Australian Government

# Report of the statutory review of the *Modern Slavery Act 2018* (Cth)

*The first three years*

A report by Professor John McMillan, AO

# Acknowledgement of Country

We acknowledge Aboriginal and Torres Strait Islander peoples as custodians of Australia and pay our respects to Elders, past and present. We also acknowledge the ongoing connection to land, sea and communities throughout Australia, and the contributions to the lives of all Australians.

# Help and Support

Help is available for any person experiencing, or at risk of, modern slavery.

If you have immediate concerns for your safety, the safety of another person, or there is an emergency, dial Triple Zero (000).

You can also contact the Australian Federal Police (AFP) on 131 237 (131AFP) or go to the AFP website at www.afp.gov.au for help. The AFP can keep you safe, provide advice and refer you to other services that provide accommodation, financial support, counselling, and legal and immigration advice.

Anti-Slavery Australia provides free, confidential legal and migration services to people who have experienced or are at risk of modern slavery in Australia. If you have experienced modern slavery, or you are worried about someone in this situation, contact Anti-Slavery Australia for free and confidential legal advice and support. Call (02) 9514 8115 (9am–5pm AEST, Monday to Friday), or email ASALegal@uts.edu.au.

If you are in, or at risk of, forced marriage, you can contact My Blue Sky, Australia's national forced marriage service. Call (02) 9514 8115, text +61 481 070 844 (9am–5pm Monday to Friday), email help@mybluesky.org.au or visit www.mybluesky.org.au for support and free, confidential legal advice.

Free interpreter services are available to help any person communicate with service providers in their own language. Call Translating and Interpreting Service on 131 450. All calls are free and confidential.

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# ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| The Act | *Modern Slavery Act 2018* (Cth) |
| AFP | Australian Federal Police |
| ATO | Australian Taxation Office |
| CSE | Child sexual exploitation |
| Commonwealth Statement | Commonwealth Modern Slavery Statement |
| The Department | Attorney-General's Department |
| The Guide | *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* |
| IDC | Interdepartmental Committee on Human Trafficking and Slavery |
| IDCPP | Interdepartmental Committee on Modern Slavery in Public Procurement |
| ILO | International Labour Organization |
| MSBEU | Modern Slavery Business Engagement Unit |
| MSEAG | Modern Slavery Expert Advisory Group |
| MSHTB | Modern Slavery and Human Trafficking Branch |
| National Action Plan | *National Action Plan to Combat Modern Slavery 2020-25* |
| NCE | Non-corporate Commonwealth entity |
| OECD | Organisation for Economic Co-operation and Development |
| The Register | Modern Slavery Statements Register |
| The Strategy | International Engagement Strategy on Human Trafficking and Modern Slavery: Delivering in Partnership |
| UNGPs | United Nations Guiding Principles on Business and Human Rights |

# EXECUTIVE SUMMARY

It is a universal truth that slavery is abhorrent and intolerable. All levels of society bear a collective responsibility to combat slavery.

This shared commitment must take many forms. Where once slavery could be stopped by a law making it a criminal offence to own or treat a person as a slave, a different response is now required in a complex and interconnected world economy.

New terminology captures the different forms that slavery can take. Common descriptions of slavery practices include human trafficking, servitude, worker exploitation, child labour, forced marriage, debt bondage and deceptive recruiting. Collectively, these practices are nowadays described as modern slavery.

Australia has a diverse range of laws, programs, networks and support services to address this immense challenge. A key element of Australia's response is the *Modern Slavery Act 2018*. It is described as a transparency reporting law.

The Act requires large businesses and other entities in Australia to submit an annual statement to the Australian Government on how they are addressing modern slavery risks in their domestic and global operations and supply chains. The statements are placed on an online public register, the Modern Slavery Statements Register.

By early 2023 over 7,000 statements were published on the Register, relating to nearly 8,000 entities headquartered in over 50 countries. Over 2.2 million searches had been performed on the Register. Internationally, this is the first government-run register of its kind.

## Review of the Modern Slavery Act

The Act requires a review to be conducted three years after it commenced (on 1 January 2019). Terms of Reference for this review are at Appendix A of this report. The 12-month review commenced on 31 March 2022.

The Act has generated great interest in Australia. It was appropriate that public consultation would be at the centre of the review. This was undertaken in numerous ways – by publication of an Issues Paper in August 2022, through an online questionnaire based on the Issues Paper, an online survey being sent to all entities that had submitted a statement under the Act, and targeted consultations and meetings around Australia, both in person and online.

The review received 136 submissions, 30 responses to the online questionnaire, 496 responses to the online survey, held 38 consultation meetings attended by 285 organisations, and held another 65 meetings with government officers in Australia and abroad. Participants in the consultation and submission process came from all quarters – business, government, civil society, academia, unions, charities and peak bodies and professional associations.

Three questions lay at the heart of this review. Can a law such as the Modern Slavery Act be effective in combating modern slavery? Could the Act be more effective if changes were made to how it is framed and administered? Is the law being taken seriously?

## Can the Modern Slavery Act be effective in combating modern slavery?

Modern slavery presents a complex and difficult challenge. The latest estimate is that on any given day in 2021, 49.6 million people lived in situations of modern slavery – nearly one of every 150 people in the world. Just over half the people were in situations of forced labour, and most of the remainder in forced marriage. A majority of cases were situated in the Asia-Pacific region.

The drivers of modern slavery are numerous – poverty, economic shocks, gender inequality, exploitative business practices, and weak governance and regulatory inadequacy in other countries.

Through those forces, modern slavery has become embedded in the global economy – often hidden in what is dubbed the informal economy. There is a strong commercial incentive for businesses to search worldwide for low-price products, components and labour services. Underpaid and exploited labour in one country can yield lower-priced goods and services in another country.

How can a transparency reporting law confront that crisis? The premise of the Modern Slavery Act is that it can help build a counter pressure by requiring government and large businesses to examine their supply chains to gauge if there is a risk they build on or harbour modern slavery practices.

The Act lays down a list of matters that must be examined – the 'mandatory reporting criteria'. Among them are whether there are modern slavery risks in the entity's operations and supply chains, the actions it has taken to address those risks, and the effectiveness of its actions. The modern slavery statement must be approved by the governing board of the entity and signed by a senior officer, often the managing director.

Placing this assessment on a public register aims to encourage entities to be serious in identifying, reporting and addressing modern slavery risks. This can have flow-on market effects in consumer support, business reputation and competition for investor funding. If the 'transparency framework' works as intended, there will be a 'race to the top'.

Is this happening? A widely endorsed view in the consultations for this review is that there is no hard evidence that the Modern Slavery Act in its early years has yet caused meaningful change for people living in conditions of modern slavery. There are occasional scattered instances of modern slavery incidents and victims being identified, but no strong storyline that the drivers of modern slavery are being turned around.

That said, there is a strong belief that business – overall – is taking the Act and the reporting requirement seriously. Numerous changes and innovations point to this happening – executive level training, appointment of specialist staff, auditing and supply chain mapping, interrogation of suppliers, creation of professional networks, revision of contract arrangements, and greater multi-stakeholder collaboration, including civil society.

Investors are paying closer attention to the quality of modern slavery reporting by investment targets. Procurement processes are likewise focussing on this issue.

Overall, it is said, there has been a major cultural change and a strengthening commitment to work and collaborate harder to combat modern slavery. This is the early phase of a long journey.

Not surprisingly, this review heard a competing view. Modern slavery reporting is not being taken seriously enough. Independent studies and government evaluation have found a high level of apparent non-compliance, sometimes with basic requirements and at other times with best practice expectations.

There has been improvement in the quality of statements from one reporting period to the next, but the change is not significant enough. It resembles a tick-box exercise by a number of entities – a race to the middle!

Another line of criticism is that the underlying premise of a transparency reporting mechanism is shaky. It will be hard to turnaround the business imperative to be commercially competitive, and it is mistaken to think that consumer preferences and loyalties will hinge on the quality of modern slavery reporting.

That sharp debate will continue, but the welcome midpoint is a shared commitment to explore options for making the modern slavery reporting process more venerated and effective. Legislative and administrative changes have both been proposed for that objective.

This report makes thirty recommendations for change.

## Could changes to the Modern Slavery Act make it more effective?

Proposed legislative changes largely target what are seen to be the three main weaknesses in the present Act – the standard of modern slavery reporting is variable, the reporting obligation is not properly enforceable, and the process is at risk of being drowned by a sea of large and incompatible statements.

Several recommendations are made in this report to amend the Act to strengthen and sharpen the reporting process and context. The most significant is a recommendation that the Act require entities to implement a due diligence system that will go beyond reporting and will impose a duty on entities to take effective action to identify and assess risks, and track performance in addressing them.

There are other proposed changes to the reporting requirements, to clarify the matters to be included in the annual modern slavery statement. A significant change would be consideration of a mechanism for declaring high risk regions, locations, industries, products, suppliers or supply chains that must be taken account of in the reporting process.

Penalties would be introduced for failing to report without reasonable excuse, submitting a report that knowingly includes materially false information, and failing to put a due diligence system in place. The Anti-Slavery Commissioner that the Government has committed to establishing could play a role in monitoring and oversighting compliance with those requirements.

Another important recommendation is that the reporting obligation under the Act be extended to businesses that have annual consolidated revenue of $50M or more. The current reporting threshold is $100M. A lowered threshold would bring Australia into line with developments in due diligence and transparency reporting laws in other countries, and recognise that human rights abuses must be the concern of all business. Smaller businesses would not be subject to the penalties or due diligence requirements until their third reporting cycle.

To streamline the reporting process the report recommends that entities have the option of submitting a full modern slavery statement every three years, and update reports in the intervening two years. The Act would also require that all statements have a standardised coversheet that highlights key features of the report – such as modern slavery incidents identified during the year, and action taken by the entity on commitments or plans foreshadowed in the previous year's statement.

## Could changes to the administration of the Modern Slavery Act make it more effective?

Heavy reliance has been placed by entities on a government guidance manual, the *Guidance for Reporting Entities*. It is a highly-regarded publication, that has been supplemented by specific guidance material over the past three years.

With the added experience and insight that three years of reporting has brought, it is an appropriate time to commence a wholesale review of the Guide. This could be a lengthy process, and this report recommends that it commence with a forward work program. It is an appropriate task to be undertaken by the Attorney-General's Department, but should be undertaken in close consultation with the Commonwealth Anti-Slavery Commissioner and with the business, professional and general community (as occurred in the past).

The report refers to many of the suggestions that were made during this review for matters that could be addressed in the Guide. Particular interest was expressed in publishing supplementary guidance that is tailored to particular sectors, such as the financial sector.

Other recommendations are also made for administrative improvements to the reporting process (for example, creation of a reporting template) and for enhancing the Online Modern Slavery Statements Register to improve the searchability function.

Emphasis is also placed on the special role that the Commonwealth Anti-Slavery Commissioner can play in monitoring these processes and facilitating collaborative networks in and outside government. This review heard a strong message that the Commissioner should be a high-profile, specialist and committed office that

provides national leadership in raising awareness of modern slavery risks and ensuring those risks are addressed.

It is recognised that the extensive recommendations made in this report may require additional substantial resourcing over time where they are implemented.

## Going forward

This review was an excellent opportunity to gauge the level of interest in and commitment to the modern slavery reporting process. The outcome is pleasing. A large number and variety of individuals and organisations contributed to this review. The mood in all consultation sessions was constructive and enthusiastic. The written submissions to the review are of an exceptionally high quality that reflect a great deal of thought and discussion.

That is a promising basis on which to move forward in strengthening Australia's Modern Slavery Act. An effective law holds out a promise to current and potential victims of modern slavery that action is being taken and the problem can be remedied. That faith should not be misplaced.

## Acknowledgements

This review has benefitted greatly from the input and assistance of many people.

Special thanks is extended to the large number of people who participated in consultation sessions and the submission process. The in-person consultation sessions were hosted by civil society, professional, business and government bodies that spontaneously offered to provide this support. This offer was gratefully accepted and enabled the review team to consult with a far broader range of people and organisations than would otherwise have been possible.

This review received excellent assistance, in the early phase from the Australian Border Force, and after a machinery-of-government move, from the Attorney-General's Department. The staff of the Modern Slavery and Human Trafficking Branch were unfailingly helpful and pleasant throughout the full review process. Three members who warrant special mention are Frances Finney, the Assistant Secretary of the Branch, and Todd Kliendienst and Chantelle Silva. Chantelle worked tirelessly on the project throughout, and brought an ideal combination of knowledge, intellect and pleasantry to the task.

# LIST OF RECOMMENDATIONS

**Recommendation 1**
The Australian Government – either through or in consultation with the Anti-Slavery Commissioner – initiate discussion with other jurisdictions in Australia and internationally on options for defining 'modern slavery' for the purpose of mandatory reporting laws such as the *Modern Slavery Act 2018*. A report on those discussions should be provided to any later review of the Act.

**Recommendation 2**
The Modern Slavery Act be amended to include, in an Appendix to the Act, the terms of Article 3 of the Trafficking Protocol (defining 'trafficking in persons') and Article 3 of the Worst Forms of Child Labour Convention (defining 'the worst forms of child labour').

**Recommendation 3**
The Attorney-General's Department review the *Guidance for Reporting Entities* to ensure that the description of modern slavery in Appendix 1 of the Guide accurately represents the terms of the *Criminal Code*.

**Recommendation 4**
The Modern Slavery Act s 5(1)(a) be amended to provide that a 'reporting entity' is an entity that has a consolidated revenue of at least $50 million for the reporting period.

**Recommendation 5**
The Attorney-General's Department, in consultation with the Anti-Slavery Commissioner, amend the *Guidance for Reporting Entities* to provide tailored guidance to small and medium-sized entities on complying with the reporting requirements of the Modern Slavery Act, either on a voluntary basis or as required by the Act under a lowered reporting threshold.

**Recommendation 6**
The Attorney-General's Department examine the matters discussed in Chapter 4 of this report as to difficulties that have been encountered in deciding whether an entity is a 'reporting entity' for the purposes of the Modern Slavery Act. The Department should consider the desirability of amending the *Guidance for Reporting Entities* or the Modern Slavery Act.

**Recommendation 7**
The Attorney-General's Department, as part of the forward work program proposed in Recommendation 25, commence a review of how the terms 'operations' and 'supply chains' are explained in the *Guidance for Reporting Entities*. The review could suitably be done in stages, commencing with a review of how those terms apply to the financial sector. The review should include public consultation.

**Recommendation 8**
The Attorney-General's Department consider the desirability of amending the mandatory reporting criteria in s 16 of the Modern Slavery Act:

- to replace the phrase 'operations and supply chains' in ss 3, 11 and 16 with the phrase 'operations and supply networks'
- to revise criteria 3, 4, 5 and 6 in the manner discussed in Chapter 6 of this report, and
- to add new mandatory reporting criteria that would require an entity to report on:
    - modern slavery incidents or risks identified by the entity during the reporting year
    - grievance and complaint mechanisms made available by the entity to staff members and other people, and
    - internal and external consultation undertaken by the entity during the reporting year on modern slavery risk management.

**Recommendation 9**
The Attorney-General's Department consider the desirability of amending the Modern Slavery Act to provide that the mandatory reporting criteria can be prescribed in a rule or regulation made under the Act, and deal with specified matters, rather than listed in s 16 of the Act as at present.

**Recommendation 10**
The Attorney-General's Department, as part of the forward work program proposed in Recommendation 25, give consideration to the matters raised in Chapter 6 of this report regarding revision of the *Guidance for Reporting Entities*.

**Recommendation 11**
The Modern Slavery Act be amended to provide that a reporting entity must:

- have a due diligence system that meets the requirements mentioned in rules made under s 25 of the Act, and
- in the entity's annual modern slavery statement, explain the activity undertaken by the entity in accordance with that system.

This duty should not apply to an entity with a consolidated annual revenue of between $50-100M until two years after the entity has become subject to the reporting requirements of the Act.

**Recommendation 12**
The Modern Slavery Act be amended to provide that an entity has the option of submitting every three years a modern slavery statement that addresses all requirements of the Act, and in the intervening two years to submit a report that updates the information in the full statement. The procedure for reporting along these lines should be spelt out in rules made under s 25 of the Act.

**Recommendation 13**
The Attorney-General's Department develop a template for optional use by reporting entities for preparing and submitting an annual modern slavery statement in compliance with the Modern Slavery Act.

**Recommendation 14**
The Attorney-General's Department facilitate the submission of an online modern slavery statement (using the template referred to in Recommendation 13) through an online portal on the Online Register for Modern Slavery Statements.

**Recommendation 15**
The Modern Slavery Act be amended to require that all modern slavery statements submitted under the Act include a coversheet that addresses specified matters.

**Recommendation 16**
The Attorney-General's Department review the *Guidance for Reporting Entities* to consider inclusion of clearer guidance, including an optional template, for use by entities to record that they have complied with the approval and signature requirements in the Modern Slavery Act ss 13(2) and 14(2).

**Recommendation 17**
The Attorney-General's Department seek further clarity regarding criticisms discussed in Chapter 8 of this report about difficulties encountered in joint reporting.

**Recommendation 18**
The Modern Slavery Act be amended by removing the requirement that an entity that has notified the Minister that it will submit a voluntary modern slavery statement under s 16 of the Act can only revoke that notice by notifying the Minister before the start of the reporting period in which the entity would otherwise report.

**Recommendation 19**
The Attorney-General's Department establish a formal arrangement for annual review of the Commonwealth Modern Slavery Statement, and to consider the role of the Anti-Slavery Commissioner in that review.

**Recommendation 20**
The Modern Slavery Act be amended to provide that it is an offence for a reporting entity:

- to fail, without reasonable excuse, to give the Minister a modern slavery statement within a reporting period for that entity
- to give the Minister a modern slavery statement that knowingly includes materially false information
- to fail to comply with a request given by the Minister to the entity to take specified remedial action to comply with the reporting requirements of the Modern Slavery Act
- to fail to have a due diligence system in place that meets the requirements set out in rules made under s25 of the Act.

The penalty offence provisions should not apply to an entity with a consolidated annual revenue of between $50-100M until two years after the entity has become subject to the reporting requirements of the Act.

**Recommendation 21**
The Modern Slavery Act be amended to provide that an entity that will not be lodging a modern slavery statement in a year following the earlier lodgement of a statement, will notify the Minister before the end of the reporting year, with an explanation as to why a statement will not be lodged that year.

**Recommendation 22**
The Attorney-General's Department compile, and publish on the Modern Slavery Statements Register, an annual list of entities that have submitted statements that are published on the Register.

**Recommendation 23**
The Attorney-General's Department examine the practicability of making additional information available regarding reporting entities' compliance with the reporting requirements of the Modern Slavery Act.

**Recommendation 24**
The Attorney-General's Department examine the practicability of establishing a procedure for the receipt and investigation of complaints from the public regarding entity reporting under the Modern Slavery Act.

**Recommendation 25**
The Attorney-General's Department, in consultation with the Anti-Slavery Commissioner, develop and publish a forward work program for reviewing and updating the *Guidance for Reporting Entities* and other guidance material.

**Recommendation 26**
The Modern Slavery Act be amended to provide (expressly) that the Minister shall arrange for guidelines to be published on the reporting requirements in Part 2 of the Act, and that reporting entities shall be encouraged to have regard to any such guidelines.

**Recommendation 27**
The Modern Slavery Act be amended to provide that:

- the Minister or the Anti-Slavery Commissioner may make a written declaration of a region, location, industry, product, supplier or supply chain that is regarded as carrying a high modern slavery risk, and
- the declaration may prescribe the extent to which reporting entities must have regard to that declaration in preparing a modern slavery statement under the Act.

**Recommendation 28**

The Attorney-General's Department have regard to options discussed in Chapter 11 of this report for improving the Online Register for Modern Slavery Statements.

**Recommendation 29**

The Modern Slavery Act s 24 be amended to provide that a further review of the kind described in that section be undertaken in another three years by a person appointed by the Minister, who may be the Anti-Slavery Commissioner.

**Recommendation 30**

The legislation establishing the office of Anti-Slavery Commissioner provide expressly that a function of the Commissioner is to issue guidelines on special issues relating to the reporting requirements in Part 2 of the Modern Slavery Act. Any guidelines must not be inconsistent with guidelines that the Minister has arranged to be published under the Act.

# PART 1 – REVIEWING THE MODERN SLAVERY ACT

# Chapter 1: About this review

## Why this review was conducted

The *Modern Slavery Act 2018* (Cth) (the Act) commenced operation on 1 January 2019. The Act requires a review to be undertaken three years after the commencement of the Act (s 24). The review is to be completed within one year. A report on the review is to be provided to the Minister and tabled in each House of the Parliament within 15 sitting days of that House after the completion of the report.

This review was announced on 31 March 2022 by the former Australian Minister administering the Act, the Hon Jason Wood MP, Assistant Minister for Customs, Community Safety and Multicultural Affairs. Professor John McMillan AO was engaged to lead the review, with the support of the Modern Slavery and Human Trafficking Branch – which was then in the Australian Border Force but was moved to the Attorney-General's Department in accordance with an Administrative Arrangements Order issued on 23 June 2022.

Terms of Reference for the review are in Appendix A to this paper. They remained constant during the review. The stated objective of the review is to consider the operation of the Act over the first three years and to look at options for improved operation and compliance.

Professor McMillan, who led the review, is an Emeritus Professor at the Australian National University and has relevant professional experience in public law as a legal practitioner and Commonwealth and State agency head. He has held appointments as Australian Information Commissioner, Commonwealth and NSW Ombudsman, Integrity Commissioner for the Australian Commission for Law Enforcement Integrity and member of the Australian Copyright Tribunal.

## How this review was conducted

The review was conducted within a 12-month period, commencing on 31 March 2022. An Issues Paper was released in August 2022 to initiate a three-month public consultation phase.

The Issues Paper set out key areas of focus for the review and included 27 targeted consultation questions on which submissions were invited. Topics of interest included the impact of the Act in requiring that designated entities prepare an annual modern slavery statement, the reporting requirements for preparation and submission of a statement, administration and enforcement of compliance with the reporting requirement, and publication of the statements on the online Modern Slavery Statements Register (the Register). The Issues Paper also welcomed commentary on any issue of interest falling within the Terms of Reference for this review.

There were five consultation avenues:

- Written submissions were invited on the Issues Paper, that contained 27 consultation questions
- The consultation questions could also be responded to through an online questionnaire on the Attorney-General's Department website
- An online survey was sent to all entities that had submitted a modern slavery statement under the Act
- Targeted consultations were held both online and in person around Australia
- Meetings were held with selected individuals and committees.

The bulk of the consultations were completed by 22 November 2022 – that is, three months after the date of publication of the Issues Paper.

## Targeted consultations

Between 22 August – 22 November 2022, 38 targeted consultations were held with government and non-government organisations including business, civil society and academia. 21 consultations took place online and 17 in-person in Melbourne, Sydney, Brisbane, Perth and Adelaide. In total, 285 organisations were consulted during the three-month consultation period. Table 1 outlines the number of organisations consulted.

**Table 1: Number of organisations consulted during the public consultation period**

| Type of organisation | Number consulted |
|---|---|
| Business | 193 |
| Australian Government | 32 |
| Civil society | 30 |
| Academia | 12 |
| Peak bodies | 14 |
| Foreign Government | 4 |
| **Total number** | **285** |

## Written submissions

The review received 136 written submissions from a range of domestic and international stakeholders. Submissions to the review will be made publicly available on the Attorney-General's Department website, with the exception of some submissions where the authors requested confidentiality.

Appendix B lists the individuals and bodies that made a written submission.

Appendix C provides a breakdown of the overall response to six consultation topics in the written submissions and the online questionnaire.

## Online questionnaire

Any person could contribute to the review via an online questionnaire, hosted on the Attorney-General's Department website. The questionnaire contained all 27 consultation questions listed in the Issues Paper. Respondents could choose to respond in free-text form to each of the consultation questions and could respond anonymously if they wished. Thirty responses to the online questionnaire were received.
The responses to the online questionnaire were drawn on generally in preparing this report and are not separately published or listed. The online questionnaire responses are also included in the overall breakdown of responses in Appendix C.

