprehend legal concepts, principles and/or processes of Australian laws and international obligations of a current international human rights issue where Australia has a legal interest
2. select legal information from sources relevant to current international human rights where Australia has a legal interest
3. analyse a legal issue involving international human rights where Australia has a legal interest
4. evaluate a legal situation relevant to international human rights where Australia has a legal interest
5. create a response that communicates meaning to suit the intended purpose in an argumentative essay.

Instrument-specific marking guide (ISMG)

Criterion: Comprehending

Assessment objective

1. comprehend legal concepts, principles and/or processes of Australian laws and international obligations of a current international human rights issue where Australia has a legal interest

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"> comprehensive identification of the essential legal features of a current international human rights issue where Australia has a legal interest perceptive description of legal concepts, principles and/or processes of Australian human rights laws and international obligations precise use of legal terminology. 	4–5
<ul style="list-style-type: none"> effective identification of the legal features of a current international human rights issue where Australia has a legal interest effective descriptions of concepts, principles and/or processes of Australian human rights laws and international obligations adequate use of legal terminology. 	2–3
<ul style="list-style-type: none"> identification of some concepts, principles or processes of Australian human rights laws and/or international obligations. 	1
<ul style="list-style-type: none"> does not satisfy any of the descriptors above. 	0

Criterion: Selecting

Assessment objective

2. select legal information from sources relevant to current international human rights where Australia has a legal interest

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"> discerning choice of current and relevant legal information from primary and/or secondary sources relevant to current international human rights where Australia has a legal interest perceptive use of legal information consistent and accurate documentation of legal information in the form of a reference list and citations. 	3–4
<ul style="list-style-type: none"> adequate choice of current or relevant legal information from primary and/or secondary sources relevant to current international human rights where Australia has a legal interest adequate use of legal information some documentation of legal information in the form of a reference list and/or citations. 	2
<ul style="list-style-type: none"> narrow choice of legal information from primary and/or secondary sources relevant to international human rights where Australia has a legal interest use of some legal information narrow documentation of sources. 	1
<ul style="list-style-type: none"> does not satisfy any of the descriptors above. 	0

Criterion: Analysing

Assessment objective

3. analyse a legal issue involving international human rights where Australia has a legal interest

The student work has the following characteristics:	Marks
<ul style="list-style-type: none">perceptive application of relevant legal concepts, principles and/or processes to determine the nature and scope of an international human rights issue where Australia has a legal interestinterpretation of legal information to perceptively examine different viewpoints and their consequencesdiscerning use of evidence to support the analysis.	5–6
<ul style="list-style-type: none">effective application of relevant legal concepts, principles and/or processes to determine the nature and scope of an international human rights issue where Australia has a legal interestinterpretation of legal information to effectively examine different viewpoints and their consequencessufficient use of evidence within the analysis.	3–4
<ul style="list-style-type: none">superficial description of legal concepts, principles and/or processes that link to the nature and/or scope of an international human rights issuedescription or identification of superficial viewpoints and/or consequencesnarrow use of evidence.	1–2
<ul style="list-style-type: none">does not satisfy any of the descriptors above.	0

Criterion: Evaluating

Assessment objective

4. evaluate a legal situation relevant to international human rights where Australia has a legal interest

The student work has the following characteristics:	Marks
<ul style="list-style-type: none">relevant legal alternatives presented from the analysis and insightful recommendation/s proposedsynthesis of information that justifies the recommendation/s through the discerning use of legal criteriafluent discussion of the implications of the recommendation/s.	5–6
<ul style="list-style-type: none">relevant legal alternatives presented from the analysis and effective recommendation/s proposedsynthesis of information that justifies the recommendation/s through the effective use of legal criteriaadequate discussion of the implications of the recommendation/s.	3–4
<ul style="list-style-type: none">legal alternatives presented and/or recommendation/s proposedsome justification of the recommendation/sdiscussion identifies some implications.	1–2
<ul style="list-style-type: none">does not satisfy any of the descriptors above.	0