## Online survey for reporting entities

The Attorney-General's Department conducted an online survey as part of the review to obtain the views of entities that submitted a modern slavery statement under the Act. The online survey was issued on 22 November 2022 and was sent to over 4,000 reporting entities who had lodged statements on the Register. The survey contained 22 questions that sought information about the reporting entity and their experience in preparing and submitting a modern slavery statement. The survey form recommended that the business unit/function that has responsibility for developing the entity's statement complete the survey.

496 responses were received to the online survey. Appendix D provides a breakdown of the overall response to the online survey questions.

## Selected meetings

In addition to the formal public consultation program, the review engaged in several meetings with individuals and committees that have a strong practical connection to Australian Government modern slavery policy and practice. This included introductory meetings with the Government's National Roundtable on Human

Trafficking and Slavery, the Modern Slavery Expert Advisory Group, the Interdepartmental Committee on Human Trafficking and Slavery, the Interdepartmental Committee on Modern Slavery in Public Procurement and the Intergovernmental Network on Modern Slavery in Public Procurement, comprising representatives from state and territory governments. Professor McMillan also participated in several presentations to groups from business, civil society, and peak bodies.

Over the course of the review, 65 engagements were undertaken, including consultations, meetings, presentations and events.

### Victim and survivor engagement

The review consulted with members of the Survivor Advisory Council, established by the Salvation Army as part of a government-funded pilot program, the *Lived Experience Engagement Program*. This consultation took place outside the three-month public consultation period, to account for Survivor Advisory Council member preparation and availability.

During the consultation session, Council members shared perspectives on the importance of greater due diligence in the ethical recruitment in the supply chains of business, barriers to reporting experiences of exploitation, what justice looks like and experiences in not receiving justice. Feedback provided during this consultation session has been drawn on in preparing this report and is additionally being considered as part of the Government's targeted review of Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth).

## Observations on the consultations for this review

Several positive features of the active consultation for this review are noteworthy.

First, a large number of individuals and organisations participated in the various consultation activities. There was direct participation by hundreds of people in consultation sessions and in making submissions and responding to the online questionnaire and survey. In addition, roughly 25 submissions explained that a special process had been followed to canvass the views of members, affiliates and other people for the purpose of preparing a submission to this review. Examples were liaison between 25 civil society organisations, a consumer survey, a survey of members, a lived experience focus group discussion, a survey of suppliers, discussion with clients and academic staff, and formation of or consultation with a modern slavery working group. It is likely that a thousand or more people directly contributed views that are captured in the submissions and responses to this review.

Secondly, the variety of organisations that contributed to the review was extensive, as illustrated in Table 1 above. Participation in consultation forums came from Australian and foreign government agencies, business entities, civil society organisations, academic units, peak bodies, and religious and charitable bodies. A similar range of bodies (and individuals) made written submissions and completed the questionnaire. There was also notable diversity within those sectors. For example, written submissions from the business sector came from retail, mining, financial, utility and research bodies. The civil society and academic representatives who participated in the review represented many disciplines – such as law, human rights, criminology, economics, religion and diversity practices.

Thirdly, the mood in all consultation sessions was constructive and enthusiastic. The review team was struck by the open-minded and inquiring approach that all participants brought to this review. This is indirectly reflected in Appendixes C and D that provide a breakdown of the responses to key consultation questions. On all major points there was a balance in the contrasting views expressed, both overall and within different sectors. An example noted in Chapter 4 of this report is that on the question of lowering the reporting threshold from $100M to $50M, there was an equal measure of support and opposition for that proposal from within both the business and civil society sectors. There was a similar spread of opinion on whether to include penalty offences in the Act.

Fourthly, the written submissions to the review are of an exceptionally high overall quality. It is clear that a great deal of thought and care went into preparing the submissions. They convey considerable research and consultation.

Finally, nearly all those making submissions expressed a genuine desire to contribute further to this review and to the improved operation of the Act. A practical example of that commitment is that all the in-person consultation sessions were hosted by civil society, professional, business and government bodies that spontaneously offered to host the sessions. Most of the online consultation sessions were similarly convened by other bodies that approached the review team to offer assistance. This collaboration enabled the review team to consult with a far broader range of people and organisations than would otherwise have been possible.

## The style of this report

Every effort has been made in preparing this report to study and draw widely from the highly valuable written submissions. However, it was simply not practical on many issues to refer to all relevant submissions. Nor was it possible, within the direction and narrative of this report, to document the full diversity of points made in submissions.

To ensure that the full value of the submissions is not lost or forgotten upon publication of this report, it provides a footnote reference on many points to a sample of submissions that dealt with an issue. For practical and length reasons only the submission numbers are given (Appendix B identifies the authors of most submissions).

At numerous points the report notes views expressed in individual submissions that are not taken up in this report. The views are nevertheless a respected contribution to the broader debate about dealing with modern slavery. Noting those views in this report may assist them being taken up by others or considered in any subsequent review of the Act.

Another style feature of the report is that it rarely refers to the name of the person or organisation who expressed a view that is noted in the report. This was a considered choice to avoid, both directly and implicitly, giving priority or lending prominence to the authorship of particular views. The review team was impressed by the uniformly serious thought and experience that was reflected in all submissions and contributions. It seemed important that the substance of the views being put remained the key feature. The authorship of particular viewpoints and submissions can be followed up through the footnotes by anyone wishing to do so.

# Chapter 2: The Australian Modern Slavery Act

## Introduction

This chapter provides background information on the *Modern Slavery Act 2018* through a brief discussion of the following issues:

- Why the Act was enacted in Australia
- The broader global setting in which modern slavery has thrived
- The different strategies adopted or proposed internationally to combat modern slavery
- The main features of the Australian Act, and how it seeks to address the problem of modern slavery
- The operation of the Act, including independent studies of its operation
- Other Australian government programs and policies that aim to combat modern slavery practices.

The discussion in this chapter draws from the Issues Paper for this review (which contains additional discussion). Features of the Australian Act described in this chapter are also discussed more fully in other chapters of this report.

## The development of the Modern Slavery Act

The prime impetus for the adoption of a modern slavery law in Australia was an Australian Parliamentary inquiry conducted in 2017 by the Joint Standing Committee on Foreign Affairs, Defence and Trade. The Committee report, *Hidden in Plain Sight*, examined a United Kingdom law enacted a couple of years earlier – the *Modern Slavery Act 2015* (UK) – as well as the findings of a report in 2013 by the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Trading Lives: Modern Day Human Trafficking*.

The 2017 Joint Standing Committee inquiry attracted a high degree of public interest, receiving 225 submissions and holding public hearings over ten days. The inquiry report made a unanimous recommendation endorsed by 36 members of both houses of Parliament for a modern slavery law to be adopted in Australia.

An extensive consultation process to frame an Australian law and reporting requirement was undertaken by government in 2017-18 with business and civil society. This involved 12 stakeholder roundtables in 4 capital cities attended by more than 130 people; publication of a consultation paper that attracted 99 written submissions; 50 direct meetings with stakeholders; and consultation with a further 40 stakeholders on a draft Bill. A summary of the consultation roundtables and the submissions was published.

The Australian *Modern Slavery Act 2018* commenced on 1 January 2019.

During this period, NSW also enacted the *Modern Slavery Act 2018* (NSW). It commenced operating on 1 January 2022. It began as a Private Member's Bill and was subsequently amended in 2021 on the Government's initiative. A feature of the NSW Act is that it establishes both an office of Anti-Slavery Commissioner and a joint parliamentary committee called the Modern Slavery Committee. The current Commissioner is Dr James Cockayne.

## The global modern slavery challenge

Legislation to prohibit and criminalise slavery has been enacted in many countries from the early 1800s onwards. The target of the early laws was chattel slavery – the practice of a person being owned or sold by another. That practice was widespread and commercially embedded in many countries before the advent of the anti-slavery movement in the late 1700s.

An Australian example of a law that criminalises chattel slavery is Division 270.3 of the *Criminal Code*. It creates the offences of asserting ownership of a person, including by a debt or contract with the person, and purchasing a slave, or capturing, transporting or disposing of a person to be a slave.

Prohibition of those obvious forms of slavery did not prevent the practice flourishing in other forms. The legislative response in many countries has been a steady expansion in the range of anti-slavery offences. This is reflected in the titles to Divisions 270 and 271 of the *Criminal Code* that refer to 'Slavery and slavery-like offences' and 'Trafficking in persons'. Both divisions extend the range of slavery offences to include forced labour, deceptive recruitment, forced marriage, debt bondage, human trafficking (domestically and globally), harbouring a victim and organ trafficking.

Australian state and territory criminal laws add other categories to the list of slavery-like offences. They include sexual servitude, child abuse, deceptive recruiting, kidnapping, deprivation of liberty and labour practices.

The steady expansion of criminal law offences has been remarkable in itself, but not a wholly effective solution. There is general acceptance that tackling slavery has become a harder challenge.

The main reason is that slavery has become embedded in the global economy. There is a strong commercial incentive for businesses to search worldwide for low-price products, components and labour services. Underpaid work in one country can yield lower-priced goods and services in another country. The problem grows in dimension when driven by behaviour in other countries that is unscrupulous, avaricious, inhumane and unregulated – or even government-sanctioned. Slavery practices can be hidden from view and broader knowledge when occurring at faraway levels in a supply chain – in the informal economy.

The term 'modern slavery' is used to describe this new challenge of stopping coercion, threats and deception that exploits people and deprives them of their freedom.

The scale of the modern slavery challenge has been outlined in numerous recent reports of international human rights and labour bodies.[1] A 2022 report by Walk Free, an international non-aligned human rights group, has been widely cited and endorsed by commentators, including government agencies. The report was prepared in collaboration with the International Labour Organization and the International Organization for Migration.

Walk Free published the *Global Estimates of Modern Slavery – Forced Labour and Forced Marriage* (2022). The estimate was that, in 2021 on any given day, 49.6 million people lived in situations of modern slavery – nearly one of every 150 people in the world. The breakdown[2] was:

- An estimated 27.6 million people were in situations of forced labour, and 22 million in forced marriage.
- The forced labour cases included 11.8 million women and girls (43%), 3.3 million children, 3.9 million cases of state-imposed forced labour, and 6.3 million cases of forced commercial sexual exploitation. The areas of forced labour were Asia and the Pacific (55%), Europe and Central Asia (15%), the Americas (13%) and Arab States (3%). The major areas of forced labour are services, manufacturing, construction, agriculture and domestic work.
- Over two-thirds of the forced marriage cases were women and girls. The cases occurred in all regions, with most in Asia and the Pacific (65%), Africa (15%), and Europe and Central Asia (10%). Those principally responsible for forced marriage occurrences were parents (73%) and other relatives (16%).
- The total figure of 49.6 million was an increase of 10 million (20%) on the previous estimate in 2016. Factors that had caused an increase in modern slavery were the COVID-19 pandemic, armed conflict and climate change. Those factors had disrupted employment and education, and led to an increase in extreme poverty and forced and unsafe migration.

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[1] Eg, United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (2020); United Nations General Assembly, 'Role of organised criminal groups with regard to contemporary forms of slavery', *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences* (2021, A/76/170).

[2] The percentage figures have been rounded up/down.

An Australian estimate is that there was an estimated 1,300 to 1,900 victims of modern slavery and human trafficking in Australia between 2015-16 to 2016-17.[3]

An influential instrument at a global level is the Sustainable Development Goals adopted by the United Nations General Assembly in 2015. The Global Goals are seventeen objectives that are designed to serve as a 'shared blueprint for peace and prosperity for people and the planet, now and into the future'. As that broad mission statement suggests, the goals range broadly over environmental, social and economic aspects of sustainable development.

The shared commitment of the global community is to achieve all goal targets by 2030 (unless an earlier date is specified). Sustainable Development Goal 8.7 is to –

> Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by end 2025 child labour in all its forms.

Australia was the inaugural Chair of Alliance 8.7, which is the multi-stakeholder group of government and non-government bodies that was established to carry forward the work on Goal 8.7.

## Combating modern slavery

There is broad acceptance of the scale of the challenge to combat modern slavery practices that directly affect 50 million or more people globally. It is recognised that a combination of legislative, regulatory, cultural, remedial and inter-governmental steps are required. To take the Walk Free discussion of forced labour as an example, the report identified the following key policy priorities –

- Workplace cultural changes that recognise the freedom of workers to associate and bargain collectively
- Recognition of basic workplace rights, such as ethical recruitment, income security, non-discrimination, and occupational health and safety standards
- Stronger workplace regulation through measures such as public labour inspectorates, investigations and prosecution of offenders
- Support services to provide protection, assistance and rehabilitation, particularly for vulnerable groups such as children and migrants
- Remedial rights for victims to compensation for material and moral damage
- Immigration controls that address migrant vulnerability to forced labour and human trafficking
- Recognition of risk factors such as armed conflicts, disasters and disease, and development of a crisis response
- Supply chain transparency to combat forced labour and human trafficking
- Political commitment to end forced labour
- International cooperation and partnership between government and non-government stakeholders to end forced labour and human trafficking.

The broad policy response in Australia to modern slavery is outlined later in this chapter. It rests on legislation, adoption of national plans and administrative programs, international engagement and adoption of agreements, creation of domestic consultative mechanisms, and government funding of community-based initiatives.

Many submissions to this review also laid down options for broadening the Australian response, by such means as victim compensation schemes, import bans and legislative and regulatory protection against worker exploitation. These options are generally beyond the Terms of Reference for this review; they are noted briefly in Chapter 13 of this report.

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[3] Submission #112, referring to S Lyneham, C Dowling & S Bricknell, 'Estimating the dark figure of human trafficking and slavery victimisation in Australia' (Australian Institute of Criminology, Statistics Bulletin, 16 February 2019).

A specific focus in the government response internationally has been legislation to stop modern slavery practices being part of domestic and international commerce. Examples of the legislation in several countries was given in the Issues Paper, and is covered in Appendix E to this report (and in several chapters of the report). In general terms, the legislation has followed three models:

- Require large business entities and government agencies to report annually on the steps they have taken to scrutinise their own business operations and supply chains to ensure that modern slavery practices are not occurring – often called a transparency reporting law
- Impose an obligation on business entities to implement a due diligence system to ensure that human rights abuses (including modern slavery practices) are not occurring in the business operations and supply chains – often called a mandatory human rights due diligence law
- Block the importation or sale (including through customs seizures) of foreign merchandise that is reasonably suspected of involving forced labour or servitude, by placing the onus on the importer to establish the contrary – often called an import ban (or, in the United States, a 'Withhold Release Order').

The Australian Modern Slavery Act is an example of a transparency reporting law.

## Outline of the Modern Slavery Act

### Overview

The Modern Slavery Act requires large businesses and other entities in Australia to submit an annual report to the Australian Government on how they are addressing modern slavery risks in their domestic and global operations and supply chains. The reports are placed on an online public register, the Online Register for Modern Slavery Statements.

The Australian Government is also required by the Act to prepare a separate annual statement covering all non-corporate Commonwealth entities (NCEs). This statement is published on the Register, but separately also as the Commonwealth Modern Slavery Statement (Commonwealth Statement). The Commonwealth Statement is formally endorsed by the Minister administering the Act.

The dual aim of the Act is to increase business and government awareness of modern slavery risks, and support entities to identify, report and address the risks. Equipping and enabling large businesses to be responsible and transparent in responding to modern slavery risks was expected to have flow-on market effects, for example, in consumer support and business reputation and competition for investor funding. Two phrases commonly used to describe the Act at the time of enactment were that it would create a 'transparency framework' that would instigate a 'race to the top'.

The Act was designed also as a practical way of giving effect to Australia's international treaty obligations to prevent and combat human trafficking and slavery and slavery-like practices. The Act lists nine international agreements that are partially implemented by the Act – dealing with slavery, human trafficking, human rights, discrimination, labour conditions, and child protection.

### Definition of 'modern slavery'

The annual modern slavery statement of all reporting entities is required to address seven mandatory reporting criteria (s 16). Those criteria are linked to the term 'modern slavery', which is defined in the Act as conduct that is either a criminal offence under the slavery provisions of the *Criminal Code* (Divisions 270 and 271) or that falls under one of two international instruments (the Trafficking Protocol and the Worst Forms of Child Labour Convention) (s 4).

The Act and the international instruments apply to as many as fourteen categories of slavery practice – slavery, slave trading, servitude, forced labour, forced marriage, child marriage, debt bondage, trafficking in

persons, child trafficking, domestic human trafficking, organ trafficking, harbouring a victim, global human trafficking, and serious child labour.[4]

A unifying theme in the different forms of modern slavery is that coercion, threat or deception has been used to seriously exploit a victim or deprive them of their freedom.

### Entities to which the Act applies

The following entities are described in the Act as reporting entities that are required to prepare and submit an annual modern slavery statement (s 5):

- An entity that has a consolidated annual revenue of at least AU$100 million over its twelve-month reporting period, and is either an Australian entity or a foreign entity carrying on business in Australia at any time in that reporting period. The entity may, for example, be a company, partnership, trust, individual, unincorporated association or superannuation fund.
- The Australian Government, on behalf of all Commonwealth departments and statutory and executive agencies (that is, NCEs).
- A Commonwealth company or corporate entity that has an annual revenue of at least AU$100M in its financial year.

An Australian or foreign entity carrying on business in Australia that does not meet those tests may volunteer to report under the Act (s 6). It may discontinue that voluntary compliance by written notice to the Minister. The revenue test of $100M takes account of revenue earned in Australia or overseas, and revenue earned by a group of entities under the Australian Accounting Standards.

### The mandatory reporting criteria

An annual modern slavery statement (including the Commonwealth statement) must include the following information (s 16(1)):

- identification of the reporting entity
- the reporting entity's structure, operations and supply chains
- modern slavery risks in the entity's operations and supply chains
- actions it has taken to assess and address those risks, including due diligence and remediation processes
- a description of how the entity assesses the effectiveness of those actions
- a description of the process of consultation with any entities the reporting entity owns or controls, and
- any other information the entity considers to be relevant.

The Act also requires entities to meet two approval requirements (s 13):

- the modern slavery statement must be approved by the principal governing body of the reporting entity, and
- the statement must be signed by a responsible member of the reporting entity.

### Other reporting requirements

The Act gives entities the option of submitting a joint statement that covers one or more entities (s 14). This enables a joint statement that covers a corporate group or collection of entities (though there is no limit on the number or type of entities that can collaborate to submit a joint statement). The entities must consult with each other in preparing the joint statement, the mandatory reporting criteria must be met for each entity, and the statement must be separately approved by the governing board of each entity.

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[4] A plain language guide to those terms is provided in the Issues Paper for this review, at p 7; and in the *National Action Plan to Combat Modern Slavery 2020-25* at Appendix B.

A similar modification is that a single statement may cover a parent entity and its subsidiaries. The statement must include information about consultation processes between the related entities in preparing the statement (s 16(1)(f)).

All statements are to be made publicly and freely available on a website hosting the Modern Slavery Statements Register (s 18). The Minister has a discretion to register a statement that does not comply with the requirements of the Act (s 19(2)). Alternatively, the Minister may require that a statement be revised prior to registration (s 16A). An entity also has the option at any time of preparing a revised statement for republication, and to show details of the revision (s 20).

There is no single reporting date for all entities. They are required to report within six months of the end of their own financial year or accounting period in which they had an annual revenue of at least $100M (s 4). The statements are accordingly received and published on the Register throughout the year.

### Enforcement of the reporting requirement

The Act aims for a commitment from entities to strive for continuous improvement over time in modern slavery reporting. The intent is that Australian businesses will realise they benefit by striving for full compliance with a law that supports them to identify modern slavery risks in their operations and global supply chains. Transparency of business reporting through the Register is also expected to provide a practical and reputational compliance incentive and pressure.

The Act contains a supplementary regulatory measure, empowering the Minister to request an entity to explain within 28 days why it has not complied adequately or at all with the reporting requirement, or to take specified remedial action to ensure compliance (s 16A). The Minister may publish the identity of an entity that does not comply with the request.

The Act does not contain any offence or civil penalty for non-compliance with the reporting requirement. The Act further provides that any subordinate legislative rule made by the Minister under the Act may not create an offence or civil penalty, or authorise entry, search or seizure (s 25(2)). However, the Act provides that this three-year review of the legislation is to consider the need for additional compliance measures, including civil penalties (s 24).

### Administration of the Act

The Act is administered by the Modern Slavery and Human Trafficking Branch (MSHTB) in the Attorney-General's Department. The Branch includes the Modern Slavery Business Engagement Unit (MSBEU), and undertakes the following tasks:

- managing the Register
- examining all statements to assess if they comply with the requirements of the Act, and providing feedback to entities in cases of potential non-compliance to support them to meet their obligations under the Act
- conversing with the business community about reporting obligations and modern slavery risks
- arranging and presenting at online and face-to-face workshops and information sessions for business and civil society
- managing an online helpdesk
- publishing administrative guidance documents
- convening formal consultation groupings
- convening the Modern Slavery Expert Advisory Group.

The Minister may, by legislative instrument,[5] make a rule for carrying the Act into effect (s 25). To date, no rules have been made.

[5] The term 'legislative instrument' is defined in the *Legislation Act 2003* (Cth), which lays down requirements for the making, publication and sunsetting of legislative instruments.

The Minister is required by the Act to table in Parliament an annual report each calendar year on the implementation of the Act, noting compliance by entities and best practice reporting (s 23A).

### Administrative guidance

Detailed administrative guidance was required to explain the Act's new reporting concepts and requirements. During the first three years, twenty guidance documents and e-learning modules have been published on the Register.

The main guide is the *Guidance for Reporting Entities* (the Guide), published in August 2019. It is a 96-page manual that explains key terms in the Act, the entities required to report under the Act, matters to be reported, joint reporting and voluntary reporting options, reporting timelines, and support resources. The Guide includes case studies and practical advice on responding to modern slavery incidents. The Guide was developed by the MSBEU in consultation with 13 businesses and civil society experts and involved public consultation. The Guide explains that it draws on the *United Nations Guiding Principles on Business and Human Rights* (UNGPs), as the recognised global standard for preventing and addressing business-related human rights harm.

An opening message in the Guide is that 'The nature and extent of modern slavery means there is a high risk that it may be present in your entity's operations and supply chains'. The Guide emphasises the need to foster consultation between business, investors, government, consumers and civil society groups.

Other topics covered in guidance material are good practice reporting, editing a published statement, signifying governing body approval, addressing COVID-19 impacts, and identifying modern slavery risks in government procurement.

## Developments under the Modern Slavery Act

### Statements lodged under the Act

Two full reporting cycles concluded under the Modern Slavery Act, respectively, on 30 June 2021 and 30 June 2022.[6] The number of statements published under those reporting cycles was:

- First reporting cycle: around 1,700 statements
- Second reporting cycle: around 2,700 statements.

Over 7,000 statements were published by early 2023, comprising roughly 6,200 mandatory statements, over 800 voluntary statements and 3 Commonwealth Statements.

The indicative number of reporting entities covered by those statements was close to 7,900, representing entities that were headquartered in over 50 countries. The Register provides additional detail on the revenue base of those entities, the industry sector to which entities belonged, and the number of entities that had also reported under comparable foreign laws.

The Register recorded that 2.2 million had been performed by early 2023.

### Government assessment of compliance with reporting requirements

The MSBEU examines all statements, before they are published on the Register, to assess if they formally comply with the signature and approval requirements of the Act. The MSBEU assessment for the first two reporting cycles[7] was:

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[6] The statutory period for this review was the first three years of operation of the Act, which ended on 31 December 2021. Additional reporting data has been included in this section to provide a more comprehensive picture of compliance with the Act. The Issues Paper for this review (at 20-26) also contains graphs and additional discussion of reporting activity under the Act.

[7] These are updated figures taken from the Issues Paper, *Review of Australia's Modern Slavery Act 2018* (2022) at 22-23.

- First reporting cycle: around 40% were assessed as likely to be non-compliant
- Second reporting cycle: around 30% were assessed as likely to be non-compliant.