Criterion: Creating a response

Assessment objective

5. create a response that communicates meaning to suit the intended purpose in an argumentative essay

The student work has the following characteristics:	Marks
<ul style="list-style-type: none">• concise expression and logical development of relevant ideas that enhance legal meaning• features of an argumentative essay genre are consistently demonstrated• minimal errors in spelling, grammar and punctuation.	3–4
<ul style="list-style-type: none">• adequate expression and development of ideas that convey legal meaning• features of an argumentative essay genre are demonstrated• some errors in spelling, grammar and punctuation.	2
<ul style="list-style-type: none">• some elements of essay formatting and inconsistent use of language conventions.	1
<ul style="list-style-type: none">• does not satisfy any of the descriptors above.	0

Task

Create an argumentative essay in response to the question ‘to what extent will the proposed *Commonwealth Modern Slavery Act 2018* be effective in addressing human rights issues found in international supply chains?’

Discuss one recommendation to further improve the human rights outcomes for international workers.

Sample response

Criterion	Marks allocated	Result
Comprehending Assessment objective 1	5	5
Selecting Assessment objective 2	4	4
Analysing Assessment objective 3	6	6
Evaluating Assessment objective 4	6	5
Creating a response Assessment objective 5	4	4
Total	25	24

The annotations show the match to the instrument-specific marking guide (ISMG) performance-level descriptors.

<p>Creating a response [3–4]</p> <p>features of an argumentative essay genre are consistently demonstrated</p> <p>clear and concise introduction and outline of the essay</p>	<p>Globalisation has caused businesses to increasingly look to international supply chains that take advantage of cheaper labour rates in different countries. In extreme forms, this can result in working conditions that are essentially slavery. The proposed Commonwealth Modern Slavery Bill 2018 (the Bill) creates a legal obligation for Australian businesses to report if and where slavery is involved in their supply chains – however, it is arguable how effective the new Bill is to address human rights found in international supply chains where the incidence is outside of Australia. The fishing industry of Thailand will be the case study for the arguments analysed and evaluated, with a recommendation proposed to improve human rights outcomes for the international workers involved.</p>
---	---

<p>Comprehending [4–5]</p> <p>comprehensive identification of the essential legal features of a current international human rights issue where Australia has a legal interest</p> <p>makes clear connections between modern slavery and the Human Rights declaration, and relevant covenants and protocol</p> <p>perceptive description of legal principles</p> <p>notes absolute rights and statements of intention</p>	<p>Modern slavery is more than poor working conditions or payments: it is a crime of exploitation demonstrating a lack of humanity towards workers. The key right is from Human Rights Declaration article 4 “No-one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms” (United Nations, 1948), and similar statements in Article 8 of the International Covenant on Civil and Political Rights (ICCPR). International human rights laws identify the freedom from slavery and servitude as an ‘absolute right’, which cannot be limited, qualified or suspended (Australian Government: Attorney-General’s Department, n.d.). This is further supported by the Protocol of 2014 to the Forced Labour Convention, 1930, signed by 187 signatory countries including Thailand and Australia. This protocol requires signatories to use action to suppress, prevent and eliminate forced labour and to sanction the perpetrators (Article 1), and to support “due diligence” by governments and private companies to “present and respond to risks of forced or compulsory labour” (Article 2e) (International Labour Organisation, 2016). Note that by signing the protocol, countries do not have a legal obligation – instead, they are recognised as statements of intention to be bound by the protocol, and they do not take effect until the protocol is ratified at a national level.</p>
<p>Analysing [5–6]</p> <p>perceptive application of relevant legal concepts, principles and/or processes to determine the nature and scope of an international human rights issue where Australia has a legal interest</p> <p>uses ‘duty of care’ principle to determine the nature of the issue</p> <p>determines scope from the business context and the nature of global supply systems</p>	<p>Businesses have an ethical and moral responsibility not to be involved in modern slavery. The overriding legal principle is provided by the United National Guiding Principles on Business and Human Rights (UNGPNR), which state there is a duty of care owed by businesses regarding human rights (United Nations, 2011). The nature and scope of this legal issue involves the extent that a business owes a duty of care to not only its employees and customers, but also all workers along its business supply chain. The UNGPNR refers to an international obligation for businesses to make a real effort to ensure modern slavery is not being used in their supply chains, to resolve this situation if it is identified, and to stop it occurring in the future (United Nations, 2011; Anti-Slavery International, n.d.). The nature of global supply chains makes this duty of care difficult to check, as they involve production systems that link raw materials to finished products, often with multiple tiers or levels, over different jurisdictions. The scope of the issue involves the extent of the duty of care that is owed to indirect workers connected to Australian businesses through a global supply chain.</p>
<p>Comprehending [4–5]</p> <p>perceptive description of legal concepts, principles and/or processes of Australian human rights laws</p> <p>describes essential elements of s270 of the Criminal Code regarding debt and astutely applies these to debt bondage in the Thai fishing industry</p>	<p>Australia has laws against modern slavery, and the Bill uses the definition of the offence that exists in ‘Division 270 – Slavery and slavery like offences’ of the Commonwealth Criminal Code 1995 (the Code). This refers to criminal offences where the right of ownership and associated power is exercised including when due to a debt. In the Thai fishing industry, debts are sold to labour brokers or directly to vessel owners, who force the worker to work to repay the debt through labour (Commonwealth Director of Public Prosecution, 2018). The essential elements of such debt bondage are that the condition arises from a ‘pledge’ where the worker is ‘under the other person’s control’ and the debt is ‘manifestly excessive’, the reasonable value of labour is not applied towards the debt or the length and nature of labour services is ‘not limited and defined’ (Criminal Code Act 1995). This is slavery because the victim cannot refuse or leave the employment and so, is</p>

Analysing [5–6]

perceptive application of relevant legal concepts, principles and/or processes to determine the nature and scope of an international human rights issue

applies element of 'intent' in terms of how it limits the scope of existing Australian laws, and how the new Bill will extend existing provisions

Comprehending [4–5]

comprehensive identification of the essential legal features of a current international human rights issue where Australia has a legal interest

clearly outlines several essential features of the Commonwealth Modern Slavery Bill, the involvement of the Special Rapporteur, and limited ability of Australian legislation to affect debt bondage

Analysing [5–6]

interpretation of legal information to perceptively examine different viewpoints and their consequences

perceptively examines differing viewpoints regarding the effectiveness of market pressure versus legislative penalty

coerced by, 'force; duress; detention; abuse of power', as defined in s 270 of the Criminal Code (1995). However, the limiting factor is the word 'intentionally' in s270.3 of the Criminal Code. This means the offence of slavery, whether within or outside Australia, must be done with intent. With modern and global supply chains and the isolated, less regulated nature of fishing by Thai owners, it can be difficult to know the fish and seafood supply chain sufficiently to prove 'intent'. This limits the reach of s270.3(c) which refers to entering into a commercial transaction involving a slave, as Australian companies may be unaware and there is no legal obligation to take steps to make themselves aware. The Bill seeks to remedy this through a requirement to report steps taken to become informed. The aim of the Bill is essentially to extend the anti-slavery provisions of s270 of the Code to identify and respond to business operations and extended supply chains such as in the Thai fishing industry.