The MSBEU also assesses compliance with the mandatory reporting criteria in the Act. In the second reporting cycle, it found there was likely non-compliance due to a failure adequately to describe:

- consultation with entities the reporting entity owns or controls (over 55%)
- how the entity assessed the effectiveness of actions it had taken to assess and address modern slavery risks in its operations and supply chains (around 24%)
- modern slavery risks in the entity's operations and supply chains (nearly 10%)
- actions taken by the entity to assess and address modern slavery risks, including due diligence and remediation processes (nearly 6%)
- the structure, operations and supply chains of the reporting entity (nearly 3%)
- the identity of the reporting entity (around 1%).

### Independent assessment of compliance with reporting requirements

Several independent studies have been undertaken that assess modern slavery statements published on the Register. The reports of these studies were referred to frequently in submissions to this review as confirmation or evidence of unsatisfactory compliance with the reporting requirements of the Act. The studies mostly looked at statements published in the first reporting cycle.

The MSHTB has welcomed these studies and consulted with the researchers, but has not previewed or endorsed the study findings. The frame of reference for each study was chosen by the researchers. The assessment criteria they adopted were not necessarily the same as the legislative requirements of the Act.

The Issues Paper for this review published a summary of the scope and the main findings of each study. The summary is not repeated in full in this report, as the study findings were drawn on in many submissions to this review. The five studies were:

- Australian Council of Superannuation Investors, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act* (July 2021). This report examined statements submitted by 151 ASX200 companies against 41 quality indicators and 8 legal compliance indicators.
- Monash University Business School, Centre for Financial Studies, *Measuring Disclosure Quality of Modern Slavery Statements* (Dec 2021). This study assessed 239 statements submitted by ASX300 companies against 31 criteria.
- Human Rights Law Centre, *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (Feb 2022). This study examined 102 statements in four sectors with known modern slavery risks against 66 indicators: garments, rubber gloves, horticulture produce and seafood from four different countries.
- Walk Free, *Beyond Compliance in the Garment Sector: Assessing UK and Australian Modern Slavery Act statements produced by the garment industry and its investors* (Feb 2022). This study examined reporting under the UK and Australian Modern Slavery Acts by 50 companies in the garment sector.
- International Justice Mission, *Spot Fires in Supply Chains* (April 2022). This study analysed 404 statements against 44 criteria, with most statements relating to entities that sourced from or operated in one particular country.

Similar criticisms were made in each study of modern slavery reporting standards. Generally, only a small minority of statements were assessed highly under the criteria/indicators adopted by the researchers. The studies found there was significant scope for improvement in modern slavery reporting.

Common weaknesses were: failing to address known modern slavery risks and products; failing to describe modern slavery risks beyond Tier 1 of supply chains; providing only a basic or unclear description of modern slavery risks; giving an inadequate explanation of risk assessment methods and grievance mechanisms; and not consulting with civil society groups in modern slavery risk assessment.

The study authors indicated their intention to repeat this assessment of modern slavery statements at a later time. At the time of finalisation of this report, two studies had published a subsequent report:

- Human Rights Law Centre, *Broken Promises: two years of reporting under Australia's Modern Slavery Act* (Nov 2022). The study examined statements submitted by 92 companies in the same four sectors examined in the earlier *Paper Promises* report. Three main findings from the study were that 66% of entities had failed to address all mandatory reporting criteria (down from 77% in the earlier study); only 33% of entities appeared to be taking some form of effective action to address modern slavery risks.
- Monash Centre for Financial Studies: *Modern Slavery Disclosure Quality Ratings: ASX100 Companies Update 2022*: This study updated the ASX100 component of the earlier study. The report concluded that the quality of modern slavery reporting had improved but was uneven; a 'fail' grade was given to the reports of 9 entities.

## Other Australian Government measures to combat modern slavery

The Modern Slavery Act is one element of a broader Australian Government response to modern slavery risks. A full description of the broader program is given in the Tenth Report of the Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response 1 July 2017 – 30 June 2020*. The main elements are noted below.

### *National Action Plan to Combat Modern Slavery 2020-25* (National Action Plan)

The National Action Plan was developed to provide strategic direction on Australian Government work to combat modern slavery. It was adopted after widespread consultation across government, business, unions, academia and the community. The National Action Plan was formally endorsed by six Commonwealth Ministers – reflecting the need for a whole-of-government response.

The National Action Plan commences by describing forms of modern slavery, the root causes and drivers of slavery, contemporary challenges (including COVID-19 and technology being used to recruit victims), data on slavery and slavery-like practices detected in Australia, and Australian exposure to modern slavery through global operations and supply chains.

The National Action Plan aims to prevent and combat slavery through a framework of 5 strategic priorities, 9 guiding principles, and 46 action items. The 5 strategic priorities are:

- **Prevent** modern slavery by combating the drivers of these crimes and empowering individuals and groups that are vulnerable to modern slavery
- **Disrupt, Investigate and Prosecute** modern slavery by identifying victims and survivors, implementing disruption strategies and holding perpetrators to account through effective investigations and prosecutions
- **Support and Protect** victims and survivors by providing holistic and tailored victim centred support and protection
- **Partner** across government and with international partners, civil society, business, unions and academia to ensure a coordinated response to modern slavery
- **Research** by strengthening data collection and analysis to build the evidence base that supports the government response to modern slavery.

The following themes permeate the 9 guiding principles:

- the Australian response to modern slavery should be comprehensive, coordinated and collaborative
- the response should take account of the unique needs of those who are disproportionately affected, notably women and children
- protection, support and remedies should be provided to victims
- a strong deterrence framework should be maintained through investigations and law enforcement
- Australia should strive to be an international and regional leader in deterring and combating modern slavery.

The 46 action items are delivered on a whole-of-government basis across several Australian Government agencies assigned to implement them during the life of the National Action Plan, led by the Attorney-General's Department. Though the 46 items are individually specific, themes they project include:

- awareness raising, advocacy and promotion of domestic and international laws and principles
- education, training, guidance and support, targeted broadly across government, business and the community, regarding modern slavery risks, responses and remedies
- providing support for victims and survivors of modern slavery
- government funding of programs, both domestically and abroad
- research into modern slavery and development of a research network
- reviewing and developing Australian laws, administrative programs and intergovernmental arrangements, and ratifying international standards
- implementing the Act and conducting the three-year review of the Act
- consulting the Modern Slavery Expert Advisory Group (MSEAG) and the National Roundtable on Human Trafficking and Slavery.

### Statutory offences and protections

Many Australian laws criminalise slavery and related practices and extend protection to victims. Examples include:

- *Criminal Code*: Divisions 270, 271 of the Code criminalise human trafficking, slavery and slavery-like practices, both in Australia and overseas when committed by an Australian citizen, permanent resident or corporation. The offences are adopted in the definition of 'modern slavery' in the Modern Slavery Act. The maximum penalty for each offence is a prison sentence of up to 25 years for slavery and trafficking in children.
- *Crimes Act 1914*: Part 1AD of the Crimes Act and Division 279 of the *Criminal Code* enable protected evidence to be given by a vulnerable witness in a criminal proceeding.
- *Migration Act 1958*: The Act controls irregular migration practices that can expose vulnerable people to slavery (such as people smuggling and visa breaches). A non-Australian who is a suspected victim of slavery may have their visa status regularised under the Human Trafficking Visa Framework.
- *Fair Work Act 2009*: The Act contains protections for vulnerable workers, including migrant workers and international students who may be at greater risk of exploitation.
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth): Financial institutions are required to file a Suspicious Matter Report with the Australian Transaction Reports and Analysis Centre (AUSTRAC) if they suspect or identify modern slavery as part of customer engagement or via transaction monitoring.[8]

Those laws are supported by specialist investigation and law enforcement teams, and victim support programs. Enforcement and support activity under those laws includes the following:

- In the 2021-22 financial year the Australian Federal Police (AFP) received 294 reports of alleged human trafficking and slavery offences (an increase from 224 the previous year).[9] The alleged offences were forced marriage (29%), human trafficking (19%), sexual exploitation (19%), forced labour (14%), child trafficking (7%), domestic servitude (6%), slavery (3%), debt bondage (3%) and deceptive recruiting (2%).
- Between 2004-22, 31 people were convicted of offences against Divisions 270 and 271 of the *Criminal Code*. In 2021-22 the Commonwealth Director of Public Prosecutions continued with 22 prosecutions and commenced three new prosecutions.

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[8] Submission #113.
[9] See AFP submission #125, and Attorney-General's Department, *Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* (Discussion Paper) at 12-18.

- The Support for Trafficked People Program administered by the Department of Social Services provided specialised support to 435 clients in 2017-20. The AFP referred 52 people to the program in 2021-22.
- The Department of Home Affairs granted 119 specialist visas under the Human Trafficking and Visa Framework in 2017-20.

### National plans and administrative programs

The *National Action Plan to Combat Modern Slavery 2020-25* forms part of a broader framework of national plans that aim to protect and support victims of exploitation and abuse. Other national plans are the *National Plan to Reduce Violence against Women and their Children 2010-2022*, the *National Plan to Fight Transnational Serious and Organised Crime 2018*, the *International Engagement Strategy on Human Trafficking and Modern Slavery: Delivering in Partnership*, and the *National Strategy to Prevent Child Sexual Abuse*.

Human trafficking and slavery also fall within the concerns addressed by other Australian Government programs. Examples are the Department of Social Services 'Support for Trafficked People Program' (that includes funding for civil society activity), the Australian Institute of Criminology 'Human Trafficking and Modern Slavery Research Program', and the AFP 'Look a Little Deeper' human trafficking awareness initiative.

### Formal consultation mechanisms

Formal consultation arrangements with government have been established to provide advice and support on modern slavery initiatives. They include:

- *National Roundtable on Human Trafficking and Slavery*: The National Roundtable was established in 2008, and presently comprises representatives from 12 Australian Government agencies, and 14 non-government representatives from civil society organisations and industry bodies. The Roundtable aims to drive law and policy reforms in Australia's response to modern slavery and human trafficking.
- *Modern Slavery Expert Advisory Group*: The MSEAG was established in 2020 to provide expert advice to Government on the Act's implementation. During the review, the group comprised 22 members drawn from business, unions, legal profession, industry peak bodies, civil society organisations, universities and research centres.
- *Interdepartmental Committee on Human Trafficking and Slavery* (IDC): The IDC was established in 2009 and comprises representatives of the Australian Government agencies with portfolio responsibilities in relation to human trafficking and slavery. The IDC also collates data on human trafficking and slavery trends, and periodically reports on the Australian Government's response to modern slavery – an example being the IDC's Tenth Report, Trafficking in Persons (noted above).
- *Interdepartmental Committee on Modern Slavery in Public Procurement* (IDCPP): The IDCPP coordinates the work of NCEs (such as government departments) in addressing modern slavery risks in government procurement and investment activities. This work is captured in the annual Commonwealth Modern Slavery Statement.
- *Intergovernmental Network on Modern Slavery in Public Procurement*: This intergovernmental grouping will coordinate the work of Commonwealth, state and territory governments to address modern slavery risks.

Less formal consultation arrangements and working groups also operate across government on particular matters. Examples include periodic consultation with sector specific groupings, such as legal practitioners, textile and construction businesses and compliance and enforcement officials.

### Australian Government funding

$7.8M was provided to non-government organisations between 2008-22 to deliver community-based initiatives on modern slavery. This has supported domestic community programs addressing forced

marriage, labour exploitation, slavery-awareness in migrant and regional communities, and the development of web platforms, training toolkits and community mapping resources.

### International engagement by Australia[10]

The overarching strategic plan for Australia's international work to combat human trafficking and modern slavery is the *International Engagement Strategy on Human Trafficking and Modern Slavery: Delivering in Partnership* (released in March 2022).

The Strategy brings together international engagement work across the Australian Government and is framed around a statement of strategic priorities, guiding principles and commitments.

The Strategy notes that the focus of Australia's international effort is in the Indo-Pacific, which in 2016 was home to an estimated two-thirds of the global number of victims of human trafficking and modern slavery. Australia participates in several regional programs and forums that promote intergovernmental cooperation, information sharing, policy dialogue, capacity building and work to address the drivers of modern slavery.

The principal regional forum is the 'Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime', which Australia co-chairs with Indonesia. Membership of the Bali Process comprises 45 governments and 4 international organisations. It includes the Government and Business Forum that supports collaborative work on supply chain transparency, ethical recruitment and worker remedies.

Other Australian initiatives in Southeast Asia include:

- the ASEAN-Australia Counter-Trafficking (ASEAN-ACT) initiative, which is a 10-year program to counter human trafficking in Southeast Asia through work with ASEAN member states to strengthen justice systems
- TRIANGLE in ASEAN, which is a 12-year program to support safe and fair work migration within ASEAN to support the rights of migrant workers
- funding of $10.6 million to support the ILO's Better Work program to improve labour standards in garment factories in several Asian countries
- a partnership agreement with Thailand in 2022 to support Thailand's Centre of Excellence for countering human trafficking.

Examples of Australia's broader participation in international forums and projects are:

- in the United Nations General Assembly Third Committee, the UN Human Rights Council, and other UN forums as a co-sponsor and supporter of resolutions, statements and initiatives relating to human trafficking and modern slavery
- in support of the UNGPs
- as co-convenor of the Financial Sector Commission on Modern Slavery and Human Trafficking (called the Liechtenstein Initiative), that continues as the Finance Against Slavery and Trafficking (FAST) initiative to promote implementation of the Commission's 2019 Final Report, *A Blueprint for Mobilising Finance Against Slavery and Trafficking*
- as inaugural Chair (2017-2019) of Alliance 8.7, a multi-stakeholder partnership of governments, UN agencies, businesses, academics and civil society, working to achieve Goal 8.7 of the 2030 Sustainable Development Goals on the eradication of forced labour, modern slavery, human trafficking and child labour
- in developing, along with the United Kingdom, United States, New Zealand and Canada, the Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains (2017)

[10] See submission #6 from the Department of Foreign Affairs and Trade.

- in establishing the position of Ambassador to Counter Modern Slavery, People Smuggling and Human Trafficking (formerly the Ambassador for People Smuggling and Human Trafficking), in the Department of Foreign Affairs and Trade, to progress Australia's regional and international efforts to combat human trafficking and modern slavery.

### Australian adoption of international instruments

Australia has ratified international instruments relating to human trafficking and modern slavery.

Those listed in the Modern Slavery Act (s 7(2)) as agreements that are partially implemented by and support the constitutional basis of the Act are:

*International Convention to Suppress the Slave Trade and Slavery* (1926)
*ILO Convention (No 29) concerning Forced or Compulsory Labour* (1930)
*Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery* (1956)
*International Covenant on Civil and Political Rights* (1966)
*Convention on the Elimination of All Forms of Discrimination Against Women* (1979)
*Convention on the Rights of the Child* (1989), and the *Optional Protocol to the Convention – on the Sale of Children, Child Prostitution and Child Pornography* (2000)
*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime* (2000)
*Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2000)
*ILO Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (1999).

The Australian National Action Plan lists other international instruments that are similarly treated as part of the international legal framework endorsed by Australia:

*International Covenant on Economic, Social and Cultural Rights* (1956)
*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000)
*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984)
*International Convention on the Elimination of all Forms of Racial Discrimination* (1965)
*ILO Convention (No 105) on Abolition of Forced Labour* (1957)
*Universal Declaration of Human Rights.*

### Parliamentary inquiries

The reports of several high-profile parliamentary inquiries have been influential in shaping Australian legislation, policy and commitments. Examples include:

- Joint Standing Committee on Foreign Affairs, Defence and Trade:
  - *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (2017)
  - *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (2018)
  - *Advocating for the Elimination of Child and Forced Marriage* (2021)
- Parliamentary Joint Committee on Law Enforcement:
  - *An Inquiry into Human-Trafficking, Slavery and Slavery-Like Practices* (2017)
- Senate Foreign Affairs, Defence and Trade Legislation Committee
  - *Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020* (2021)

# Chapter 3: Three years of the Modern Slavery Act – Key themes

## Introduction

This review of the first three years of the Modern Slavery Act had a keen interest in finding out what people thought of the Act. What impact has it had? Has it made a difference? Is it being taken seriously by business and government? Can it be made to work better?

The large number of people who participated in this review were equally keen to address those broad questions. Nearly every submission to the review commented on the 'impact' theme, and the face-to-face consultations were equally direct and lively.

An immediate take-away message from that engagement is that there is a widespread commitment in Australia to grapple with the problem of modern slavery. And there is an equally strong interest to explore whether the Modern Slavery Act can be an effective tool for doing so. Opinions, understandably, were diverse.

This chapter aims to explore the major themes that arose in that dialogue. Many of the points discussed in this chapter arise again in later chapters, because these overriding themes interact repeatedly with the specific and practical choices that arise in framing a modern slavery law – who should it apply to, what should it require, how will it be administered and enforced, and how should its effectiveness be measured?

## Spectrum of opinion on the Modern Slavery Act

The first theme to stand out in this review is the wide spectrum of opinion on key issues. Many criticisms of the Modern Slavery Act were expressed forcefully, but as commonly the alternative view was put with equal vigour.

This is apparent in a largescale way in the consolidated picture presented in Appendix C of the views expressed in written submissions and in the online questionnaire and survey responses. For example, on the paramount question of whether the Act has had a positive impact in the first three years, 64% of respondents said it had (wholly or somewhat), while 21% felt that the impact of the Act in its current form was poor. Similarly, on the much-debated issue of whether to reduce the reporting threshold below $100M, 29% were in favour, 24% were against and 14% were neutral. Further, as noted in Chapter 1, the views expressed typically crossed interest and sectoral lines on major issues.

A diversity of opinion within the business sector was apparent in the different overall responses that were received in written submissions and in the online survey completed by close to 500 reporting entities. Written submissions from the business sector made numerous and well-considered proposals for changing the reporting requirements in the Modern Slavery Act, whereas roughly 90% of survey respondents said (on many questions) that they did not experience difficulty in complying with the reporting requirements of the Act. By contrast, 61% experienced difficulty in obtaining information from suppliers for modern slavery reporting purposes, while 39% did not. There was a similar divide over whether entities had experienced difficulty in mapping their supply chains – 46% had experienced difficulty, and 54% had not.

It is not surprising there will be a spectrum of views and different experiences regarding a law that directly affects many thousands of businesses, and has broader relevance to a great many more people. While the cleavage of opinion can be read in different ways, it sheds light on two other themes in this review. One is that business engagement with the modern slavery reporting is evolving – a theme picked up later in this chapter. The other is that the successful operation both of this law and modern slavery programs generally will depend in large measure on whether there is active collaboration among all those who are either subject to the law or connect to it in some other way – a theme that is taken up throughout this report.

## Impact of the Modern Slavery Act

The ultimate purpose of the Modern Slavery Act is to make a difference in combating modern slavery. The Act aims to do that by requiring and assisting business and government to identify, report and address

modern slavery risks in their operations and supply chains. In that procedural sense it is a law about reporting, but from a substantive angle it aims to be a law about protecting and helping vulnerable people.

Is the Act doing so? The widely expressed view in this review was that there is no hard evidence that the Act has caused meaningful change for people living in conditions of modern slavery. Across the thousands of pages of modern slavery statements on the Register for Modern Slavery Statements, there is only a handful of examples of modern slavery incidents being detected or people given specific protection or remedial help.[11] Nor is there any clear story that the Act has successfully combatted any of the drivers of modern slavery – such as poverty, economic shocks, gender inequality, exploitative business practices, and weak governance and regulatory inadequacy in other countries.

At that point opinions diverge on whether the Act has nevertheless had a positive impact. At the risk of over-simplifying the responses, there was strong support for the Act from many participants in this review who pointed to the business cultural change that was underway. The direct positive impact of the Act could be seen, it was argued, in how it had raised awareness in the business community and Australian society of the need for concerted action to address domestic and global slavery challenges. In time, the impact of the Act in achieving its people-centered objective could be expected to grow.

Business awareness and commitment was said to be manifested in many ways. The senior leadership of business organisations was now keenly aware of the Act and of their responsibility to approve the organisation's annual modern slavery statement. In the survey of reporting entities for this review, close to 90% of reporting entities said their leadership team was either engaged (fully or somewhat) in both approving *and preparing* the entity's statement.

The Act was said to be causing foundational change in business understanding of how modern slavery risks must be addressed – through appointment of specialist staff and creation of new internal governance procedures; adoption of auditing and supply chain mapping processes; deeper interaction with and interrogation of suppliers; implementation of new contract management systems; requirement of staff training at both executive and operational levels, adoption of complaint and grievance procedures, creation of professional networks and multi-stakeholder working groups, greater interaction with civil society organisations to enlist their support and insights, preparation and adoption of tailored guidance material and codes, and overall collaboration across business, professional and civil society networks.

A couple of relevant results from the online survey are that 57% of entities said they had adopted a modern slavery policy following the commencement of the Act, 78% provide staff training on modern slavery risks, and a majority had publicly promoted their business's commitment to addressing modern slavery risks, had introduced new internal reporting procedures, and were engaging more with civil society and other stakeholders.

Another positive impact was said to be that organisations representing investors have embraced a sustainability philosophy of paying close attention to whether investment targets have taken seriously their modern slavery reporting obligations. Investment institutions have sponsored some of the independent studies of modern slavery reporting, and were active participants in this review. A similar point made to this review was that modern slavery statements are accessed increasingly during procurement processes.

There was, overall, support and unwavering commitment for the Modern Slavery Act expressed in all facets of the consultations for this review.[12]

The competing view – that the impact of the Modern Slavery Act has been poor – was mostly put in three ways. One was that modern slavery reporting under the Act was of inferior quality and, unless taken seriously, could never deliver on the difficult challenge of identifying slavery risks in complex global supply

[11] Eg, submission #43.
[12] Again, though, support was not unanimous. The response in the online survey to the question – 'in a broad sense, [do you] support the annual reporting requirement of the Modern Slavery Act' – was yes, 71.55%; no, 8.49%; undecided, 14.44% and prefer not to answer, 5.52%.)

chains. Unless actual and known slavery risks were identified, the prospect of meaningful change was doomed.

This criticism of reporting quality is taken up at many stages in this report. Colourful descriptions used to describe the quality of reporting was that Australia was not witnessing a 'race to the top', but a 'race to the middle', a 'stroll to slightly higher ground', or a demonstration in 'taking short cuts' or 'staying with the pack'.

A second criticism is that the Modern Slavery Act itself is not strong enough. It only requires entities to prepare a report, and does not expressly impose a duty to take action – to engage in human rights due diligence.[13] Nor does the Act have adequate mechanisms to enforce compliance with the reporting requirement – such as penalties, or compliance monitoring and regulatory enforcement by an independent anti-slavery commissioner. These criticisms are likewise taken up in greater depth throughout this report.

The third and more fundamental criticism is that a transparency mechanism is, at best, of limited valued, and at worst, inherently flawed.[14] At most it will raise awareness of a problem but without a plan or strategy for dealing with it. Furthermore, some argue, the transparency mechanism rests on two mistaken assumptions – that, internally within businesses, raised awareness of human rights challenges will outweigh commercial and other pressures; and externally in the public arena, that consumers will take notice of modern slavery statements and adjust their buying preferences and business loyalties. A few of the submissions to this review reinforced that point by referring to consumer awareness and focus group studies they had undertaken.[15]

Overall, while some commentators had little confidence that a transparency reporting mechanism could be effective in combating the drivers of modern slavery, most critics were of the view that the effectiveness of the Modern Slavery Act could at least be improved by legislative changes such as creation of a human rights due diligence obligation, imposition of penalties for non-compliant reporting, and regulatory oversight by an Anti-Slavery Commissioner.

### Evolution of a business compliance culture

It was recognised when the Modern Slavery Act commenced that it imposed a new and challenging reporting obligation on many Australian entities. There was a learning curve ahead.

It was foreshadowed that, with adequate assistance and guidance, business compliance would evolve and improve. Entities would be supported and encouraged by government to strive for continuous improvement. There would be no penalty for non-compliant reporting. Regulatory oversight powers were minimal, and reached no higher than the Minister having power to publish the identity of an entity that had failed to take specified remedial action to ensure compliance with the reporting requirements (s 16A).

Many submissions to this review (particularly from peak industry bodies) reaffirmed their support for the premise that modern slavery risk management is an evolving competence and, correspondingly, that steady improvement can be expected in the standard of modern slavery reporting. This argument was made in several ways.

It was said that many entities initially lacked the skills, experience and resources for adequate supply chain mapping and auditing when the Act commenced. Entities have since given special focus to in-house cultivation of these competencies and to enlisting outside expertise. This development has been reinforced by such things as the creation of collaborative networks and development of industry guidance and codes.

Another initial challenge for business was that some features of the Act were confusing or ambiguous and contributed to non-compliant reporting. There was a lack of regulatory standards for a reporting task of this kind. COVID-19 supply chain disruptions also impaired the ability of business to respond as adequately as some had hoped.

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[13] Submission #103.
[14] Eg, submissions #11, #15, #23, #38, #69, #109, #136.
[15] Submissions #23, #56, #122.

The standard of modern slavery reporting has, it is argued, been gradually improving as entities become more familiar with this task. This is borne out in independent studies and the intake evaluation of statements by the Modern Slavery and Business Engagement Unit in the Attorney-General's Department. While the non-compliance rate as reported through those processes is still unacceptably high, improvement is occurring.

Drawing from those points, some submissions argued that it is unnecessary to introduce stronger enforcement measures in the Act, such as financial penalties for non-compliant reporting. Variations of that argument are that punitive sanctions should only apply to blatant or repeated non-compliance, or that stronger measures should not apply immediately to smaller enterprises that become subject to the law under a lowered reporting threshold.

There is a competing argument taken up throughout this report. In essence, it rests on the view that there is no longer any excuse for a large business in Australia to fall foul of reporting requirements that are designed to combat modern slavery practices.[16]

### Limitations of a transparency reporting mechanism

There is broad acceptance that a transparency reporting mechanism cannot by itself by a complete policy response to the problem of modern slavery. The Modern Slavery Act is only one element of the broader Australian Government response to modern slavery that was described in Chapter 2.

A related point, stressed in several submissions, is that there are inherent limitations on how far a reporting process can go in identifying as well as combating and disclosing modern slavery risks. There can be practical impediments in supply chain mapping and product tracing.[17] Some commentators from large organisations noted that they had tens of thousands of individual suppliers. Beyond tier 1 of the supply chain the business environment can be opaque and beyond the direct knowledge or control of the Australian company or even its tier 1-2 suppliers. There can also be difficulty in obtaining information from suppliers, either through reluctance or disregard to questionnaires.

Geopolitical considerations can also be a limitation both on supply chain mapping and on public disclosure of questionable practices.[18] An example is state-sponsored forced labour. Similarly, public reporting can have unintended consequences, for example, for foreign workers who may be victimised.

It was also questioned whether an Australian business that fully revealed the risks it had identified would be publicly shamed rather than applauded for its honest reporting.[19]

A point drawn from those examples is that the adequacy of modern slavery reporting should be evaluated with those considerations in mind. There may be an unstated explanation for why a statement is crafted in a particular way or does not address issues as fully as possible. The 'wicked problem' concept was the shorthand description of these practicalities adopted by some commentators.[20]

Another point drawn from considerations of this kind is that an Anti-Slavery Commissioner will be well placed to work directly with business and government to devise practical solutions for addressing these reporting quandaries.

## Streamlining the reporting process

Three related features of the current modern slavery reporting process were criticised on practical grounds during the consultations for this review:

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[16] Submission #89.
[17] Submissions #8, #34, #41, #49, #50, #76, #78, #85, #94, #98, #135.
[18] Submissions #73, #96, #126.
[19] Submissions #56, #131.
[20] Submissions #21, #34, #49, #105.

- The reporting obligation is the same for all entities, however large or small. A familiar description is that the Modern Slavery Act adopts a 'one size fits all' model of reporting.
- The reporting obligation is the same each year. Many statements will contain the same static information that was presented in a previous report – such as a description of the structure and operations of the reporting entity. Individual statements can be quite lengthy, and lengthen over time. The total number of statements published on the Register is steadily increasing – over 1,700 in the first reporting cycle, around 2,700 in the second cycle, and over 7,000 in total by early 2023.
- Entities can choose how to structure and present their own statement. Although the mandatory reporting criteria are the same for all reporting entities, each entity can decide how to address them (or even construe them).

These criticisms were shared by the full range of participants in this review. On the one hand, reporting entities complained that it was burdensome and time-consuming to prepare the same comprehensive statement each year, and to gather and review information that may add little of substance to earlier statements. This burden may be felt disproportionately by smaller entities if required to report under a lowered reporting threshold.

Individuals and bodies who access statements on the Register also find the volume, length and variability of statements to be an issue. Analysing modern slavery reporting trends and responses can be demanding and time-consuming. Comparing statements to identify sectoral or supply chain issues can be unsystematic. Spotting issues – such as whether commitments made in a previous year's statement were addressed, or if comparable entities are reporting on the same supply chain issues – can be random.

A range of options were put forward during the consultations for addressing those practical issues. These are taken up in later chapters of this report and include recommendations regarding the development of online reporting templates and coversheets, and requiring full reporting every three years and update reporting in the interim.

## Updating legislative and administrative guidance

There are principally two rulebooks that entities are expected to consult and follow in modern slavery reporting.

One is the Modern Slavery Act, and specifically section 16(1) which sets out the mandatory reporting criteria. Section 25 of the Act empowers the Minister to make rules for carrying out or giving effect to the Act. A rule made under s 25 is a legislative instrument that must accord with the requirements of the *Legislation Act 2003* (Cth) (briefly, public consultation, tabling in the Parliament and possible disallowance by either House of the Parliament). No statutory rule has yet been made under this power.

The other rulebook is the *Guidance for Reporting Entities* ('administrative rules'). The Guide is a 96-page guidance manual published by the Australian Government that is described as a plain language explanation of what entities need to do to comply with the Act. The Guide notes that it is not legal advice.
Numerous suggestions were made in submissions for revising and extending both rulebooks. Often, no preference was expressed for inserting a new provision in the Act or in the Guide.

Proposals were also made for what, in effect, would be new rule-making powers. One suggestion was that the Anti-Slavery Commissioner should have powers to make rules, give directions and issue declarations. A related suggestion was that the Minister or the Commissioner should, through a formal process, have power to designate special or high-risk modern slavery challenges that must be addressed in a particular year of reporting. The topic could be identified as a specific region, industry sector, product or supply channel.
Those various options make it necessary to formulate principles to guide the creation, status and content of the rules and guidance for modern slavery reporting. The following principles guide the analysis and recommendations in this report. Further context on this suggestion is discussed in a later chapter.
Firstly, the content of the Modern Slavery Act should be succinct, along the lines of the present Act. Some amendment of the Act would be desirable (for example, to refine the mandatory reporting criteria in s 16), but new or additional legislative text should overall be kept to a minimum. Thousands of entities (perhaps more than 6,000 each year) will be required to comply with the reporting criteria. Brevity and simplicity in the Act are therefore important.

Secondly, greater reliance could be placed on the statutory rule making power in s 25 of the Act to elaborate on the reporting obligations of entities. In law, a statutory rule made under s 25 has the same status as a provision of the Act. However, a rule can generally be made more quickly and simply than a legislative amendment. An option discussed in Chapter 6 is whether the mandatory reporting criteria that are currently in s 16 of the Act could instead be prescribed in a rule or regulation made under the Act.

Thirdly, the *Guidance for Reporting Entities* has, in practice, been a fundamental element of the modern slavery reporting scheme. Entities rely heavily on the Guide. Numerous proposals were put to this review (many endorsed in this report) to expand the current guidance.

The responsibility for preparing and publishing administrative rules is an archetypical executive function. Responsibility for the Guide currently rests with the Attorney-General's Department; the work is principally undertaken by the Modern Slavery Business Engagement Unit within the Department.

An option proposed in some submissions would be to transfer that function to the Anti-Slavery Commissioner. There are many precedents for the discharge of similar functions by independent statutory regulators: two examples are the role of the Australian Information Commissioner in promulgating privacy and freedom of information guidelines;[21] and the role of the Australian Securities and Investments Commission in promulgating regulatory guides.[22]

This review has opted to leave the function of publishing the *Guidance for Reporting Entities* with the Attorney-General's Department, at least in the short term. The function has been successfully discharged to date at departmental level. It interacts with other work of the department – such as maintaining the Register for Modern Slavery Statements, and providing an informal advice and support service to entities through the MSBEU.

An additional consideration is to avoid overloading the Anti-Slavery Commissioner. There will be high expectations that the Commissioner will play a dynamic role from day 1. Preparing and updating administrative guidelines can be enormously time-consuming and would possibly divert the Commissioner away from other tasks. The Commissioner should nevertheless be consulted routinely and methodically by the Department about the adequacy of the Guide. The option of transferring the guidelines function to the Commissioner could be re-examined in the next review of the Modern Slavery Act.
The Commissioner should nevertheless be given adequate powers to play a strategic role in providing direction and guidance on modern slavery reporting. That is a standard regulatory role. Two recommendations are made in this report to confer special guidance powers on the Commissioner.

One is that the Commissioner should have power to designate a special or high-risk modern slavery challenge that entities are required to address in a particular reporting period (Recommendation 27). The challenge could be a specified region, industry sector, product or supply channel to be directly considered by reporting entities. The designation (or declaration) would have added status if it was described in the Act as a 'notifiable instrument' under the *Legislation Act 2003* (Cth). A notifiable instrument is like a legislative instrument in that it is a formal statutory instrument that is notified on the Federal Register of Legislation.[23] However, unlike a legislative instrument it is not subject to formal public consultation at the draft stage, consideration by a parliamentary committee, disallowance by a House of Parliament, or sunsetting. (This power could alternatively be conferred on the Minister.)
Another recommendation is that the Commissioner should have an express power to issue guidelines on special issues relating to the reporting requirements in Part 2 of the Modern Slavery Act (Recommendation 30). These would supplement and not contradict the guidelines published by the Department.

## Harmonisation and alignment of reporting criteria and standards

Frequent mention has been made throughout this review of the multiple laws in other countries and jurisdictions that require modern slavery reporting and human rights due diligence. Many entities reporting under the Australian law will have a similar reporting obligation in one or more other countries. (Close to 15%

[21] *Freedom of Information Act 1982* (Cth) s93A; *Privacy Act 1988* (Cth) s 28.
[22] *Corporations Act 2001* (Cth)
[23] *Legislation Act 2003* (Cth) s 11.

of the entities responding to the online survey for this review said that their headquarters were located in another country; and the Register gives figures on the high number of reporting entities that were headquartered overseas or reported also under a foreign law.)

The Issues Paper for this review queried whether more could be done to harmonise the Australian reporting requirements with those in other countries.[24] Some of the legal and practical difficulties this posed were noted. An example is that the UK and Australian laws both define 'modern slavery' by reference to criminal offence provisions, but differ in how those provisions are worded and what they cover. Another difference is that the UK law lists mainly optional reporting criteria whereas the Australian law lists mandatory criteria (that are overall more specific and demanding).

Several submissions supported harmonisation as a desirable objective. They noted the administrative burden and duplication that entities can face in tailoring reports that are essentially similar in content to the textual differences of multiple laws. Jurisdictional differences can hamper the comparability of statements submitted in different countries. Harmonisation would also acknowledge the transnational, globalised and interconnected character of business and supply chain activity – and, correspondingly, that modern slavery is enmeshed in global complexity.

Countervailing considerations and difficulties were pointed to in other submissions. Harmonisation is undesirable if it would involve weakening the Australian reporting standards to match those of other countries. If the objective is to improve reporting in a global setting, it would be better that Australia strove to match trends in other countries (particularly Europe) that place modern slavery reporting within a more demanding framework of mandatory human rights due diligence.

It was similarly urged that the more important objective for Australia is to ensure that its reporting requirements align with the UNGPs, which are 'the authoritative global standard for preventing and addressing risks of human rights impacts associated with businesses' activities, including modern slavery'.[25] The UNGP standard can bring about consistent international business practice and enables Australia to draw on considerable work that is being undertaken internationally to explain and promote the UNGPs. The *Guidance for Reporting Entities* acknowledges the reliance placed on the UNGPs in framing both the Australian Act and the Guide, and urges all parties to consult the UNGPs.

Suggestions were made for other administrative and practical ways of approaching this issue. One is to strive for thematic *alignment* of reporting obligations and practices, rather than harmonisation at a legislative level.[26] Australia could start by discussing alignment with major supply chain trading partners, such as New Zealand and the UK – perhaps by placing this issue on the agenda of the next Commonwealth Heads of Government meeting scheduled for 2024.[27]

Another suggestion is for Australia to explore the possibility of reciprocal or mutual recognition of modern slavery statements among countries with similar (though not identical) reporting requirements.[28] One form of reciprocal recognition would be a procedure by which a country would accept, as due compliance with its reporting requirements, a modern slavery statement lodged in another country that addressed all relevant operational and supply chain issues. Another form of reciprocal recognition would be that an entity, for the purposes of its own country reporting, could rely upon a statement lodged in another country by one of its suppliers, without having to undertake a separate due diligence analysis of the matters covered in the statement.

Harmonisation and alignment could also be supported by multilateral endorsement of methodologies and statistical standards for assessing and responding to modern slavery risks. An example given in one submission is the opportunity that exists for Australia to endorse the standard setting work on modern

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[24] Issues Paper, *Review of Australia's Modern Slavery Act 2018* (2022) at 37-38.
[25] Pillar Two, submission #126. See also submissions #127, #134, #136.
[26] Submissions #132, #136.
[27] Submission #95.
[28] Submissions #74, #81, #90, #100, #134.

slavery undertaken by the International Labour Organisation, Walk Free Foundation, the International Organization for Migration, and the International Conference of Labour Statisticians.[29]

The approach adopted in this report is to recommend that the Australian Government - either through or in consultation with the Commonwealth Anti-Slavery Commissioner, initiate discussion with other jurisdictions in Australia and internationally on options for defining 'modern slavery' for the purpose of mandatory reporting laws such as the Modern Slavery Act 2018 (Recommendation 1)

## Other measures to combat modern slavery

Chapter 13 of this report discusses other proposals made in submissions for combating modern slavery. In some instances, these suggestions were made in the context of arguing that a transparency reporting mechanism has limited effectiveness and heightened priority should be given to other measures that would be more effective. They include:

a. Import bans
b. Worker exploitation strategies
c. Victim compensation
d. Government procurement requirements

[29] Submission #110.

# PART 2 – REVISING THE MODERN SLAVERY ACT

# Chapter 4: Defining modern slavery

## General observations

The Modern Slavery Act defines 'modern slavery' as conduct that falls within one of three other legal instruments (s 4):

- an offence provision in Division 270 or 271 of the *Criminal Code*
- Article 3 of the Trafficking Protocol
- Article 3 of the Worst Forms of Child Labour Convention.

Chapter 2 of this report explained that as many as 13 different slavery practices are covered by those three instruments. The *Guidance for Reporting Entities* provides a plain language condensation that lists eight types of modern slavery. The *National Action Plan to Combat Modern Slavery 2020-25* also summarises the *Criminal Code* provisions and lists nine categories (the National Action Plan does not include the two conventions).

The use and understanding of the term 'modern slavery' was extensively considered by the Joint Standing Committee in the *Hidden in Plain Sight* report in 2017.[30] The Committee observed that 'modern slavery' was a non-legal term with no globally agreed definition, though it had increasing acceptance as an umbrella term to describe practices that were criminalised in Australia or condemned in international instruments. Accordingly, the Committee supported the use of the term in the Australian Act. Insofar as some slavery-like conduct may not fall within the existing definition (the Committee gave orphanage trafficking as an example) it thought this could be taken up in Australia's policy framework to address modern slavery.

With three qualifications, the debate about terminology and scope was not revisited in any depth in this review. Most participants in the review conveyed, either directly or implicitly, that the term 'modern slavery' is appropriately used as the title of the Australian Act and to frame the reporting obligation. A few specialist issues were raised (taken up below) as to how modern slavery is defined in the Act and the conduct that falls within the concept. However, the use of the term 'modern slavery' in the Australian Act was not generally questioned, beyond the three qualifications that will now be discussed.

## Aligning the title and object of the Modern Slavery Act

The Australian Act is commonly described as a reporting mechanism that aims for supply chain transparency. Accordingly, the main focus of the law in its practical operation is upon modern slavery practices that typically occur in the supply chains of large entities, such as forced labour, child labour and debt bondage. This focus is more prominent in the titles of modern slavery reporting laws in some other countries – such as the proposed *Fighting Against Forced Labour and Child Labour in Supply Chains Act* in Canada, the *Transparency in Supply Chains Act* in California, and the *Supply Chain Due Diligence Act* in Germany.

Consequently, a criticism of the title of the Australian Act is that it conveys the misleading impression that it deals with modern slavery and exploitative practices generally. The Act's success will be tarnished if there is a disconnect between its perceived and its actual aim.[31] An example given in one submission[32] is that the law is incorrectly perceived (publicly) as addressing practices such as trafficking for sexual exploitation, which in fact require a differently-balanced response than a transparency reporting mechanism. Generally, the title of the Act may suggest that it is a victim-centred law, when in fact it mainly deals with the responsibilities of corporate and government entities.

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[30] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (2017) at 29-48. Submission #97 to this review contains an extensive literature review on modern slavery terminology and regulatory models.
[31] Submission #56.
[32] Submission #55.

This line of criticism of the Australian Act goes beyond its title and is relevant to other aspects such as the role of an Anti-Slavery Commissioner and the scope of due diligence reporting under the Act. Those are likely developments in coming years. It would therefore seem better that any fundamental rethinking of the title and scope of the Modern Slavery Act is taken up in the next review of the Act.

## Adopting a broader human rights focus

A related aspect of the scope/terminology question is that some proposals for stronger due diligence reporting would, at a practical level, require an entity to go beyond the current definition and understanding of modern slavery. That is a likely outcome of placing modern slavery reporting within a broader framework that requires businesses to undertake due diligence work to combat human rights abuse.[33]

Similar proposals have been made for requiring a more targeted focus in due diligence analysis and reporting. An example is a proposal in one submission for 'gender-sensitive due diligence'.[34] The submission urged a stronger focus in data collection and reporting on how supply chain exploitation affects groups differently according to factors such as sex and sexual identification, indigenous and ethnic status, and disadvantaged and vulnerable group experience and needs.

Some submissions to this review observed that development of a comprehensive human rights due diligence law may require a broader inquiry than this modern slavery review has undertaken.[35]

## Extending modern slavery to worker exploitation

A third qualification on the scope/terminology question is that some submissions supported a New Zealand government proposal to target the reporting obligation on 'modern slavery and worker exploitation'[36] (with one submission proposing that the Act be retitled the 'Modern Slavery and Labour Exploitation Act'[37]).

The New Zealand Government explanation for linking those terms as a composite phrase, given in a discussion paper published in 2022,[38] is that both terms describe exploitative practices that occur in supply chains and that negatively impact human rights, business competition and national reputation. Though the composite phrase is used throughout the New Zealand discussion paper, it acknowledges that the terms cover different conduct to which separate legal obligations should apply. The paper states:

> **Modern slavery** broadly reflects exploitative situations that a person cannot leave due to threats, violence, coercion, deception, and/or abuse of power. We are proposing that modern slavery be defined as including the legal concepts of forced labour, debt bondage, forced marriage, slavery and slavery like practices, and human trafficking.
>
> **Exploitation** can be seen generally as behaviour that causes, or increases the risk of, material harm to the economic, social, physical or emotional well-being of a person. We are proposing that worker exploitation be defined as including non-minor breaches of New Zealand employment standards [as defined in the *Employment Relations Act 2000*, and includes requirements such as providing written employment agreements, keeping wage and time records, providing no less than the minimum wage, and providing annual holiday entitlements]. This excludes minor and insignificant breaches that are not constant and easily remedied.[39]

The discussion paper proposes that the obligations imposed on entities by the Act will apply, in the international zone, to *modern slavery* only, and in the domestic zone, to *modern slavery and worker exploitation*.

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[33] Submissions #19, #24, #53.
[34] Submission #18
[35] Submission #19.
[36] See footnote 66 below
[37] Submission #116.
[38] Ministry of Business, Innovation & Employment, *A Legislated Response to Modern Slavery and Worker Exploitation*, Discussion Document (2022).
[39] Ibid at 13.

The Australian Modern Slavery Act indirectly captures domestic employment practices in the reporting requirement. Two of the mandatory reporting criteria require entities to report on the risks of modern slavery practices in their operations and supply chains, and the actions taken to assess and address those risks (s 16(1)(c), (d)).

The *Guidance for Reporting Entities* gives examples of indicators that may point to risks of labour exploitation. Among them are the use of unskilled and seasonal labour, short-term contracts, wage deductions and underpayment, isolated workplaces and accommodation arrangements, and unrealistic cost targets and delivery timeframes. Actions that can be taken to address those risks are staff training and awareness, worker consultation, grievance mechanisms, and engaging an entity's Human Resources section in its modern slavery reporting.[40]

The National Action Plan also recognises that workplace rights protection is an essential component of a comprehensive modern slavery program. Two action items in the National Action Plan require the Office of the Fair Work Ombudsman to develop programs for protecting and empowering vulnerable workers.[41]

Workplace protection against exploitation is principally covered in Australia by laws such as the *Fair Work Act 2009* (Cth). The Act sets minimum terms and conditions of employment for national system employees through the National Employment Standards, and specifies the rights and responsibilities of employees and employers. Parts of the Act deal specially with particular industries, such as the 'outworker provisions' that are designed to eliminate exploitation of outworkers in the textile, clothing and footwear industry.[42] Compliance and enforcement activity is undertaken by the Fair Work Ombudsman (including Fair Work Inspectors) and the Fair Work Commission.

Adoption of the New Zealand proposal in Australia at this time would require a rethink of the existing framework for protecting workers against exploitation. At a minimum it would require the modern slavery reporting obligation to be broadened and potentially duplicate or redefine the existing Fair Work Act processes. If that is thought desirable it is an option that could better be explored in a separate or subsequent review of the Modern Slavery Act. It is not an option that has been squarely examined during the consultations in this review.

Moving away from that issue, three other themes were raised in this review about the definition of modern slavery in the Act:

- the definition is cross-referenced to other legal instruments
- forced marriage is included in the definition
- some other practices are not included in the definition.

## Defining modern slavery by cross-referencing to other instruments

There are advantages in relying on the *Criminal Code* and the international conventions to define modern slavery. The slavery practices proscribed in those instruments are acknowledged forms of modern slavery. The instruments give a relatively precise definition of the elements that constitute each form of slavery. This makes it easier – objectively – to examine whether the modern slavery statements of entities fulfil the reporting requirements. It means, too, that there is consistency across the various government programs to address modern slavery practices.

The same approach to defining the modern slavery reporting obligation is adopted in NSW and the United Kingdom. The NSW *Modern Slavery Act 2018* defines 'modern slavery offence' by reference to offence provisions in the NSW *Crimes Act 1900* and the Commonwealth *Criminal Code* (s 5). The UK *Modern Slavery Act 2015* uses the term 'slavery and human trafficking' and defines it by reference to offence provisions in that and some other Acts. (By contrast, the Canadian Fighting Against Forced Labour and Child

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[40] *Guidance for Reporting Entities* at 40, 43, 52-53, 80-82.
[41] *National Action Plan to Combat Modern Slavery 2020-25*, Items 5, 13.
[42] *Fair Work Act 2009* (Cth) Part 6-4A 'Special provisions about TCF outworkers'; see submission #124.

Labour in Supply Chains Bill 2022 contains its own definitions of 'forced labour' and 'child labour' for the purposes of annual reporting, though the definitions incorporate text from two relevant international instruments.)

Many submissions to this review endorsed (without elaboration) the definition of modern slavery in the Act.[43] Several submissions added that up-to-date guidelines are necessary to amplify the statutory concepts, and that regular review of the currency of the Act and the guidelines is therefore important. An example given in two submissions[44] is that the concept of 'the worst forms of child labour' will require consideration of fluctuating factors such as the age of a child, the type of labour they are undertaking, the conditions of employment, and how child labour is used in business operations.