The Bill aims to reduce debt bondage, both inside Australia and when it is used by Australian businesses in supply chains. It is a 'reporting requirement' for businesses larger than \$100 million revenue to annually report on 'their actions to address modern slavery risks in their operations and supply chains' (The Parliament of the Commonwealth of Australia, 2018). The Bill includes the definition of debt bondage as provided by Division 271 (trafficking in persons and debt bondage) of the Code. The United Nations Special Rapporteur on contemporary forms of slavery warned in 2016 that debt bondage is 'one of the most prevalent forms of modern slavery' globally, and specifically identified legislative and other policy measures to protect, prevent 'and redress for rights violations' as required approaches to this human rights issue (UNHR Office of the High Commissioner, 2016). Significantly in Australia's Commonwealth legislative approach to protecting and preventing debt bondage workers, there are no legal penalties applied to businesses for non-reporting. The 'other measures' referred to are required because poverty increases workers' vulnerability in the Thai fishing industry, which is outside of Australia's legal jurisdiction and impinges upon the economic success and state sovereignty of Thailand, Cambodia and Myanmar.

Businesses such as those represented by the Business Council of Australia recognise the potential of negative public backlash from being associated with abuses undertaken by their suppliers and are vocal in their support of the new Bill (Business Council of Australia, 2018). They agree reasonable reporting requirements are legally appropriate to reduce the incidence of modern slavery. They argue the consequences of market pressure from consumers and shareholders will force companies to become more active in reducing debt bondage and accept their legal responsibilities under the UNGPBHR. This is because consumers and shareholder groups will support and value responsible businesses who investigate their supply chains for incidences of debt bondage. This, the argument continues, is sufficient penalty if companies do not comply by reporting, and so legal penalties for not reporting are not necessary within the Bill. However, the Law Council of Australia counter that effective laws need 'teeth', and that public exposure of a business that does not comply with the new Bill is not sufficient (News.com, 2018). The Labour Party has continued this argument by identifying the Bill as 'toothless' (ABC Rural News, 2018). That is, without a punitive penalty or legal remedy if companies do not report, report only in part, or report with perfunctory attention to their

<p>Evaluating [3–4]</p> <p><u>synthesis of information through the effective use of legal criteria</u></p> <p>foreshadows information that will be used to support a recommendation</p> <p>notes criteria of equity (how consistent and enforceable?)</p>	<p>“actions to assess and address modern slavery risks, including due diligence and remediation process” as required by the Bill (The Parliament of the Commonwealth of Australia, 2018), then the law will be inconsistently applied and unenforceable. In addition, it is not clear what level of due diligence that businesses must apply. Therefore, it is difficult to see how the Bill will effectively achieve its aims.</p>
<p>Analysing [5–6]</p> <p><u>interpretation of legal information to perceptively examine different viewpoints and their consequences</u></p> <p>reference to ‘businesses’ is vague, but reference to Law Council of Australia is specific about the holder of the opposing viewpoint</p> <p>discussion perceptively examines the costs and complexity of legal compliance</p>	<p>A different concern, expressed by businesses and Parliament, is that businesses smaller than \$100 million turnover would have to bear an unreasonable cost of compliance – estimated at \$22,000 per business, annually (Parliament of the Commonwealth of Australia, 2018). This cost is exacerbated in the fishing industry by the nature of small commercial fishing vessels –Thailand has 6,700 commercial vessels and 302,000 registered migrant workers, mainly from Cambodia and Myanmar and an unknown number of unregistered migrant workers, making the industry challenging to monitor (International Labour Office, 2018). The supply chain is complex and long, with “seven to eight steps between the boat and the [seafood] plant” (Son, 2018), prior to products being exported to Australia, and from there, to supermarkets and consumers. In contrast, the Law Council of Australia argues that the reporting threshold should be lowered to \$60 million, similar to the UK version of the Bill with £60,000. In a practical sense, this situation has high costs of compliance, and smaller companies may not be able to follow through so many levels of the supply chain through to the labour brokers, debt owners and fishing vessels that are involved in debt bondage. The implications are that shareholders will not support large expenses in this ‘fishing expedition’ to find labour brokers or fishing vessel owners who deal in debt bondages as this will reduce profits, and consumers will not appreciate higher costs that are passed on as higher prices. This argument pitches law and human rights perspectives against business interests.</p>
<p>Evaluating [3-4]</p> <p><u>synthesis of information through the effective use of legal criteria</u></p> <p>foreshadows information that will be used to support a recommendation</p> <p>infers criteria of legal effectiveness; could have made stronger link between economic and legal criteria</p>	<p>The Bill will address many elements of modern slavery, and certainly its intent is in accordance with Australian’s international human rights obligations. From the analysis above, the alternatives of applying legal penalties and greater clarity on the due diligence requirements could each improve the Bill’s effectiveness.</p>
<p>Evaluating [5–6]</p> <p><u>relevant legal alternatives presented from the analysis and insightful recommendation/s proposed</u></p> <p>presents two alternatives and expresses insightful recommendations using arguments developed throughout the essay</p>	<p>The application of legal penalties would appear a necessary recommendation. New South Wales (NSW) has shown the lead in remedying this gap in legal sanctions by enacting its own Modern Slavery Act in June 2018. It provides a penalty of up to \$1.1 million for failing to prepare or publish slavery statements or where false or misleading statements concerning modern slavery are provided (Modern Slavery Act 2018 No 30, 2018).</p> <p>The potential problem with the uncertainty around the extent of due diligence required, creating ‘wriggle’ room for businesses, could be tightened by a clearer statement of due diligence requirements. The existing reporting provisions leave a loophole for businesses to rely on the complexity of the Thai fishing industry, potentially leading to a disclaimer of ignorance of the existence or extent of debt bondage in the supply chain. Debt bondage is difficult to claim in any industry that largely operates in an unregulated and undocumented manner, “through a system of advances and fees by the brokers” (Nakamura, et al., 2018). Tightening the due diligence may create further loopholes, so the recommendation here is to monitor this over the first three years of</p>