Some submissions presented arguments against relying on the *Criminal Code* provisions.[45] One argument is that this adds an unfortunate layer of legal complexity. For example, the *Guidance for Reporting Entities* describes servitude in the following terms:

> **Servitude** describes situations where the victim's personal freedom is significantly restricted and they are not free to stop working or leave their place of work.

The comparable definition of servitude in the *Criminal Code* (s 270.4) is more elaborate:

> (1) … ***servitude*** is the condition of a person (the ***victim***) who provides labour or services, if, because of the use of coercion, threat or deception:
>
> (a) a reasonable person in the position of the victim would not consider himself or herself to be free:
>
> (i) to cease providing the labour or services; or
>
> (ii) to leave the place or area where the victim provides the labour or services; and
>
> (b) the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.
>
> (2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person.
>
> (3) The victim may be in a condition of servitude whether or not:
>
> (a) escape from the condition is practically possible for the victim; or
>
> (b) the victim has attempted to escape from the condition.

The same comparison can be made between other slavery offences in the *Criminal Code* (which extend over 20 pages) and the two-page summary of those offences in the Guide.

The language and precision of the *Criminal Code* provisions are designed as a standard for criminal law enforcement and prosecution. But, it is argued, they are not as appropriate or necessary as a reference point for reporting on modern slavery risks and counter-measures. Furthermore, they set a standard that is fixed at a particular point in time and cannot easily be changed. This has the potential to hinder revision of the concept of modern slavery as circumstances change.[46]

A related argument is that using the criminal law as the reference point for modern slavery reporting may induce entities to approach the task from a legal standpoint and to focus on legal compliance in crafting their statements. The Act does not provide an illustrative definition of modern slavery but directs readers to a criminal law statute and international instruments.

An alternative approach supported in some submissions is for the Modern Slavery Act to adopt a definition that is more functional from a modern slavery policy perspective. The definition could, for example, link more

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[43] Eg, submissions #28, #46, #53, #67, #113, #132.
[44] Submissions #97, #126.
[45] Eg, submissions #45, #116, #78.
[46] Submission #68.

directly to risk issues that occur in a business or commercial setting, or more explicitly highlight the human rights dimension of modern slavery, or better align with how the concept of modern slavery is understood in the international sphere.[47]

Another consideration is that the current approach to defining modern slavery may hinder international harmonisation of reporting requirements (an objective supported by some participants in this review, as discussed in Chapter 3). Modern slavery offence provisions are drafted differently in each jurisdiction, both in language and in the scope of the offences. An example is that the offence provisions relied on in the UK in framing the modern slavery reporting obligation do not cover forced marriage and debt bondage.

As that summary indicates, there are compelling arguments for both retaining and replacing the current reliance on the *Criminal Code* to define modern slavery. The pragmatic middle-ground, favoured by this review, is to retain the current approach to defining modern slavery.

An important consideration is that reporting entities in Australia have been using the present definition in s 4 of the Act for the last four years and, for the most part, seem content to continue doing so. A major factor is that there is routine reliance on the plain language definition of eight modern slavery categories listed in the Guide.

Other changes are afoot that make it undesirable to restructure the definition of modern slavery at this stage. It is likely that more countries will adopt reporting obligations that rely on a local definition of modern slavery (or related terms such as forced labour and human trafficking). There is also a separate review underway, led by the Attorney-General's Department, of Divisions 270 and 271 of the *Criminal Code*. It is advantageous to await the outcome of those developments to gauge their relevance to the current definition of modern slavery in the Act. There is also merit, in the short term, in directing attention to other recommendations in this report that would require action by reporting entities, such as the proposals to strengthen due diligence action and reporting.

Recognising that the concept of modern slavery is fluid, recommendation 1 proposes that the Australian Government hold discussions with other jurisdictions to explore options for agreeing on how to define modern slavery in mandatory reporting laws, and for alignment generally of reporting requirements. Those discussions could also canvass the reliance that Australia and other countries place on defining modern slavery by reference to Article 3 of the Trafficking Protocol and Article 3 of the Worst Forms of Child Labour Convention. The legal drafting style of those conventions differs from that of the *Criminal Code*. For example, Article 3 of the Trafficking Protocol has the following definition:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Discussions held with other countries could also canvass options for aligning modern slavery reporting standards and practices, including reciprocal recognition of modern slavery statements among jurisdictions. This is further discussed in Chapter 12.
Another matter to note at this stage is that the definition of modern slavery in the Act will be seen in a different light if stronger regulatory oversight (including penalties) is introduced, as recommended in Chapter 10 of this report. A penalty for failure to submit a compliant modern slavery statement will direct attention back to what is required – a statement that addresses all elements of the definitions of modern slavery in the *Criminal Code* and the international conventions, or a statement that addresses some other standard such as a government policy directive? A review of the definition of modern slavery will be all the more important if the term underpins a new and stronger regulatory framework.

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[47] Submissions #44, #63, #72, #95, #112, #122.

Three consequential matters warrant comment.

Firstly, Recommendation 9 canvasses the option of specifying the mandatory reporting criteria in rules made under the Act, rather than in the Act itself. If adopted, this would open the option of a rule adding a modern slavery practice (or risk) for the purpose of annual reporting under the Act.

Secondly, the definition of modern slavery in the Act is not self-contained but requires reference to the *Criminal Code* and to two international instruments. Accessing the *Criminal Code* provisions is straightforward on the Federal Register of Legislation (legislation.gov.au). it may not be as easy for some readers to access the definitions of 'trafficking in persons' and 'the worst forms of child labour' in the two international instruments.[48] A simple change would be to reproduce those definitions in an Appendix to the Act, as proposed in one submission.[49] This proposal is adopted in Recommendation 2.

Thirdly, retaining the current definition of modern slavery is likely to mean that reporting entities continue to rely in practice on the plain language description of the forms of modern slavery in the Guide. It is therefore important that the description accurately represents the provisions in the *Criminal Code* and the two international conventions. This is particularly important if non-compliance with the requirements can, in future, attract a regulatory censure or penalty.

Some slavery practices caught by the *Criminal Code* are not fully represented in the Guide. Four examples are Child marriage, Child trafficking, Organ trafficking and Harbouring a Victim. Those practices may not have been picked up in the Guide as they are unlikely to occur in the supply chains or operations of the large entities that report under the Act. If so, this should at least be noted in the Guide so that entities relying upon it are aware of its limitations or assumptions.

The importance of aligning the Guide with the Act was brought out by submissions to this review that proposed adding organ trafficking to the definition of modern slavery in the Act. In fact it is already covered in Division 271, Subdivision BA, of the *Criminal Code*.[50] Its non-inclusion in the Guide and the National Action Plan may be the source of misapprehension.

Alignment of the Act and the Guide is proposed in Recommendation 3.

## Defining modern slavery: the inclusion of forced marriage

Forced marriage falls within the definition of modern slavery for annual reporting purposes as it is an offence provision in Division 270 of the *Criminal Code* (s 270.7A). However, the *Guidance for Reporting Entities* qualifies the inclusion of forced marriage by advising:

> You only need to report on forced marriage situations where your entity's activities or the activities of entities in your supply chain may cause or contribute to forced marriage.[51]

The Guide gives two examples of where a reporting obligation may arise – a marriage celebrant in Australia reasonably suspects that a child bride is a victim of forced marriage; and village women near an isolated foreign mining site are pressured to marry mine workers to perform sexual and household services.

Whether to include forced marriage within the Modern Slavery reporting scheme was questioned in submissions to this review, as well as in the *Hidden in Plain Sight* report.[52] There are two main arguments against its inclusion.

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[48] The advice given in a Note in s 4 of the Modern Slavery Act is as follows: 'In 2018, the text of international agreements in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (http://www.austlii.edu.au)'.
[49] Submission #127.
[50] Submissions #54, #128.
[51] *Guidance for Reporting Entities* at 77.
[52] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (2017) Ch 3. See also submissions #28. #30, #74, #100, #122, #132.

One is that it requires reporting entities to focus on an issue that is unlikely to occur as part of their business operations or supply chain activity. It is better, it is argued, to focus the reporting scheme on real and apparent risks that occur in a commercial setting. Forced marriage is not included, for example, in the UK scheme or the proposed Canadian scheme. Reporting schemes typically focus on high risk supply chain practices such as forced labour, child labour and human trafficking.

Another objection is that it may be difficult or intrusive for an entity to assess whether forced marriage is occurring within its own business operations or those of its suppliers. Monitoring for this practice carries an associated risk of racial or religious profiling, and of the entity assuming responsibility for the private lives of its staff.

The countervailing argument – for including forced marriage – is that it is a recognised and vigorous modern slavery practice.[53] The latest Walk Free report published in December 2022 estimated that forced marriage constituted 44% of the globally estimated 49.6 million instances of modern slavery, and that 54% of global victims were women and girls.[54] In Australia in 2021-22 the AFP received 84 reports of allegations of forced marriage offences (the largest single category of allegations, and an increase of 30% from the previous year).[55]

It would thereby send the wrong message, it is argued, if an Act titled the Modern Slavery Act expressly excluded forced marriage. An express exclusion would be necessary in Australia because the current wholesale adoption of all offences in Divisions 270 and 271 of the *Criminal Code* includes forced marriage.

As noted above, the Guide gives a couple of examples of where reporting entities may need to be alert to the possibility of forced marriage. Other instances were referred to informally during consultations for this review, such as activity witnessed in mining camps, cleaning contracting, and child support services, and in air transport being used to facilitate human trafficking and forced marriage.[56] One submission from a charitable organisation noted that it had reported on situations of forced marriage occurring in child, youth and family services, and that this may be a more common reporting topic if the reporting threshold is lowered to capture more charitable organisations.[57]

On balance, this review concludes that the better option is to retain forced marriage as a form of modern slavery that falls within the Modern Slavery Act reporting scheme, but to explain (as the Guide currently does) that the risk profile is different to that of some other modern slavery practices. An Anti-Slavery Commissioner could play an active and influential role, on topics such as this, in aligning reporting expectations with the risk profile and response plan of entities.

## Defining modern slavery: adding other practices to the definition

This review received several submissions proposing that the definition of modern slavery in the Act be extended either to broaden an existing category or to include a new category.

The proposals will be noted in this report, but without a direct recommendation on whether to adopt any individual proposal. There is a parallel review underway within the Attorney-General's Department into Divisions 270 and 271 of the *Criminal Code*. A Discussion Paper has been published that canvasses some of the issues raised with this review.[58] Any amendment to Divisions 270 and 271 following that review will, under the existing Modern Slavery Act, correspondingly change the reporting obligation of entities to which the Act applies.

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[53] Submission #27.
[54] Walk Free, *Global Estimates of Modern Slavery – Forced Labour and Forced Marriage* (2022).
[55] Attorney-General's Department, *Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* (Discussion Paper) at 12-13. The Discussion Paper discusses the suitability of the present definition of the forced marriage offence at 37-38.
[56] Submissions #103, #118.
[57] Submission #118.
[58] Attorney-General's Department, *Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* (2022).

The Modern Slavery Act reporting requirement must also be seen in the wider context of Australian Government laws and programs to combat slavery and allied practices. Measures other than an extended transparency reporting framework may provide a more targeted and effective response to conduct of concern. The agencies implementing the National Action Plan may care to take note of the following proposals raised with this review for expanding the scope of modern slavery as comprehended by Australian Government laws and programs.

- *Disability segregated employment*:[59] A submission pointed out that Australia, as a party to the UN Convention on the Rights of Persons with Disabilities, has an obligation under Art 27(2) to 'ensure that persons with disabilities are not held in slavery or servitude, and are protected, on an equal basis with others, from forced or compulsory labour'. The Convention is not included in the list of conventions to which the Modern Slavery Act gives effect (s 7(2)). The submission states that disability segregated employment can be a form of modern slavery based on factors such as sub-minimum wage levels, restrictive workplace practices and lack of consent.

  The report expected later in 2023 of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability may discuss this issue.

- *Child Sexual Exploitation*:[60] A submission proposed that child sexual exploitation (CSE) be recognised separately within the Act as a type of modern slavery that falls within a wider continuum of exploitation, violence and abuse. While noting that aspects of CSE are presently covered by the definition of modern slavery in the Act, the submission contends that legislative differentiation of CSE is too narrow and not as prominent as in some other countries. The submission also makes other proposals regarding CSE, including – to amend the discussion of CSE in the Guide; refer more specifically to CSE at multiple stages in the National Strategic Plan; adopt a nationally consistent definition of CSE; and enact a separate duty to report reasonable suspicion of CSE to law enforcement authorities.

  The Discussion Paper for the parallel review of Divisions 270 and 271 of the *Criminal Code* queries the adequacy of current laws on matters such as online child sexual exploitation and trafficking in children.[61]

- *Domestic exploitation:*[62] A submission commented that the Act fails to protect those in the informal sector and outside identified supply chains, such as victims of domestic slavery. Young women entering the workforce as domestic helpers can also face sexual exploitation and child and forced marriage. The reach of the Act could be expanded to the informal sector by encouraging voluntary reporting and drawing attention to risk factors in that sector.

- *Organ trafficking:*[63] Two submissions pointed out that the definition of organ trafficking in the *Criminal Code* is narrower than the practices covered in the Council of European Convention Against Trafficking in Human Organs (which Australia has not ratified). The Australian law creates the offence of human trafficking for the purpose of organ removal contrary to law, whereas the Convention covers additional practices such as offering a financial gain either to a person to agree to organ removal, or to a health professional to facilitate organ removal.

- *Indentured labour:*[64] A submission proposed that the practice of 'indentured labour' be included in the definition of modern slavery. The submission argued that people who came to Australia under special visa arrangements to work with approved employers in areas such as horticulture could face deprivations that were akin to debt bondage – such as being tied to a particular employer who may make substantial deductions for travel costs and accommodation and expenses, and substandard living

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[59] Submission #4; see also L Steele, 'Law and Disability "Supported" Employment in Australia: the case for ending segregation, discrimination, exploitation and violence against people with disability at work' (2023) 49 *Monash Law Review.*
[60] Submission #13; see also submission #108.
[61] Eg, Attorney-General's Department, *Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* at 22, 46.
[62] Submission #108.
[63] Submissions #21, #54; see also #110.
[64] Submission #120.

and working conditions. The same restrictions do not apply to visiting workers under the Working Holiday Maker program.

- *Worker/Labour exploitation*: Several submissions commented that workplace slavery practices are covered too narrowly in the Act. The main category at present is forced labour, which (to quote the Guide) 'describes situations where the victim is either not free to stop working or not free to leave their place of work'.[65] Allied offences are servitude, deceptive recruiting for labour or services and trafficking in persons.

  Some submissions pointed to the proposal in New Zealand to apply the modern slavery reporting regime more broadly, in the domestic zone, to 'modern slavery and worker exploitation'.[66] The intention in the New Zealand proposal is to cover 'non-minor breaches of New Zealand employment standards'. A similar general point made in a couple of submissions is that the concept of worker exploitation should be reappraised in Australia and construed more broadly (including by amendment of other Commonwealth laws).[67]

  The New Zealand proposal was discussed above. A point made there is that the Modern Slavery Act presently requires that statements address employment practices that carry a risk of modern slavery. If it is thought the Act should go further in overtly requiring employment practices to be addressed as a type of modern slavery, that should follow a separate review because of the implications for how the Modern Slavery Act and the Fair Work Act interact with each other. As an interim measure, a recommendation is made below that (as one submission proposed[68]) the Guide address this issue more fully by encouraging entities in their modern slavery statement to discuss compliance with the National Employment Standards and relevant features of the Fair Work Act.

- *International Labour Conventions:* The application of the Modern Slavery Act to worker exploitation was also raised in submissions that that made proposals for linking modern slavery reporting to principles in International Labour Conventions. A decision on these proposals should similarly be deferred, pending the parallel review of the forced labour offences in Division 270 of the *Criminal Code*, and any broader analysis of the interaction of the Modern Slavery Act and the Fair Work Act. Examples of ILO principles referred to in submissions include:

  - *2014 Protocol to the Forced Labour Convention 1930* (No 29): The Protocol obligates state parties to provide protection and remedies, including compensation, to victims of forced labour, and to develop a national plan of action targeted at forced and compulsory labour.[69]
  - *ILO Declaration on Fundamental Principles and Rights at Work* (2022): The Declaration specifies fundamental principles that should be upheld by government and employers, including freedom of association, collective bargaining, elimination of forced labour, child labour and employment discrimination, and provision of a safe and healthy working environment.[70]
  - *Maritime Labour Convention 2006*: A submission[71] proposed that the definition of modern slavery be clarified in its application to seafarers, to expressly cover the following conduct dealt with in the Convention: non-payment or underpayment of a seafarer's wage; non-adjustment of a seafarer's minimum wage level to take account of cost of living changes; and conduct by a seafarer's employer that would constitute abandonment of the seafarer (such as failure to cover the cost of repatriation).

    The submission (on the Maritime Labour Convention) also made proposals (in line with the Convention) for broadening the definition of 'coercion' in the *Criminal Code* to capture forced labour on ships, and in particular the detention of a seafarer beyond the duration of their contract of employment. A draft legislative proposal was included in the submission.

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[65] *Guidance for Reporting Entities* at 77.
[66] Submissions #58, #75, #116, #122, #124. See also submission #18 proposing a broader definition of exploitation.
[67] Eg, #18, #133.
[68] Submission #29.
[69] Submissions #83, #128.
[70] Submissions #75, #116.
[71] Submission #58.

**Recommendation 1**

The Australian Government – either through or in consultation with the Anti-Slavery Commissioner – initiate discussion with other jurisdictions in Australia and internationally on options for defining 'modern slavery' for the purpose of mandatory reporting laws such as the *Modern Slavery Act 2018*. A report on those discussions should be provided to any later review of the Act.

**Recommendation 2**

The Modern Slavery Act be amended to include, in an Appendix to the Act, the terms of Article 3 of the Trafficking Protocol (defining 'trafficking in persons') and Article 3 of the Worst Forms of Child Labour Convention (defining 'the worst forms of child labour').

**Recommendation 3**

The Attorney-General's Department review the *Guidance for Reporting Entities* to ensure that the description of modern slavery in Appendix 1 of the Guide accurately represents the terms of the *Criminal Code*.

# Chapter 5: The Reporting Threshold

## The requirements of the Modern Slavery Act

The Modern Slavery Act imposes a duty to report on Australian entities that have an annual consolidated revenue of AU$100 million or more in the reporting year. They are described in the Act as 'reporting entities' (s 5).

There was commentary on two topics in this review –

- Whether the reporting threshold of $100M should be retained, lowered or replaced by a new criterion for imposing the reporting obligation
- The clarity of the test for ascertaining 'consolidated revenue' and the existence of a reporting obligation.

A third issue flagged in the Issues Paper did not attract any comment and will not be taken further in this report. It is the test in the Act for deciding if an entity is an 'Australian entity', or an entity that 'carries on business in Australia' (s 5(1)(a)).[72] The Modern Slavery Act principally draws on the *Income Tax Assessment Act 1936* (Cth) and the *Corporations Act 2001* (Cth) to define those terms.

The reporting threshold of $100M will first be considered, followed by the consolidated revenue test.

## The reporting threshold of $100M[73]

The choice of $100M as the reporting threshold was explained in the Minister's Second Reading Speech for the Act as one that 'focuses on entities that have the capacity to meaningfully comply and the market influence to clean up and address their global supply chains'.[74] In effect, $100M was a pragmatic choice to balance the potential public benefit from reporting under the Act against the workload impact imposed on entities to prepare reports. The expectation was that approximately 3,000 entities would be required to report annually under the Australian law (the reality was, after the first three years there were an estimated 6,293 entities covered by statements submitted to the Register and by the end of this review it had further increased to over 7,000 entities).

A consideration in choosing a reporting threshold of $100M threshold was that Australian Taxation Office data could be used to ascertain if an entity was above that threshold. The same dataset would not be available for all entities that fell below $100M annual consolidated revenue.

There was widespread commentary on this topic in both the consultation sessions and in submissions. There was a division of opinion, largely along three lines:

- retain the $100M threshold, at least for a couple more years (if not indefinitely)
- lower the threshold, preferably to $50M (or maybe lower)
- modify the threshold, for example, by imposing different reporting obligations on entities above and below the $100M mark, or only impose a reporting obligation on entities below the $100M mark that conduct business in fields that carry a high modern slavery risk.

Support for those options crossed sectional and interest group lines. For instance, there was support across business groups both for retaining and for lowering the reporting threshold, just as there was across civil society groups.

In some instances, too, the same argument was made for competing outcomes. An example is the indirect impact of the Act on suppliers that are not reporting entities but are required to provide information about modern slavery risk management to reporting entities. This was argued by some to be a reason for lowering

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[72] Issues Paper, *Review of Australia's Modern Slavery Act 2018* (2022) at 34.
[73] Two submissions that presented helpful research on this issue were submissions #97 and #103.
[74] The Hon Alex Hawke, MP, Assistant Minister for Home Affairs, Second Reading Speech, Modern Slavery Bill 2018, 28 June 2018.

the threshold to directly capture those smaller businesses, and by others as a reason to retain the threshold as the relevant information is already being captured.

The broad breakdown of the responses to this issue in written submissions and the online questionnaire was as follows:[75]

- Retain the current reporting threshold: 24% of respondents
- Lower the reporting threshold: 29%
- Neutral on this issue: 14%
- No comment or response: 33%.

Many submissions referred to or relied on preliminary modelling that was presented in the Issues Paper on the possible effect of lowering the reporting threshold.[76] (No disagreement was communicated about the reliability of that modelling, or about alternative modelling.)

Essentially, the modelling showed:

- An additional 2,393 businesses would become reporting entities if the threshold was lowered to $50M (or 1,656 if it was lowered to $70M). It is possible (but not known) that some businesses that would be newly captured are already reporting voluntarily under the Act or are part of the supply chain of a current reporting entity.
- The additional number of reporting entities would not necessarily result in a commensurate increase in the coverage of Australian business activity, which is concentrated in a smaller number of large businesses. The global supply chain activity of Australian businesses is proportionately more likely to be concentrated in a smaller number of large firms than spread evenly across the Australian business sector.
- A lower reporting threshold might not capture a different style of business or supply chain activity than is currently captured by the Act. The profile of Australian business activity is largely consistent at turnover bands of $50-60M, $70-80M and >$100M.

This review also sought information on the cost borne by individual entities in preparing a modern slavery statement.

It was estimated in a Regulation Impact Statement for the Act in 2018 that the average annual cost of preparing and submitting a statement would be AU$21,950 per reporting entity. There was anecdotal commentary in the consultations for this review that the figure could be much higher, and that the workload impact of preparing a statement could be higher than assumed.[77]

The online survey of reporting entities included a question on this issue, asking for the estimated direct cost of preparing the most recent modern slavery statement.[78] The results from the 496 responses are:

- $25,000 or less: 71.17%
- $25,000-50,000: 17.14%
- $50,000-75,000: 5.44%
- $75,000-100,000: 1.41%
- $100,000-150,000: 2.02%
- $150,000+: 2.82%

[75] Appendix C to this report, Figure 1.
[76] Issues Paper, *Review of Australia's Modern Slavery Act 2018* (2022) at 27-29.
[77] Eg, submissions #3 and #46, referring to set-up costs and to access auditing services and appoint staff.
[78] Appendix D to this report, Figure 10.

### Arguments for retaining the present reporting threshold[79]

There were three main themes in the arguments presented in the submissions and consultations for retaining the reporting threshold at $100M:

- A lower threshold would place an unnecessary and disproportionate administrative and reporting burden on small and medium-sized businesses. Many would not have the administrative resources, or internal audit, risk assessment and sustainability expertise, that can be required to undertake annual modern slavery reporting in a meaningful way. The reporting obligation is more appropriately targeted at larger entities that have that capability and staff resourcing, as well as the leverage to identify and address modern slavery supply chain risks.

  Non-reporting entities are nevertheless made aware of and required to observe human rights and modern slavery principles and expectations, including through supply chain contracts and surveying undertaken by larger entities. The current reporting scheme has a cascading or flow-on effect, drawing smaller organisations into monitoring and reporting activities. Only minimal additional information may be obtained by imposing a separate reporting obligation upon them.

  While consolidated turnover of $50M may sound high, it does not represent business profit, which may be quite marginal. A lower reporting threshold is also likely to capture a larger number of non-profit organisations that undertake charitable, educational or community activities that would be impacted by the cost of reporting.

- The annual reporting process will have greater impact on combating modern slavery if there is active government regulatory oversight of the quality and integrity of annual statements. The administrative resources currently devoted to oversight are minimal and stretched. To-date, approximately 3,000 statements on average have been submitted to the Register during each reporting period. Without a substantial increase in administrative resources for regulatory oversight (which may not occur) there is likely to be overall inferior compliance in reporting. This undermines the transparency premise of the Act. Failure to report will also be harder to detect if the potential pool of reporting entities is increased.

  A larger number of annual statements will similarly make it more challenging for university and civil society organisations to undertake the valuable analytical and monitoring activity of statements that they presently undertake.

- It is premature to lower the reporting threshold. While modern slavery reporting is fast developing, it is still at an early stage. There is vibrant debate globally as to how the reporting process should be refined or altered. Equally, more work is needed to study the modern slavery risk profile of small to medium-sized organisations.

  It would be better to wait 2-3 years, perhaps after another review of the Act and a proper regulatory impact appraisal, before lowering the threshold.

### Arguments for lowering the present reporting threshold[80]

Submissions arguing for a lower reporting threshold commonly selected $50M, though some preferred a lower figure, such as $25M, $10M or zero. There was mention also – but no considered endorsement – of the alternative of selecting the number of employees of a business to set the reporting threshold.

There were three main themes in submissions and the consultations for a lower financial threshold:

- The Act would convey a clearer message that modern slavery is unacceptable at any level of business or society if the reporting obligation applies more extensively within Australia. Small and medium-sized entities are a significant part – the mid-tier – of the Australian economy. They are an important investment target, and therefore a legitimate focus for modern slavery evaluation. Small

[79] Submissions that give a representative sample of the arguments for retaining the present reporting threshold are #28, #39, #78, #81, #85, #111, #126, #132.
[80] Submissions that give a representative sample of the arguments for lowering the reporting threshold are #75, #86, #89, #96, #112, #114, #127.

enterprises are also prominent in many high-risk areas that may not adequately be captured directly by the current high reporting threshold – such as farm work, sex work, internet services and organ trafficking. Exploitation can easily be hidden in those areas.

A lower reporting threshold would build awareness of modern slavery challenges, strengthen supply chain transparency and drive meaningful change in modern business practice in the domestic and global economy.

- A lower threshold would align more closely with the thresholds either applying or proposed in other jurisdictions (those frequently mentioned were the United Kingdom (£36M), New Zealand (NZ$50M), Canada (CA$40M) and a former NSW requirement ($50M)).

  There was mention, too, of Article 14 of the UNGPs that provides: 'The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure'.[81] (Article 14 goes on to note that those factors may be relevant to how an obligation is applied to a business.) Organisation for Economic Co-operation and Development (OECD) guidelines similarly provide that enterprises should 'Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts'.[82]

  Among the perceived benefits of national and international consistency would be to streamline the reporting obligations of entities, make it easier for investors and procurement officials to ascertain information necessary for their decisions, and smooth the way for Australian states and territories to adopt a national reporting framework.

- There is conjecture at present that annual reports are not being submitted by some entities that exceed the $100M reporting threshold. A related issue is that some large corporate groupings may fall below the reporting threshold because sub-entities are not 'controlled' for the purposes of ascertaining the consolidated revenue of the corporate group.[83] Clarifying which entities have a reporting obligation can be difficult because of complex business structures and financial reporting arrangements. A lower reporting threshold would make it harder for larger entities to circumvent or disregard the Act.

### Recasting the reporting obligation[84]

Many submissions made suggestions for recasting the reporting obligation in the Act to capture essential information from smaller entities without imposing a heavy reporting burden on them. The suggestions included:

- Introduce a reporting framework that would be tiered or scaled according to business size. Reference was frequently made to a proposal floated in 2022 by the New Zealand Government for three reporting categories:
  - all organisations would be required to report and take action when aware of modern slavery or worker exploitation in their international or domestic operations
  - medium-sized organisations with revenue of more than NZ$20M would report on the steps they are taking to prevent modern slavery, and
  - organisations above a $50M threshold would also undertake due diligence to prevent modern slavery.[85]

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[81] *Guiding Principles on Business and Human Rights,* United Nations, Human Rights, Office of the High Commissioner (2011).
[82] OECD, *OECD Guidelines for Multinational Enterprises* (2011) Section IV(5).
[83] See the definitions of 'consolidated revenue' and 'control' in s 4 of the Modern Slavery Act.
[84] Submissions that give a representative sample of the arguments for recasting the reporting obligation are #24, #29, #30, #33, #38, #43, #45, #46, #69, #71, #73, #104, #109, #110, #122.
[85] Ministry of Business, Innovation & Employment, *A Legislated Response to Modern Slavery and Worker Exploitation*, Discussion Document (2022). See also submission #69.

- Impose a special obligation on entities (either generally or above a $50M threshold) to report annually if they operate in a high-risk sector, region, product or supply chain. The requirements for high risk reporting could be spelt out periodically in directives issued by the Minister or an Anti-Slavery Commissioner.
- Impose a scaled-back reporting obligation on entities in the $50-100M zone. For example, they could be required to report only on first-tier suppliers and their own operations; or they could have the option of reporting through an online portal or prescribed template that frames the reporting obligation more specifically than is presently done in both the Modern Slavery Act and the Guide.
- Transition smaller entities into the full modern slavery reporting scheme. This could be done by suspending for a period of two years certain provisions of the Act, for example: any penalty offences for failing to report or for misleading reporting; the Minister's existing power in s 16(4) of the Act to publish the identity of an entity that has failed to comply with a request made under s 16A(4); and any new obligation imposed by the Act to undertake due diligence as well as to report on it. (Postponement of any new due diligence and penalty provisions proposed in Recommendations 12 and 21.)
- Require smaller entities to submit an annual modern slavery attestation rather than a comprehensive modern slavery statement.[86] The attestation could, for example, confirm that staff of the organisation had been advised of their workplace rights and grievance procedures. An example of a similar procedure referred to in one submission is the requirement in the *Workplace Gender Equality Act 2012* (Cth) s 13 that employers to which the Act applies must prepare regular public reports containing information linking the employer to gender equality indicators that are prescribed under the Act.[87] (The proposal for a form of annual attestation is a worthy proposal but beyond the terms of reference of this review and more appropriately falls within the portfolio responsibility of the Department of Employment and Workplace Relations.)

Many suggestions were also made for administrative reforms that would apply a non-enforceable reporting expectation to smaller entities, or would prepare the ground for extending the reporting obligation to them at a later stage. Two examples are:

- Develop a government-endorsed reporting metric that could be used by smaller entities (suppliers) to record, in a standardised form, information that may be relevant to modern slavery reporting.[88] The reports could be placed on a public register and used by reporting entities in their own modern slavery statements. This mechanism could have multiple benefits – such as reducing the pressure on smaller entities to complete multiple surveys, providing reliable supply chain information for reporting entities, aiding consistency in modern slavery reporting, and promoting greater transparency in modern slavery risk management.
- Supplement the current reporting framework with a government-led educational campaign to encourage voluntary reporting by smaller entities. Allied to this, the *Guidance for Reporting Entities* could be amended or supplemented (in consultation with the Anti-Slavery Commissioner) to provide tailored guidance to small and medium-sized entities on the application of the UNGPs to those entities, and the comparable reporting requirements of the Modern Slavery Act. The guidance could be reinforced by government and business giving weight to voluntary reporting in their procurement decisions. (See also recommendation 5)

An underlying theme in many of those legislative and administrative proposals is that steps should be taken to build on the UNGPs principle that entities of all sizes should undertake human rights (and modern slavery) due diligence. This point was aptly put in the submission to this review from the NSW Anti-Slavery Commissioner:

> The question of who should report under the Act should be answered not by reference to the size of the reporting entity or its revenues, but by reference to its connection to salient modern slavery risks – that is, those risks which are most significant in scope, severity and remediability. 'Salience' is the

[86] Submission #122.
[87] Submission #99.
[88] Submission #33.

established approach under the UNGPs (and indeed under OECD guidance) for assessing human rights risks and prioritising engagement and response.[89]

### Analysis

Those various arguments – for retaining, lowering or altering the current reporting obligation – are all persuasive. Collectively, they illustrate how the ground has shifted in recent years. There is greater recognition of the modern slavery challenge across business, government and the community. The impact of modern slavery reporting is growing. As those trends continue, all business sectors will face greater pressure to explain their awareness of and steps to deal with modern slavery risks.

The issue for government is whether to reinforce those trends by imposing the legal obligation to prepare an annual modern slavery statement on a larger group of entities. This review supports that change, for three reasons.

First, Australia took an important step in enacting the Modern Slavery Act in 2018. That initiative has enjoyed strong support, both domestically and internationally. Many other countries are enacting similar transparency or due diligence laws that are likely to apply more broadly than the current Australian law. It will be unfortunate if Australia, having been at the forefront in this field, is seen to be lagging behind.

The structure of the Australian law was premised on its novelty and the desirability of moving cautiously in imposing new regulatory obligations on business. It would be timely for Australia to signify that the initial phase has passed and a new phase begins.

Secondly, the practical likelihood is that an entity required to report for the first time under a lowered reporting threshold would not report until late 2024/early 2025 at the earliest. This allows reasonable time to prepare under a well-known law that will by then have been operating for over five years. A lower threshold has been a possibility from the outset, with the Joint Standing Committee proposing in 2017 in the *Hidden in Plain Sight* report that the threshold be set at $50M.[90]

Thirdly, this review has thrown up many options for modifying the reporting obligation so that it can be tailored to the size and activity of an entity (consistently with the spirit of the UNGPs). Examples noted above (and taken up elsewhere in this report) are to allow reporting online or through a template, or to focus reporting on topics identified in a directive from an Anti-Slavery Commissioner. Consequently, the reporting burden on smaller entities may not be as large as thought in some commentary.

How should a new reporting threshold or requirement be set? It is important that the *legal* obligation to report is not too complex or hedged with too many variables. On that basis this review proposes a single reduction of the reporting threshold to $50M (Recommendation 4). While there is merit in other options – such as staged reductions to $75M and $50M, or requiring different reporting for larger and smaller entities or for international and domestic operations – those are matters that can be better handled at an administrative or implementation level. A central role of a strengthened government business engagement unit and an Anti-Slavery Commissioner would be to work with entities to encourage meaningful compliance.

Several recommendations made in this and other chapters provide scope for adjusting or adapting the reporting obligation in its application to small and medium-sized entities.

Recommendation 5 proposes that the Department, in consultation with the Anti-Slavery Commissioner, amend the *Guidance for Reporting Entities* to provide tailored guidance to small and medium-sized entities on complying with the reporting requirements of the Modern Slavery Act.

## Definition of Australian entity

A few submissions (some from legal advisory firms) commented on difficulties encountered in deciding whether an entity falls within the definition of 'reporting entity' in the Act. Some of these difficulties may be

[89] Submission #136.
[90] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (2017) at 103.

localised, or they may warrant clarification in the *Guidance for Reporting Entities* or amendment of relevant provisions in the Modern Slavery Act. Which path is better is not taken up in this report. Instead, Recommendation 6 below proposes that the Department consider each of the following comments and whether action is required:

- It is unclear how the consolidated revenue of trusts, trustees and funds is to be calculated.[91] An example given in one submission was the need for clarity on whether the income of an investment trust is included within consolidated revenue of the investor entity, bearing in mind that the income can fluctuate considerably.[92]
- Clarification is needed as to whether, if there are entities in a group, some of which exceed the $100M threshold and some of which do not, the modern slavery statement is to cover all entities or only those exceeding the $100M. The generic reference in the Act to the Australian Accounting Standards does not answer whether key terms are covered in those standards, and where they are to be found in the Standards.[93]
- The revenue test is artificial for corporate groups that consolidate external revenue on a group basis, but include individual entities that meet the reporting threshold yet do not trade and do not have employees (for example, an entity that collects licence revenue). A more sensible approach would be to require the parent company (or highest reporting entity) to report on the governance arrangement and modern slavery compliance arrangements in place.[94] (This matter is also discussed in Chapter 8.)
- Revenue fluctuations in an entity may mean that it falls above the reporting threshold one year and below it the next. An alternative approach would be to require that consolidated revenue be calculated on a rolling average basis over three years.[95]
- One submission suggested that a less complex test for identifying entities to which the Act should apply is that in the *Tax Administration Act 1953* (Cth) s 3C.[96] Another submission (referring to s 3C) expressed a preference for the test in the Modern Slavery Act.[97]
- The Act uses inconsistent terminology to describe the reporting threshold: the phrase 'more than $100 million' is used in s 3, but 'at least $100 million for the reporting period' in s 5.[98] (An alternative would be '$100 million or more'.)

**Recommendation 4**

The Modern Slavery Act s 5(1)(a) be amended to provide that a reporting entity is an entity that has a consolidated revenue of at least $50 million for the reporting period.

**Recommendation 5**

The Attorney-General's Department, in consultation with the Anti-Slavery Commissioner, amend the *Guidance for Reporting Entities* to provide tailored guidance to small and medium-sized entities on complying with the reporting requirements of the Modern Slavery Act, either on a voluntary basis or as required by the Act under a lowered reporting threshold.

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[91] Submission #29.
[92] Submission #82.
[93] Confidential submission #42.
[94] Submission #81.
[95] Submission #85.
[96] Submission #103.
[97] Submission #57.
[98] Submission #126.

**Recommendation 6**

The Attorney-General's Department examine the matters discussed in Chapter 4 of this report regarding difficulties that have been encountered in deciding whether an entity is a 'reporting entity' for the purposes of the Modern Slavery Act. The Department should consider the desirability of amending the *Guidance for Reporting Entities* or the Modern Slavery Act.

# Chapter 6: The Reporting Criteria

## Listing mandatory reporting criteria

A unique feature of the Australian Modern Slavery Act is the seven mandatory reporting criteria in s 16 of the Act. The criteria apply commonly to single entity statements, joint modern slavery statements and the Commonwealth Statement. The seven criteria were listed in Chapter 2 of this report.

There was broad agreement in the consultations for this review that the approach of listing the reporting criteria in the Act was beneficial. It was noted that reporting standards had generally been higher under the Australian than the UK Modern Slavery Act, because of the mandatory Australian criteria[99] (and the independent review of the UK Act in 2019 supported the Australian approach[100]).

Generally, too, there was agreement in the consultations that the mandatory criteria addressed fundamentally important elements of modern slavery risk management. The reliance placed on UNGPs in framing the criteria was noted. Most reform proposals were to refine or extend the criteria, rather than rethink the architecture of the Modern Slavery Act. In addition, some submissions cautioned against changing the criteria too markedly while business is becoming accustomed to developing internal processes that are aligned to the criteria.[101]

The focus of this chapter is upon how the criteria are worded and the activities they cover. Three other important aspects of the criteria are the subject of other chapters:

- *Modern slavery*: The reporting criteria are tied to the definition of 'modern slavery' in the Act. This topic is discussed in Chapter 4.
- *Due diligence*: The fourth reporting criterion requires entities to describe their 'due diligence processes' for assessing and addressing modern slavery risks. The term 'due diligence' is not defined in the Act. Many submissions urged that the Act require entities to *take* due diligence action as well as *describing* the processes in place. Other duties were also proposed – such as a duty to report suspected modern slavery instances to law enforcement or other regulatory bodies. Those proposed duties are discussed in Chapter 7.
- *Reporting on the criteria*: Though separate, the two issues of how the reporting criteria are framed and how entities report on them are intertwined. Indeed, most of the proposals in this review for better modern slavery reporting did not differentiate between how the criteria are defined in s 16 of the Act, how they are explained in the *Guidance for Reporting Entities,* and how entities are required (or choose) to report on the criteria.

Those second and third aspects (the Guide, and reporting practices) are mostly discussed in Chapter 8. The present chapter nevertheless covers the suggestions made to this review for clarifying (in legislation or the Guide) key terms that have uncertain meaning, such as 'operations', 'supply chains', 'effectiveness' and 'consultation'.

A great deal has been published, in and outside government, to explain the matters that should be addressed in a high-quality modern slavery statement. In that context, this chapter has little to say that is new. The twofold purpose of this chapter is to draw attention to many of those suggestions for elucidating issues to address under each reporting criterion, and to examine whether legislative amendment of any of the criteria is desirable. As explained in Chapter 3, a principle adopted for this report is that the requirements of the Modern Slavery Act should be succinct. The elaboration of the reporting requirements should principally occur in administrative guidelines and statutory rules.

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[99] Eg, Walk Free, *Beyond Compliance in the Garment Sector: Assessing UK and Australian Modern Slavery Act statements produced by the garment industry and its investors* (2022).
[100] *Indepen(2019) dent Review of the Modern Slavery Act: final report* (2019) Volume II, para 2.2.3.
[101] Submissions #78, #100, #132.

The chapter concludes by querying whether, going forward, the better approach overall would be to amend the Act and require the criteria to be spelt out in a rule or regulation, rather than in the Act itself. This would allow greater flexibility to alter and refine the criteria from time to time.

Another introductory point to make is that the online survey of reporting entities asked several questions about whether entities experienced difficulty in construing and complying with the mandatory reporting criteria. The breakdown of the overall responses (496 in total) to these questions is given in Appendix D.

The general picture is that on most aspects of the criteria over 90% of respondents said they did not experience difficulty in complying. The main exceptions are that a higher level of difficulty was experienced in providing information about 'structure, operations and supply chains' (27.33% of respondents), in describing modern slavery risk (27.94%), in describing the effectiveness of risk management measures (18.7%) and in describing consultation with affiliated entities (43.81%).

## Mandatory reporting criterion 1: identify the reporting entity

There have been a few instances of non-compliance and difficulty encountered with this criterion. However, no suggestions have been made for revising the requirement or the guidance.

There is discussion in Chapter 8 of the reporting requirements for joint statements, which overlap with this reporting criterion.

## Mandatory reporting criterion 2: describe operations and supply chains

A reporting entity is required to describe its 'structure, operations and supply chains' (s 16(1)(b)). Those terms are important to other criteria, which require entities to describe the actions taken to assess and address modern slavery risks in their operations and supply chains, and the effectiveness of those actions. Those terms 'operations' and 'supply chains' are not defined in the Act. There is an extended discussion of the terms in the *Guidance for Reporting Entities*.[102] The discussion is more descriptive than definitional:

- The term 'operations' is briefly defined as 'activity undertaken by the entity to pursue its business objectives and strategy in Australia or overseas'. Examples are given of activities that may come within that phrase, including: direct employment of workers (e.g. at a manufacturing plant), production (e.g. of dairy products), financial lending to clients (e.g. by a bank), property leasing (e.g. by a property owner or agent), research (e.g. by a pharmaceutical entity), sales (e.g. by a retail outlet) and marriage services (e.g. by a religious entity).
- The term 'supply chains' is briefly described as 'the products and services (including labour) that contribute to the entity's own products and services'. Examples that may come within that phrase are: products sourced from suppliers (e.g. products sold by a supermarket or used by a hospital); services provided by suppliers (e.g. by subcontractors, cleaners or external advisers); and products and services from indirect suppliers (e.g. overseas call centres, and manufactured products that contain components produced by other suppliers).

The Guide adds two important qualifications to those descriptions:

- An entity's operations do not include how its products or services are used by customers – for example, the activities of a lessee, or of a foreign manufacturing plant that has bought an Australian product.
- The operations of a financial entity do not include the activities of the bodies in which it invests or to which it lends money. The manual nevertheless adds that the Government expects entities to assess whether they may be exposed to modern slavery risks through their investment arrangements and lending practices.

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[102] *Guidance for Reporting Entities* at pp 33-36. The terms are also defined in a similar way in a New Zealand Government discussion paper, *A Legislative Response to Modern Slavery and Worker Exploitation*, Discussion Document (2022) at 24.

Many submissions to this review commented that the terms 'operations' and 'supply chains' are well-understood, or at least require only moderate clarification in guidelines. There were only a few specific proposals for amendment of those terms in the Modern Slavery Act (discussed below).

The suggestions for clarification were of three kinds:

- amend or extend some of the current general guidance
- provide additional sector specific guidance
- adjust the messaging on responsibility for downstream risks.

The individual suggestions will be noted, without comment or endorsement. It is more appropriate that these suggestions are taken up by the Department in the normal editorial review process.

### Amending the current guidance

Suggestions for amendment or extension of the current guidance included the following:

- The discussion of 'supply chains' should point out explicitly that a reporting entity should report on modern slavery risks beyond Tier 1.[103] The indirect way that lower tiers are currently addressed in the guidance may explain the failure of many modern slavery statements to address this issue.
- Better guidance is required on the reasonable efforts required of entities to map the supply chains for their products and services.[104] Reporting entities are unsure as to which supply networks should be mapped, particularly if the entity has thousands of direct suppliers. Another source of uncertainty is that some reporting entities are suppliers in other entity supply chains (that is, upstream links).
- There should be clearer guidance on what should be covered as part of 'operations' (such as workforce, business relationships, key sites, products and services[105]) and what would ordinarily not fall within the reporting obligation (such as payment of government fees, land acquisition and employee payments[106]).
- The guidelines currently give prominence to business and physical links in supply chain activity. Other elements that should be drawn out include human security, and labour and financial supply chain activity.[107]
- The guidance should advise that transportation from product source to final destination is an element of the supply chain, particularly if there is a shipping component.[108]
- There is inconsistency in how entities classify some services as either operations or supply chains – for example, contract labour that has multiple in-house and external support roles, and contractors that provide both products and labour.[109]

### Sector specific guidance

Several submissions emphasised the importance of supplementing the guidelines with targeted sector specific guidance – for example, for the financial, tertiary, manufacturing, charity and residential housing sectors.[110] A general observation was that operation and supply chain activity can differ greatly from one sector to another, and with it the types of modern slavery risks. A lack of attention to this differentiation can impair quality and comparability in modern slavery reporting.

Three examples were given in one submission of the term 'operations' being unclear in specific situations:[111]

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[103] Submissions #26; #112, #13, #97, #133.
[104] Submissions #24, 28.
[105] Submission #76.
[106] Submission #63.
[107] Submissions #1, #42, #93.
[108] Submission #58.
[109] Submissions #19, #33, #42, #43, #62.
[110] Submissions #27, #52, #66, #69, #78, #80, #97, #112, #134.
[111] Submission #29.

- unincorporated joint ventures, where a reporting entity may be involved in some but not all aspects of the joint venture
- in the professional services industry, as to whether the activities of a client who is seeking advice fall within the operations of the adviser
- in the financial services industry, where financial products such as lending, trading and brokerage comprise an aspect of the reporting entity's operations.

### Responsibility for downstream risks

A lively topic of discussion during consultations for this review was reporting expectations on what are variously described as allied, customer-related or downstream risks. As noted above, the *Guidance for Reporting Entities* briefly addresses this topic by advising, on the one hand, that an entity's operations do not include the activities of its customers or clients, but that financial lenders should consider whether their lending practices expose them to modern slavery risks.

A few submissions[112] argued that the current guidance is inadequate and should be extended. Many entities can be exposed to modern slavery risks in the same way as a financial lender – for example, in leasing property for a car wash, nail bar or restaurant; in giving professional advice on business transformation; in supplying components to foreign manufacturers; in operating a social media platform that is used for child sexual exploitation; or in inviting foreign students to enrol in Australian tertiary institutions.

The submissions argued that the guidelines should advise all reporting entities to begin identifying and acting on customer-related risks. This would be consistent with the UNGPs, which are premised on a 'continuum of involvement' principle.[113] An example is Foundational Principle 13 in the UNGPs, which states:

> 13. The responsibility to respect human rights requires that business enterprises:
> (a) Avoid causing or contributing to adverse human rights impacts when they occur;
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

### Amending the Act

A small number of submissions expressed support for defining 'operations' and 'supply chains' in the Act, but without proposing specific language.[114] It was suggested that a common reporting standard could facilitate greater consistency and comparability of statements.