Evaluating [3–4]

synthesis of information that justifies the recommendation through the effective use of legal criteria

identifies equity criteria, building on previous criteria used in the essay

Evaluating [5–6]

fluent discussion of the implications

implementation of the Bill.

The recommendation to further improve the human rights outcomes for international workers is to enact legislation to introduce penalties that would allow the modern slavery laws to be enforceable, through a system of legal consequences. Without legal consequences, the Bill is a statement of 'what should happen' not 'what is required to happen'. This introduces equity in terms of all companies of the prescribed size being required to report, so shareholders and consumers can make informed decisions which businesses have accepted as their duty of care under the UNGPBHR (United Nations, 2011). The options are to implement this recommendation now or later. The Bill's explanatory memorandum states the Government will undertake a review of the Modern Slavery legislation in three years' time (Parliament of the Commonwealth of Australia, 2018). However, as the Bill is yet to be passed through Parliament, there is still time for the Senate to put forward this amendment.

In conclusion, modern slavery in the form of debt bondage in the Thai fishing industry has been analysed according to the legal duty of care principles within the UNGPBHR. The Commonwealth Modern Slavery Bill 2018 proposes to satisfy the Australian statement of intention to be bound by the Protocol of 2014 to the Forced Labour Convention, 1930. Arguments regarding the effectiveness of the proposed Bill have been presented, resulting in a judgement that the Act, while effective and better than no change, could be improved to have a greater impact on the human rights of international workers. Consequently, a recommendation was made to introduce legal penalties, so that reporting requirements can be legally enforced.