Only three specific amendment proposals were put forward. One is to change the term 'supply chain' to 'supply network'.[115] The explanation is that 'supply chain' infers a linear set of links, which is uncommon. This may explain, it was said, why reporting beyond the tier 1 supply base has been problematic, and why entities may not be reporting on their position in customer supply chains.

A second amendment suggestion is to replace 'operations' and 'supply chains' with 'business activities' and 'business relationships'.[116] Those are the terms used in the UNGPs (for example, see Principle 13 above). The terms draw attention to the diversity of direct and indirect business relationships that may be part of a supply chain, such as joint venture partners, investors and upstream and downstream value chains. Adoption of these terms would, it was argued, be a step towards greater harmonisation of reporting frameworks.

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[112] Submissions #27, #43, #103, #126; #134. See also submission #39, submitting that any revision of the terms 'operations' and 'supply chains' in the *Guidance to Reporting Entities* should not include customers and tenants of a reporting entity.
[113] UN Global Compact, *Effective Modern Slavery Grievance Mechanisms* (2021) at 16.
[114] Eg, submissions #28, #33, #112.
[115] Submission #24.
[116] Submission #112.

A third suggestion is to substitute the term 'value chain' for supply chain.[117] This term is used in some of the commentary in the UNGPs,[118] and the argument for using this term is along the same line as that proposed for using 'business relationship'.

### Analysis

The preceding discussion illustrates three points – the diversity of activities and topics that may need to be addressed in a modern slavery statement; an equal diversity in the types of reporting entities; and the heavy reliance that entities place on government guidelines to elucidate the matters to be covered in a statement. Those points work against attempting to define the terms 'operations' and 'supply chains' in the Modern Slavery Act. A definition could raise as many questions as it resolves, and would not replace the need for extensive explanatory guidelines.

The alternative amendment pathway is to replace 'supply chain' with 'network', 'business relationship' or 'value chain'. Of those options, 'network' is probably the more self-explanatory term, and the one that best describes the range of activities to be reported on. By contrast, the phrase 'business activities' might not adequately capture or reflect the work of reporting entities such as government agencies, tertiary institutions and charities.

Recommendation 8 proposes that consideration be given to adoption of the term 'supply network'. This should follow a limited round of consultation, as the term has not otherwise been discussed in this review. Adoption of new terminology also needs to be examined against the backdrop of support for international harmonisation or alignment of reporting concepts.

Whichever term is used in the Act, the existing government guidance on 'operations and supply chains' requires a review, and perhaps refresh, to capture the greater understanding of modern slavery risks that three years of reporting has built. This is taken up in Recommendation 7. Two other recommendations in this report are also relevant to this issue – Recommendations 25, 26.

Recommendation 25 proposes that the Business Engagement Unit in the Attorney-General's Department (in consultation with the Anti-Slavery Commissioner) develop and publish a forward work program that deals, among other topics, with the review of the *Guidance for Reporting Entities*. A full review is likely to be a time-consuming exercise, involving extensive consultation with stakeholders and interest groups.

Accordingly, the review could suitably be done in stages. An ideal first stage may be the development of specific guidance for the financial sector (see Recommendation 7). The financial sector was most frequently mentioned during consultations as one in which unresolved questions have been raised. It is also nominated by many commentators as the sector that has great potential to influence how other entities assess and deal with modern slavery risks. Another sector that is functionally distinct and that may warrant early and separate examination is the tertiary sector.

Recommendation 26 proposes that the government guidelines on the administration of the Modern Slavery Act be given a formal statutory basis. This will elevate their importance and standing for the community that relies upon them.

## Mandatory reporting criterion 3: describe the risks of modern slavery practices

The *Guidance for Reporting Entities* provides relatively clear and structured guidance on this criterion. The Guide explains that the description of modern slavery risks will need to be tailored to an entity's operations and supply chains, and should address sectoral, product, geographic and entity risks. Appendix 1 in the Guide has an extensive list of modern slavery risk indicators. Appendix 5 lists over twenty other publications in the nature of good practice guides, toolkits, international standards and general guidance about modern slavery.

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[117] Eg, submissions #1, #33, #27, #89.
[118] Eg, to Principles 13 and 17.

There was nevertheless regular criticism in this consultation of weak or inadequate identification of risks in modern slavery statements. Most of the suggestions for improving reporting on this criterion could (if appropriate) be taken up at a practice level.

The main theme in the proposals for enhanced administrative guidance are to tailor the guidance more overtly to distinctive risks of particular types or in particular sectors.[119] For example, managing modern slavery risks for child labour are different to managing those for forced labour; and modern slavery risks in mining operations will be different to those in financial investing.[120] Examples of sectoral risks are given in the Guide, but the thrust of the guidance is general.

A proposal for sector specific guidance was outlined above in the discussion of 'operations and supply chains'. It was envisaged that the specific guidance could be developed in stages, because of the scale of the workload challenge in developing guidance for numerous different sectors. This can be taken forward in an overall review of the *Guidance for Reporting Entities* (Recommendation 25). It is also envisaged that the Anti-Slavery Commissioner can play an active role in collaborating with and encouraging individual sectors to improve reporting practices, including by development of guidelines or codes directed to entities in that sector.

Another option for requiring a more specific risk focus in modern slavery reporting is to introduce a new mechanism by which entities are required to have regard to a declaration by the Anti-Slavery Commissioner (or the Minister) that designates high risk topics (regions, industries, products, suppliers or supply chain) for modern slavery reporting purposes (Recommendation 27). Further context to this issue is included in a later chapter.

Two suggestions were also made to this review for legislative amendment of this mandatory reporting criterion. One is to require that an entity 'identify' (rather than describe) the risks of modern slavery practices in its operations and supply chains.[121] That suggestion has merit, but is better considered further in the context of any review of the administrative guidance.

The other suggestion (made by the authors of two independent studies of modern slavery reporting) is to reverse the order of reporting under criteria 3 and 4, as follows: '(1) describe how the entity identifies and assesses risks, (2) report on the risks identified, and their assessed level (high/medium/low), and (3) describe how it is addressing those risks'.[122] Recommendation 8 is that the Department give further consideration to that proposal.

### Mandatory reporting criterion 4: describe actions taken to assess and address modern slavery risks, including due diligence and remediation processes

The requirement of this criterion to describe 'actions taken' is subject to the same considerations as for mandatory criterion 3. A common observation is that entities often consider the same material under both criteria.[123]

Many of the suggestions for clarifying the guidance on criterion 4 are already covered directly or indirectly in the *Guidance for Reporting Entities* (for example, explain organisational mapping, risk assessment policies and plans, internal teamwork, worker engagement, grievance mechanisms, and staff training). Elaboration and adaptation of the Guide is probably best done in a sector specific context. Again, the Anti-Slavery Commissioner may play a role in that work.

The other element of this criterion is the requirement to describe 'due diligence' and 'remediation' processes. That is largely taken up in Chapter 7.

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[119] Submission #35.
[120] Submission #85.
[121] Submission #127.
[122] Submission #85 (Monash University Centre for Financial Studies).
[123] Eg, submission #85.

The suggestions for legislative amendment of this criterion related to its compound structure: it requires reporting on assessment of risks, how they were addressed, due diligence processes and remediation processes. The suggestion was that these could be separated so that the breadth of the reporting obligation is clearer.[124] This suggestion is, in essence, met by Recommendation 11 in Chapter 7 to impose an obligation on entities to establish a due diligence system.

## Mandatory reporting criterion 5: describe the effectiveness of actions taken to assess and address modern slavery risks

A common observation during consultations for this review and in the independent studies of modern slavery reporting is that compliance with this criterion is noticeably weak. Respondents to the online survey for this review also reported difficulty with this criterion.[125]

Several submissions echoed an observation in the Issues Paper that the criterion is framed ambiguously: does it require a reporting entity to describe the method it used to assess effectiveness (a matter of form) or the entity's opinion on how effective its own actions have been (a matter of substance)?[126]

The main theme in the proposals for enhanced administrative guidance was that effectiveness can only suitably be measured if a there is a framework – or measurement standards, or metrics – for undertaking qualitative and quantitative assessment.[127] As one submission explained, the metrics would then be used to specify matters such as how many suppliers were contacted, reports received, employees trained, grievances raised and incidents identified.[128] A comparison could also be drawn with earlier reporting years, or with industry standards.

The *Guidance for Reporting Entities* in fact provides guidance along the lines proposed – that entities should consider developing Key Performance Indicators for measuring qualitative and quantitative developments on such matters as training programs, grievance procedures, contract clauses and supplier engagements.[129]

A further refinement to the Guide, proposed in one submission, is that it should differentiate between outputs, outcomes and impacts.[130] For example, a statement may explain the staff training programs that are in place, the number of staff trained, and the impact of this training on the entity's exposure to slavery risks in areas such as procurement.

Again, the better way forward may be to adapt the reporting guidance for specific sectors, and for the Anti-Slavery Commissioner to encourage collaboration and awareness-raising forums.

## Mandatory reporting criterion 6: describe consultation between affiliated entities

This criterion requires that a statement provide details of the 'process of consultation', of two kinds: consultation with entities that the reporting entity owns or controls; and consultation with entities that are covered by a joint statement.

Compliance with this criterion has been problematic. The MSBEU assessed a higher rate of non-compliance with this criterion than with others (comprising roughly 60% of instances of non-compliance in the second reporting cycle);[131] and in the online survey for this review, 44% of respondents said they experienced difficulty in deciding what information to provide.[132]

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[124] Submissions #57, #58, #63.
[125] Appendix E, Figure 25.
[126] Issues Paper, *Review of Australia's Modern Slavery Act 2018* (2022) at 36. See submissions #29, #82, #89, #98, #107, #134.
[127] Submissions #53, #75, #82, #84, #89, #126, #127, #135.
[128] Submission #98.
[129] *Guidance for Reporting Entities* at 56.
[130] Submission #85. See also #1, proposing a framework for assessing effectiveness.
[131] Issues Paper, *Review of Australia's Modern Slavery Act 2018* (2022) Figure 3.
[132] Appendix E, Figure 26.

The *Guidance for Reporting Entities* provides briefer guidance on this than other criteria, giving only two examples of how the criterion may apply.[133]

Not surprisingly, there was frequent commentary in consultations and submissions that entities were uncertain as to what information they are required to provide.[134] The difficulty applies particularly in large corporate groups that include separate entities that perform legal or operational roles, but do not have distinct substantive entities in the normal sense – for example, holding or licensing companies. The entities may have the same governing board as the reporting entity. In those circumstances, consultation between entities is regarded as artificial, unwieldy and adding no value.

The submissions proposed that the criterion be revised to require that a statement that covers more than one entity should describe the governance processes adopted by the reporting entity to manage modern slavery risks. In effect, the reporting entity would be required to explain its group-wide diligence framework, explaining how internal consultation, collaboration and engagement was undertaken to manage modern slavery risks.[135]

This proposal is adopted in Recommendation 8.

## Mandatory reporting criterion 7: include other relevant information

The *Guidance for Reporting Entities* provides examples of other information that could be provided. Some of the examples are matters that submissions urged should be given greater prominence – such as participation in external forums, liaison with civil society and industry bodies, and updates on how modern slavery incidents raised in earlier statements had been addressed.

## Additional mandatory reporting criteria

In their entirety, the *Guidance for Reporting Entities* appear to mention – directly or implicitly – most if not all the items that were suggested in the submissions to this review as matters that should be spelt out more overtly. For the most part those suggestions can be taken up subsequently in a review of the Guide or in consultative and collaborative forums.

There were, however, three matters that stood out as ones on which participants in this review felt there should be more explicit pressure on entities to report. That emphasis can be given in the Guide, but consideration should also be given to referring specifically to these matters in s 16, either by adding new mandatory reporting criteria or by amending the existing criteria. The three matters are:

- Details of modern slavery incidents or actual risks identified during the reporting period, and of cases referred to law enforcement or other regulatory bodies.[136]
- Grievance, complaint or hotline mechanisms put in place by an entity to receive notifications from its staff, the staff of suppliers or (possibly) members of the public.[137] Some submissions noted the prominence given to this issue in the UNGPs which contains a separate section on 'Access to Remedy'.
- Consultation undertaken by the entity during the year on modern slavery risks with staff, and with external bodies such as industry and civil society bodies, unions and representatives of vulnerable communities.[138]

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[133] *Guidance for Reporting Entities* at 58.
[134] Submissions #29, #39, #42, #43, #71, #81, #98, #113, #126.
[135] Submissions #43, #126.
[136] Submissions #19, #109, #115.
[137] Submissions #19, #57, #58, #69, #82, #116, #124, #126, #134.
[138] Submissions #58, #76, #82, #84, #85, #103, #116, #126.

## Moving the mandatory reporting criteria to a subordinate instrument

It was fundamentally important to the scheme of the Modern Slavery Act that the mandatory reporting criteria were initially included in the Act itself. This created a minimum baseline for mandatory slavery reporting. However, that approach has the downside that the criteria are relatively brief and static.

An alternative approach is for the Act to state that a rule or regulation must be made under the Act to prescribe mandatory reporting criteria, and that those criteria can deal with a list of specified matters. This approach is adopted in the *Illegal Logging Prohibition Act 2012* (Cth) s 14 for defining the due diligence requirements that an importer of regulated timber must meet.

This would allow flexibility in revising the criteria over time, and to include more detailed criteria than s 16 of the Act presently does. This facility could also be used to add additional topics for modern slavery reporting, as discussed in Chapter 4 in relation to the current definition in the Act of 'modern slavery'.

No firm view is expressed in this report as to whether this revision of the Act should be adopted. It is a matter that requires examination, with the Anti-Slavery Commissioner and through consultative forums such as the MSEAG. Recommendation 9 proposes that the Department commence an examination of the issue.

### Recommendation 7

The Attorney-General's Department, as part of the forward work program proposed in Recommendation 25, commence a review of how the terms 'operations' and 'supply chains' are explained in the *Guidance for Reporting Entities*. The review could suitably be done in stages, commencing with a review of how those terms apply to the financial sector. The review should include public consultation.

### Recommendation 8

The Attorney-General's Department consider the desirability of amending the mandatory reporting criteria in s 16 of the Modern Slavery Act:

- to replace the phrase 'operations and supply chains' in ss 3, 11 and 16 with the phrase 'operations and supply networks'
- to revise criteria 3, 4, 5 and 6 in the manner discussed in this report, and
- to add new mandatory reporting criteria that would require an entity to report on:
  - modern slavery incidents or risks identified by the entity during the reporting year
  - grievance and complaint mechanisms made available by the entity to staff members and other people, and
  - internal and external consultation undertaken by the entity during the reporting year on modern slavery risk management.

### Recommendation 9

The Attorney-General's Department consider the desirability of amending the Modern Slavery Act to provide that the mandatory reporting criteria can be prescribed in a rule or regulation made under the Act, and deal with specified matters, rather than listed in s 16 of the Act as at present.

### Recommendation 10

The Attorney-General's Department, as part of the forward work program proposed in Recommendation 25, give consideration to the matters raised in Chapter 6 of this report regarding revision of the *Guidance for Reporting Entities*.

# Chapter 7: Due diligence and other duties

## Introduction

Support for a stronger due diligence framework in the Modern Slavery Act shone through in the consultations for this review. This was commonly put on the basis that Australia had taken an important first step in requiring supply chain transparency regarding modern slavery risks. The necessary next step is action to mitigate those risks. Reporting should not be an end in itself.[139]

That proposition masks several knotty questions – what is 'due diligence', why is it important, is it occurring, can it be evaluated, and how can it be enforced? Those questions are taken up in this chapter, starting with an explanation of the existing reference to due diligence in the Modern Slavery Act.

## Due diligence in the Modern Slavery Act

Section 16(1) of the Act, in defining the mandatory reporting criteria for modern slavery statements, provides that a statement must –

> … describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address [the risks of modern slavery practices in its operations and supply chains], including due diligence and remediation processes (s 16(1)(d)).

The term 'due diligence and remediation processes' is not defined in the Act.

From a literalist standpoint, an entity could comply with that reporting criterion by an unalloyed declaration that 'we have no due diligence processes in place and have no plan to do so'. The only rebuff to that stance would be an adverse public reaction.

However, it is clear the intent of the Act is otherwise. Requiring an entity to describe its due diligence processes assumes it has them, or has at least turned its mind to the issue. Equally, the intent of the Act is that an entity will *utilise* its due diligence processes. This is brought out in the subsequent reporting criterion which requires an entity to describe how it assesses the effectiveness of its actions to assess and address modern slavery risks (s 16(1)(e)).

The need for an entity to have due diligence processes in place is explained in the Explanatory Memorandum to the Modern Slavery Bill. It advises that:

> 'Due diligence' is intended to refer to an entity's ongoing management processes to identify, prevent, mitigate and account for how they address incidences of modern slavery.[140]

The Explanatory Memorandum further explains that 'due diligence' and other terms will be explained in government guidelines, and are drawn from the UNGPs.

The UNGPs list 31 principles that government and business enterprises are urged to follow to ensure that business respects and protects the human rights of individuals throughout their operations. The concept of 'human rights due diligence' is used to frame the operational responsibilities of business. This is defined in Principle 17:

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

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[139] Submission #136.
[140] Explanatory Memorandum, Modern Slavery Bill 2018, at [131].

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
(c) Should be ongoing, recognising that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

The *Guidance for Reporting Entities* elaborates on the meaning of due diligence:

> There are four key parts to due diligence:
> - **Identifying and assessing** actual and potential human rights impacts (for example, screening new suppliers for modern slavery risks)
> - **Integrating your findings** across your entity and taking appropriate action to address impacts (for example, introducing internal training on modern slavery and processes for incident reporting)
> - **Tracking your entity's performance** to check whether impacts are being addressed (for example, doing an internal audit of your supplier screening)
> - **Publicly communicating what you are doing** (for example, by publishing a Modern Slavery Statement or publicly responding to allegations against a supplier).
>
> Due diligence is important because it helps you to understand your entity's modern slavery risks and the actions you need to take to prevent and mitigate them. … Your due diligence process should be appropriate to your size, sector, operational context, ownership and structure.[141]

The Guide also gives practical guidance on how an entity can assess and address risks and undertake due diligence activities.

Standing back from that framework, a reasonable inference is that the due diligence obligation of entities is both explicit and structured, and aligns with the UNGPs. If that obligation is not being met, does the answer lie in the due diligence duty being stated more strongly in the Act, in extended guidance being published on due diligence measures, in stronger regulatory oversight of business reporting and actions, in the development of a more affirmative business culture, or in all those options?

Not surprisingly, all options were proposed[142] – and are partly addressed in other chapters. Specifically, Chapters 6 and 11 give examples of suggested additions to the guidance material to spell out the due diligence actions that entities should take to identify and assess modern slavery risks and evaluate their effectiveness. Chapter 12 discusses the role the Anti-Slavery Commissioner can play in raising awareness of modern slavery risks and doing capacity building work with business and other stakeholders.

That leaves two issues to address in this chapter – should the current reference to due diligence in the Modern Slavery Act be strengthened, and should enforcement measures specifically targeted at due diligence be included in the Act?

## Strengthening how the Modern Slavery Act deals with due diligence

The suggestions for strengthening how the Act deals with due diligence were generally of two kinds. One suggestion is to simplify the compound structure of mandatory criterion 4 (quoted above) which incorporates four distinct processes:

- assessing if there is a risk of modern slavery practices in the entity's operations or supply chains
- addressing any such risks
- having due diligence processes in place, and
- having remediation processes in place.

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[141] *Guidance for Reporting Entities* at 47.
[142] Eg, submissions #57, #109, #110, #126, #134, #136.

Each of those processes can be viewed separately, though there is clearly overlap among them. Separating them may have some textual advantage, but would be a limited step in meeting the criticism that effective due diligence is lacking overall in the Australian response to modern slavery. That is where the second suggestion for legislative strengthening comes into play.

The second suggestion is that the Modern Slavery Act should go further than requiring an entity to *describe* its due diligence processes, and should place an affirmative obligation on entities to implement and utilise a due diligence process. This could be done, for example, by declaring in the Act that all reporting entities are required to implement a due diligence process that meets the four elements of due diligence outlined above,[143] namely, that the entity has implemented a process that enables it to –

- identify and assess the risks of modern slavery practices in its operations and supply chains
- take action to mitigate those risks
- track the entity's performance in mitigating the risks, and
- explaining publicly how those processes are operating.

A variation on that approach suggested in one submission is to frame the obligation around six hallmarks of good diligence that include risk and outcome indicators:

- governance
- stakeholder engagement
- risk identification and prioritisation
- acting on identified risks
- monitoring and evaluating effectiveness in addressing risks, and
- providing and enabling remedy.[144]

In the context of the Modern Slavery Act, an entity would be required in its annual modern slavery statement to explain the nature of the diligence process it had established and the activity occurring under that process in the reporting year.

Imposing an obligation of that kind on entities would not be a novel step. Other Australian laws presently impose such an obligation. Following are three examples.[145]

- *Illegal Logging Prohibition Act 2012* (Cth): The Act prohibits the importation of illegally logged timber. An importer of timber products is to conduct due diligence to reduce the risk of importing illegally logged timber. The due diligence requirements are spelt out in the *Illegal Logging Prohibition Regulation 2012*. Regulation 9(1) declares that 'An importer must, before importing a regulated timber product, have a due diligence system'. The system is to be in writing and must set out the process by which the importer will meet specific requirements relating to matters such as: gathering as much information as is reasonably practicable to assess the risk that imported timber was illegally logged; assessing whether the information available to the importer is reliable; if there is a risk (albeit low) that the timber to be imported was illegally logged, conduct a risk mitigation process that is adequate and proportionate to the identified risk; and, upon request, provide to the regulator information about the importer's due diligence system and the importer's compliance with it.[146]
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth): The aim of the Act is to detect, deter and disrupt serious financial crimes such as money laundering and the financing of terrorism. Financial institutions are required to verify a customer's identity before providing certain financial services, and to report suspicious matters and prescribed transactions to the Australian

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[143] The submission from the Human Rights Law Centre (submission #38) included a suggested draft provision of this kind. The assistance gained from the Centre's submission is acknowledged. Several other submissions endorsed the Centre's submission.
[144] Submission #136.
[145] See submission #38. The term 'due diligence' is also used as an element of the defence available to a corporation or officer against an offence under an Act – eg, *Autonomous Sanctions Act 2011* (Cth), *Corporations Act 2001* (Cth).
[146] Submission #109 explained the impact of this due diligence requirement in terms of take-up and changed practices.

Transaction Reports and Analysis Centre (AUSTRAC). The Act requires institutions to undertake 'ongoing customer due diligence' to identify, mitigate and manage the risk that a service provided to a customer may involve or facilitate money laundering or financing of terrorism (s 36). The requirements for doing so are spelt out in a subordinate instrument – the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007*. Among the requirements are that a financial institution must have appropriate risk-based systems and controls in place to obtain relevant customer identification information, to monitor customer transactions, and to assess if any of those transactions are high risk.

- *Work Health and Safety Act 2011* (Cth): The Act requires that an officer of a business must exercise due diligence to ensure the business complies with any duty or obligation under the Act. Due diligence includes taking reasonable steps to: acquire and keep up-to-date knowledge of work health and safety matters; understand hazards and risks associated with the business; use appropriate resources to eliminate health and safety risks; have processes in place to receive information regarding incidents, hazards and risks; and have processes in place to comply with the duties and obligations imposed by the Act.

Due diligence is also a feature of some of the foreign modern slavery laws and proposals (see Appendix E). For example:

- *Europe*: The European Commission *Directive on Corporate Sustainability Due Diligence* requires member countries to enact legislation requiring human rights and environmental due diligence by certain countries. Among the requirements for the due diligence procedure are company policies, and procedures for identifying adverse impacts, prevention, mitigation, complaints and monitoring.
- *New Zealand*: The proposed modern slavery law will require all entities to undertake due diligence to prevent, mitigate and remedy worker exploitation by New Zealand entities. Medium-sized entities will be required to report annually on their due diligence processes, while large entities will be required in addition to meet due diligence obligations.