Comprehending [4–5]

precise use of legal terminology throughout the essay

Selecting [3–4]

perceptive use of legal information throughout the essay

consistent and accurate documentation of legal information in the form of citations throughout the essay

Analysing [5–6]

discerning use of evidence to support the analysis to make convincing and balanced points

Creating a response [3–4]

concise expression and logical development of relevant ideas that enhance legal meaning, suited to the intended purpose throughout the essay

features of an argumentative essay genre are consistently demonstrated

- introduction outlines the aims, establishes the topic's importance and states the point being argued
- main body consists of main ideas developed in clear paragraphs to present an informed argument
- conclusion astutely summarises the main findings from the analysis and evaluation

minimal errors in spelling, grammar and punctuation

Selecting [3–4]

discerning choice of current and relevant legal information from primary and/or secondary sources relevant to current international human rights where Australia has a legal interest

consistent and accurate documentation of legal information in the form of a reference list

Reference List

ABC Rural News. (2018, June 28). New laws aimed at ending modern slavery in consumer supply chain expected to pass Parliament. Retrieved August 23, 2018, from <https://www.abc.net.au/news/rural/2018-06-28/modern-slavery-bill-introduced-into-parliament/9920352>

Anti-Slavery International. (n.d.). Monitoring forced labour. Retrieved August 20, 2018, from <https://www.antislavery.org/what-we-do/work-supply-chains/monitoring-forced-labour/>

Australian Government: Attorney-General's Department. (n.d.). Absolute rights. Retrieved September 20, 2018, from <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

Business Council of Australia. (2018, May 10). Business Council welcomes an Australian Modern Slavery Act. Retrieved August 15, 2018, from <https://www.bca.com.au/media/business-council-welcomes-an-australian-modern-slavery-act>

Commonwealth Director of Public Prosecution. (2018, August 23). Human Trafficking and Slavery. Retrieved from <https://www.cdpp.gov.au/crimes-we-prosecute/human-trafficking-and-slavery>

Criminal Code Act 1995. (n.d.). Retrieved August 15, 2018, from http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/cca1995115/sch1.html

International Labour Office. (2018). Ship to Shore Rights - baseline research findings on fishers and seafood workers in Thailand. Retrieved August 23, 2018, from https://shiptoshorerights.org/wp-content/uploads/ilo-shiptoshore_A4-EN_2018-02-23_web-v2.pdf

International Labour Organisation. (2016, November 9). Protocol of 2014 to the Forced Labour Convention, 1930. Retrieved August 12, 2018, from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

Modern Slavery Act 2018 No 30. (2018). Retrieved September 15, 2018, from <https://www.legislation.nsw.gov.au/#/view/act/2018/30>

Nakamura, K., Bishop, L., Ward, T., Pramod, G., Thomson, D., Tungpuchayakul, P., & Srakaew, S. (2018, July 25). Seeing slavery in seafood supply chains. Retrieved September 1, 2018, from <http://advances.sciencemag.org/content/4/7/e1701833>

News.com. (2018, Aug 3). Modern slavery bill needs tougher penalties and oversight, says Law Council. Retrieved August 20, 2018, from <https://www.abc.net.au/news/2018-08-03/modern-slavery-bill-needs-tougher-penalties:-law-council/10068002>

Son, J. (2018, March 11). THAILAND: Could A 'Cleaner' Fishing Industry Set New Norms? Retrieved August 23, 2018, from ASEAN News: <http://www.aseannews.net/thailand-cleaner-fishing-industry-set-new-norms/>

Parliament of the Commonwealth of Australia. (2018, September). Explanatory Memorandum. Modern Slavery Bill 2018. House of Representatives.

United Nations. (1948). Universal Declaration of Human Rights. Retrieved August 3, 2018, from <http://www.un.org/en/universal-declaration-human-rights/>

United Nations. (2011). Guiding Principles on Business and Human Rights. Retrieved August 20, 2018, from https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

UNHR Office of the High Commissioner. (2016, September 15). Debt bondage remains the most prevalent form of forced labour worldwide – New UN report. Retrieved September 20, 2018, from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20504&LangID=E>

Walk Free Foundation. (2016). Harnessing the power of business to end modern slavery. Retrieved from <https://cdn.walkfreefoundation.org/content/uploads/2016/12/14152953/Harnessing-the-power-of-business-to-end-modern-slavery-20161130-Final.pdf>