### Enforcement of a due diligence observation

There are several different ways that a due diligence obligation could be enforced:

- *Voluntary compliance*: the Modern Slavery Act rests substantially on a principle of voluntary compliance as regards the obligation to lodge an annual modern slavery statement that addresses the mandatory reporting criteria in the Act. The same principle could apply to an obligation to implement and comply with a due diligence system. In effect, market forces and community opinion would be the chief pressure for compliance.
- *Regulatory oversight*: the Anti-Slavery Commissioner could pay special attention to whether there was faithful compliance by entities with the obligation to implement and use a due diligence system. One way the Commissioner could do this is through a statement review program that audits or examines a selected batch of statements, possibly with the assistance of a peer review panel (see Chapter 12). Another oversight mechanism is the appointment of an independent auditor to examine compliance with the due diligence procedure.[147]
- *Regulatory enforcement*: The Commissioner (or some other officer) could be authorised to monitor and investigate compliance with the due diligence obligation. For example, the Illegal Logging Prohibition Act provides that inspectors appointed under the Act can utilise the powers listed in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) to monitor and investigate compliance with the Act and to issue infringement notices.
- *Penalties*: The Modern Slavery Act could make it a civil penalty offence for an entity to fail to put a due diligence system in place, or to fail to comply with its own system. The Commissioner could be authorised to commence court proceedings for a penalty to be imposed. This approach is adopted in both the illegal logging and anti-money laundering schemes.

[147] Submission #136.

### Analysis

A premise of the Modern Slavery Act is that entities should undertake due diligence to identify and assess modern slavery risks. This accords with a growing international conviction – a global norm – that due diligence processes must be the core strategy for addressing human rights abuses and modern slavery practices. Reliance on due diligence to achieve regulatory objectives is also a key element of many Australian laws – such as the illegal logging, anti-money laundering and workplace safety schemes. The intent is to drive and shape business action, and to specify requirements or indicators that must be met and that can be used as benchmarks for monitoring, auditing and comparative performance assessment.

An elementary weakness in the Modern Slavery Act is that it only imposes an obligation on entities to *describe* their due diligence system. The Act should go further and impose a duty to implement and utilise such a system. The essential (or minimum) elements of the due diligence system could be specified in rules made under s 25 of the Modern Slavery Act.

It was suggested to this review that the scale of this change for business means that it should only be introduced after a multi-stakeholder working group is convened to fashion the due diligence requirement.[148] Consideration could be given in that process to whether the due diligence obligation should (as proposed in New Zealand) apply differently to large and medium-sized enterprises.

A separate issue is how that duty is to be enforced. The issue of enforcement is discussed more fully in Chapter 10. The stance taken there is that the principle of voluntary compliance is no longer sufficient, and that penalties should be introduced into the Act, but only for breaches of objective standards.

On that basis, it should be made a civil penalty offence for a reporting entity to fail to include a description of its due diligence processes in its modern slavery statement. Further, those processes must deal with the minimum requirements specified in the rules. However, the civil penalty offence should not extend to whether, for example, the due diligence system was 'best practice', nor whether the entity had acted in compliance with its own system. As explained in Chapter 10, this review does not support the introduction (at this stage, at least) of penalties that rest on subjective judgement as to whether a modern slavery statement is adequate or effective.

## Other legal duties

Two other legal duties were proposed in submissions to this review.

### Duty to report incident

It was suggested that a statutory duty should be cast on reporting entities to report to a relevant law enforcement or other body any information that may reasonably suggest a modern slavery incident has occurred or might occur.[149]

The scope of this duty could be cast more broadly – for example, to apply to all employers, importers or corporations, whether or not they are reporting entities under the Modern Slavery Act. A broad duty of that kind has been proposed as an element of the New Zealand modern slavery law, as a duty to take reasonable and proportionate action in relation to suspected modern slavery breaches.

There is obvious merit in this proposal and it would complement the Modern Slavery Act, or perhaps even fill a gap in that law. However, the proposal raises numerous questions that go beyond the scope of the present review. For example, should such a duty be imposed in the *Criminal Code* or in state and territory laws? And to whom should a notice be given if the suspected modern slavery incident is occurring in another country.

[148] Submission #126.
[149] Submissions #13, #19, #136.

## Duty to prevent modern slavery

Another suggestion is that the Modern Slavery Act should impose a duty on reporting entities to prevent modern slavery practices in their operations and supply chains.[150] This would accompany an obligation on entities to have a due diligence system in place. The duty to prevent could be enforced, it is suggested, by a penalty offence in the Act, by an enforceable undertaking procedure initiated by the Anti-Slavery Commissioner, or by creation of a private right of action by a person who had suffered loss or damage because of a contravention of the duty. It would be a defence for an entity to establish that it had taken all reasonable steps to avoid a contravention, for example, through the due diligence system it had implemented.

A duty of this kind was recently introduced into the *Sex Discrimination Act 1984* (Cth) by the Respect at Work Bill. Section 47C of the Sex Discrimination Act now imposes a duty on employers and those conducting businesses or undertakings to take reasonable and proportionate measures to eliminate, as far as possible, discriminatory conduct such as sexual harassment in the workplace, hostility on the ground of sex, or victimisation.

It is important, in this review of the Modern Slavery Act, to draw attention to this option of creating an enforceable duty to prevent modern slavery. However, the proposal is not being taken further in this review, essentially for two reasons.

Firstly, the design of the Modern Slavery Act is evolving in a measured way to generate widespread business support and engagement to combat modern slavery practices. The first stage was the introduction of supply chain transparency by large businesses. The next stage (if the recommendations of this review are accepted) would be the introduction of a due diligence obligation, strengthened reporting requirements, extension of those obligations to medium-sized businesses, and compliance oversight by an Anti-Slavery Commissioner. Substantial changes of that kind should be bedded down before additional duties are introduced.

Secondly, the Modern Slavery Act currently rests on a platform of voluntary compliance and administrative oversight. This report proposes that the administrative oversight dimension of the Act be significantly strengthened. The proposal for an enforceable duty to prevent modern slavery rests on a different platform of judicial enforcement.[151] It would be inexpedient at this stage to shift the underlying basis of the law in that manner.

**Recommendation 11**

The Modern Slavery Act be amended to provide that a reporting entity must:

- have a due diligence system that meets the requirements mentioned in rules made under s 25 of the Act, and
- in the entity's annual modern slavery statement, explain the activity undertaken by the entity in accordance with that system.

This duty should not apply to an entity with a consolidated annual revenue of between $50-100M until two years after the entity has become subject to the reporting requirements of the Act.

[150] Submissions #38, #109, #116, #120.
[151] Submission #136.

# Chapter 8: The reporting process

## Introduction

This chapter deals with the following aspects of the Modern Slavery Act for preparing and submitting an annual modern slavery statement:

- the requirement to submit an annual modern slavery statement
- the timeline for submitting the statement
- options for specifying a format for modern slavery reporting
- the requirements for approval of a statement by a reporting entity
- the principles regarding submission of a joint statement
- the principles regarding voluntary submission of a statement.

## Annual reporting

There was general agreement during this review that, in one form or another, an annual or similar reporting process is important to achieving the objectives of the Modern Slavery Act.[152]

The annual process ensures that entities maintain constant focus on their responsibility to address modern slavery risks. This accords with the expectation of the UNGPs that human rights due diligence will be 'ongoing, recognising that the human rights risks may change over time as the business enterprise's operations and operating context evolves'.[153]

Annual reporting underpins continuous scrutiny and improvement. Themes, patterns, issues and risks can more easily be identified through an annual process. Geopolitical instability and natural disasters add to the need for heightened sensitivity to new or changing modern slavery risks.[154]

Annual reporting is also a familiar corporate process. In fact, as one submission observed, out-of-cycle reporting can be onerous and ineffective.[155] An added practical danger is that topics that do not require regular review and report will be parked to the side or overlooked.

A couple of qualifications were nevertheless expressed about the annual reporting requirement in the Act. One is that it is producing an overload of lengthy modern slavery statements, as discussed in Chapter 3 of this report. Over time, the large volume of reports could make external analysis of modern slavery reporting more demanding and time-consuming.

It was also questioned whether the annual reporting process in its current form unproductively directs the attention of reporting entities to formal compliance with all reporting requirements rather than to the continuous improvement dimension of the reporting process. Meaningful analysis of modern slavery risks and responses may be unrealistic in the short annual timeframe, which can reduce line-of-sight on actual progress. Deeper analysis may be overpowered by the demand imposed to cover a large range of issues in the annual report and to move the draft report through multiple internal clearance and sign-off processes (which can take up to four months or longer, and stretch into the next reporting period).

There was some – though limited – support expressed for a longer reporting period of two years.[156] The middle option, endorsed in this report in Recommendation 12, is to retain but adjust the annual reporting requirement. Entities would have the option of providing a full statement every three years, with update

[152] Eg, submissions #19, #29, #35, #39, #42, #43, #46, #103, #107, #112.
[153] UNGPs, Principle 17.
[154] Submission #69.
[155] Submission #105.
[156] Submissions #22, #35, #36, #49, #78, #104,

reporting in the intervening two years on changes to operations and supply chains, and critical incidents and other risk management developments.[157]

This may have benefits across-the-board – for entities in preparing statements, for government in reviewing compliance with reporting requirements, and for the public in having a clearer guide to important developments.

The format for this process could be spelt out in rules made under s 25 of the Act. For example, the rules would spell out how and when an entity would nominate which statement was being treated as the full statement, and the minimum or essential matters to be addressed in the update reports.

This facility should be framed by the Act as an option rather than a stipulation. Some entities may prefer to continue reporting in the current annual format. Doing so may be regarded as integral to the culture and commitment of the entity to address modern slavery risks. Presently, some entities use the release of the annual statement as an occasion to convene internal seminars or other events. They may feel that a full annual statement aligns better with those processes than an update report.

There was mention during consultations of other voluntary reporting frameworks that allow flexibility in the pattern of reporting.[158] Two examples are:

- Reconciliation Action Plans:[159] the framework prescribes four different plan types – an initial scoping plan (1 year); an innovation and implementation plan (2 years); a stretch plan (2-3 years); and a leadership plan.
- Voluntary Principles on Security and Human Rights:[160] the Corporate Pillar Reporting Guidelines prescribe a Full Report every three years, and an Update Report in other years.

One other matter that will be noted for further action was a request for direct guidance on the reporting obligation in the event of a merger or acquisition of a reporting entity during the reporting year.[161]

## Reporting timelines

An entity is required to submit its annual modern slavery statement within six months of the end of its 'reporting period'.[162] The term 'reporting period' is defined as a financial year 'or another annual accounting period applicable to the entity' (s 4).

The *Guidance for Reporting Entities*[163] describes three most common reporting periods for reporting entities:

- the Australian financial year (1 July – 30 June), with a final lodgement date of 31 December
- the Australian calendar year (1 January – 31 December), with a final lodgement date of 30 June
- the foreign financial year (e.g. UK: 1 April – 31 March), with a final lodgement date of 30 September.

That flexible structure means that the reporting cycle spans many months (and was longer during the first reporting cycle when a COVID-19 extension was applied across the board). Because entities can submit statements at any time within the six months leading up to the reporting deadline, reports are submitted and published on the Register continuously throughout the year.

There was some preference expressed during consultations for a single reporting date for all entities.[164] The main perceived advantage would be easier comparability of statements across a reporting cycle.

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[157] Supported in submissions #29, #30, #39, #44, #63, #64, #85, #90, #95, #98, #113, #129. This option was also supported in many of the online survey responses.
[158] Submission #129.
[159] reconciliation.org.au
[160] Voluntaryprinciples.org
[161] Submission #29.
[162] *Modern Slavery Act 2018* (Cth) ss 13(2)(e), 14(2)(f).
[163] *Guidance for Reporting Entities* at 27
[164] Submissions #24, #51, #89, #133.

The alternative, with far stronger support, is to retain the present reporting timeframes.[165] These allow flexibility for entities to align their reporting work with other internal accounting, reporting, business planning and data collection processes. There may also be limited benefit in a single reporting deadline because of the six-month submission window.

This review sees no reason to change the current timeframe provisions in the Act.

One matter to note for further action is that a couple of submissions observed they had encountered uncertainty among reporting entities about the timeframes and suggested that these could be better communicated.[166]

## Format of the annual statement

The Modern Slavery Act does not prescribe a format for annual statements, other than requiring that entities address the mandatory reporting criteria and comply with approval and sign-off requirements.

This flexibility is broadly welcomed by entities. The flexibility recognises that entities vary widely in their size, operations and supply chain activity. It is also clear from the style of individual statements that the reporting process is viewed differently by entities. Some view the statement simply as a statutory reporting exercise, while others use the statement to project a view of the entity's commitment to human rights and sustainability principles.

Flexibility as to the format of an annual statement will also be important if the reporting threshold is lowered to $50M to make smaller-sized entities report under the Act. Their workload burden could be disproportionately high if an overly-demanding reporting format is imposed.

A countervailing consideration is that flexibility in reporting provides no assurance that essential matters will be addressed in a statement. Comparability of statements can also be difficult. More specific direction on what must be included in statements will also be necessary if the Act imposes an obligation on entities to have a due diligence system in place and to require reporting against due diligence indicators.[167]

There was broad support in the consultations for this review for reporting measures that could balance those various considerations. This is taken up in the following proposals.

- The Attorney-General's Department should develop a reporting template for optional use by reporting entities. The template would list the mandatory reporting criteria and approval requirements, linked to advice on the kinds of information that should be provided. (Recommendation 13)
- One method of submitting an annual statement using the reporting template should be online through the Register. (Recommendation 14)
- All modern slavery statements should be required to include a template coversheet that lists specified matters, and whether (and where) those matters are dealt with in the statement. Examples of matters that should be specified[168] are any modern slavery incidents identified by the entity during the year, action taken by the entity on commitments or plans foreshadowed in a previous year's modern slavery statement, if external consultation and quality assurance were part of the statement preparation process, and details of the approval of the statement by the principal governing body of the entity. (Recommendation 15)

[165] Submissions #17, #41, #76, #126, #132, #134
[166] Submissions #39, #62
[167] Submission #136, and Chapter 7.
[168] Submissions #42, #131, #136

## Statement approval

The Act requires entities to meet two approval requirements for the annual modern slavery statement:[169]

- the statement must be approved by the principal governing body of the reporting entity, and
- the statement must be signed by a responsible member of the reporting entity.

These requirements were universally applauded during the consultations for this review.[170] They were regarded as a way of ensuring that the leadership/management team takes responsibility for and an active interest in the modern slavery statement process, and more broadly in the entity's human rights cultural focus. The requirements had instigated training and other group work within entities for the leadership team. The procedure for formal internal approval also provides another opportunity to stand back and check that the reporting requirements of the Act have been met.

That said, non-compliance with this requirement has been a marked problem in the first three years of the operation of the Act. The MSBEU assessed that 27% of statements in the first reporting cycle (632 instances) did not comply with the approval and/or signature requirements, and 17% of statements (679 instances) in the second reporting cycle.[171] Those statements were not published on the Register until the approval and signature requirements were corrected.

Not surprisingly, commentators have pointed to this result as evidence that many entities are half-hearted about their reporting obligations and the Modern Slavery Act in general. The response, from some entities and advisors, is that the high non-compliance rate was principally caused by an initial (and temporary) lack of understanding of practical requirements, particularly for entities that have complex business structures. A tenth of the respondents to the online survey reported they had experienced difficulty in complying with the approval requirement.[172] Anecdotal accounts were also given of statements that included approval and signature details that were initially returned as unsuitable for publication but upon further clarification were accepted.

No firm proposals were made for amending these requirements in the Act.[173] There was, on the other hand, a request for more specific practical guidance than currently given in the *Guidance for Reporting Entities*, that the approval 'must be clear and easy to find in your statement'.[174] A common suggestion was that the Guide should include an approval/signature template for optional use by reporting entities. Supplementary guidance has in fact been published by the MSBEU in the Resources section of the Register. Examples are given of good practice, compliant and non-compliant statements for governing body approval. It may be that this supplementary guidance is not well-known.

Another way of approaching the issue (noted above) is to require that all statements include the same standard coversheet which, among other things, would require entities to confirm that approval and signature requirements were met and to give details.

There were also suggestions (noted below) for clearer guidance on how the approval and signature requirements are to be met in joint statements.

It was also observed that the importance of these requirements could be reinforced if entities were encouraged to provide details of the processes and frequency by which the governing board and other committees discussed modern slavery and related issues.[175] This could be coupled with collaboration between government and companies to develop plans for enhanced director education and allocation of responsibilities.[176]

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[169] *Modern Slavery Act 2018* (Cth) ss 13(2), 14(2).
[170] Eg, submissions #82, #95, #97.
[171] Issues Paper at 23 (Figure 4) and 41.
[172] Appendix E, Figure 15.
[173] Cf submission #58 observing that sign-off by the Chair if the Board and the and CEO should be required.
[174] *Guidance for Reporting Entities* at 64.
[175] Submission #95.
[176] Submission #97.

## Joint statements

The Act contains a flexible procedure in s 14 for submitting a joint modern slavery statement to cover more than one entity. There is no limit on the number or type of entities that can be covered by the statement. The entities may be part of the same corporate group or they may be unrelated entities. The statement may cover entities that are required to report under the Act and entities that are not required to report.

The entities must consult with each other in preparing the joint statement, and the statement must describe the process of consultation they adopted (s 16(1)(f)). The statement must address all the mandatory reporting criteria for each entity – though, as the *Guidance for Reporting Entities* advises, this can be done in a consolidated discussion rather than in separate sections of the statement.[177]

A joint statement must be separately approved by the governing board of each entity. The Act allows flexibility in meeting this requirement (s 14(2)). If it is not practicable to get the approval of each entity, one of the entities covered by the statement can provide that approval. Further, the approval can be provided on behalf an entity by another entity covered by the statement and that is in a position, directly or indirectly, to influence or control it.

While there was criticism that joint reporting can weaken effective supply chain mapping in multi-national corporations that have multi-divisional business structures,[178] the flexibility of the joint statement process was generally supported.[179]

Some comments in submissions pointed to difficulties that may have been encountered in joint reporting. For example, there was comment that dormant entities within a complex group structure may be required to report separately; that separate identification should not be required for each subsidiary within a group structure that meets the consolidated revenue threshold; and that a joint statement should not have to itemise entities coved by the statement that do not produce anything and do not have staff.[180] It was observed that sign-off requirements can be complex for joint statements.[181]

There may be flexibility within the Act and the current guidance to address those concerns. This is a specialist matter that can best be followed up by the Department, as proposed in Recommendation 17.

## Voluntary reporting

The opportunity provided by s 6 of the Act for an entity to submit a voluntary modern slavery statement serves multiple purposes. It enables an entity that falls below the reporting threshold to demonstrate its commitment to the objectives of the Act. Voluntary reporting may benefit an entity in procurement endeavours, or in discussions with investors or other reporting entities. Regular reporting can also be undertaken by an entity that, from one year to another, is on the borderline of the reporting threshold.

The procedure has also been well-supported. The Register contained over 800 voluntary statements in early 2023. Close to 6% of respondents to the online survey for this review were volunteer reporters.

The Act lays down an exacting procedure for voluntary reporting. An entity may notify the Minister during a reporting period (through an online form) that it wishes to make a voluntary statement for that period (or for that and subsequent periods). The statement must comply with the requirements applying to other entities – such as addressing the mandatory reporting criteria and being submitted within the allowable time period. An entity may discontinue voluntary compliance by written notice to the Minister prior to the start of the next reporting period.

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[177] *Guidance for Reporting Entities* at 69
[178] Submission #24.
[179] Eg, submissions #35, #51, #53, #86.
[180] Respectively, submissions #51, #53, #81.
[181] Submission #33.

Requirements of that kind are understandable. It is important that all statements on the Register conform to the same requirements. An entity can also choose the alternative path of not submitting a statement under the Act but instead posting a similar statement on its own website.[182]

In one respect, however, the requirements may go too far. It is not apparent why an entity can discontinue voluntary reporting only by notifying the Minister prior to the commencement of the reporting period. There is no similar restriction applying to an entity that has reported in one year but falls below the reporting threshold in a subsequent year: the entity may choose not to report without any notice or declaration. In effect, it is a public relations choice for the entity whether to announce or explain its decision not to report.

Recommendation 18 is that the same rule applies to voluntary reporting.

**Recommendation 12**

The Modern Slavery Act be amended to provide that an entity has the option of submitting every three years a modern slavery statement that addresses all requirements of the Act, and in the intervening two years to submit a report that updates the information in the full statement. The procedure for reporting along these lines should be spelt out in rules made under s 25 of the Act.

**Recommendation 13**

The Attorney-General's Department develop a template for optional use by reporting entities to prepare and submit an annual modern slavery statement in compliance with the Modern Slavery Act.

**Recommendation 14**

The Attorney-General's Department facilitate the submission of an online modern slavery statement (using the template referred to in Recommendation 13) through an online portal on the Online Register for Modern Slavery Statements.

**Recommendation 15**

The Modern Slavery Act be amended to require that all modern slavery statements submitted under the Act include a coversheet that addresses specified matters.

**Recommendation 16**

The Attorney-General's Department review the *Guidance for Reporting Entities* to consider inclusion of clearer guidance, including an optional template, for use by entities to record that they have complied with the approval and signature requirements in the Modern Slavery Act ss 13(2) and 14(2).

**Recommendation 17**

The Attorney-General's Department seek further clarity regarding criticisms discussed in Chapter 8 of this report about difficulties encountered in joint reporting.

[182] *Guidance for Reporting Entities* at 22.

**Recommendation 18**

The Modern Slavery Act be amended by removing the requirement that an entity that has notified the Minister that it will submit a voluntary modern slavery statement under s 16 of the Act can only revoke that notice by notifying the Minister before the start of the reporting period in which the entity would otherwise report.

# Chapter 9: Public sector reporting

## Applying the reporting requirements to government

Governments across Australia accept that modern slavery analysis and reporting should apply to them. Government purchasing is not immune from modern slavery risks, any more than private sector purchasing. Government agencies are among the largest purchasers of goods and services in the Australian market. Australian Government procurement in 2021-22 totalled $80.8 billion across 92,303 contracts, with 14.75% of suppliers (by value) being located overseas.[183] Overall, government procurement comprised more than a third of Australia's gross domestic product.

Many submissions to this review emphasised the importance of applying modern slavery regulation and transparency to government procurement.[184] Government stature and economic leverage means it is well-placed to drive improvements in supply chain transparency and remediation. Government can lead by example in setting a high standard for modern slavery reporting.

By demonstrating its commitment to high standards, government is more strongly placed to work with – and to pressure – the private sector to do the same. This also strengthens government's ability to incentivise good corporate performance by prioritising and giving preference in government procurement to businesses that meet the standards set by government.

The Australian Government's commitment to modern slavery reporting was signalled by separate Forewords from both the Prime Minister and the Attorney-General in the latest Commonwealth Statement. Both emphasised the need for government leadership, collaborative work with civil society and the business community, and strengthening the government response to modern slavery challenges.

## The framework for public sector reporting

The requirements applying to government agencies vary across Australia, and are a mixture of statutory and executive schemes.

The most comprehensive framework is the Commonwealth *Modern Slavery Act 2018*. It applies to Australian Government agencies in two ways:

- Commonwealth corporate entities report in the same manner as private entities. Those above the $100M threshold must submit an annual modern slavery statement, either individually or jointly with other entities.
- Non-corporate entities such as departments and statutory agencies are collectively covered by a consolidated annual statement – the Commonwealth Modern Slavery Statement (s 15). The Act's mandatory reporting criteria and timeframes apply to the Commonwealth statement as for other entities. The Commonwealth Statement is to be published by 31 December each year and is published on the Register.

Commonwealth corporate entities that fall below the reporting $100M reporting threshold may report voluntarily under the Act.

The NSW *Modern Slavery Act 2018* applies supply chain transparency requirements separately to State owned corporations and to government agencies and local councils. State owned corporations are required to report voluntarily under the Commonwealth Act. Government agencies and local councils are required to comply with directions by the NSW Procurement Board under s 175 of the *Public Works and Procurement Act 1912* (NSW). The directions may relate to the 'reasonable steps' to be taken to ensure that government procurement of goods and services is not the product of modern slavery. A public register is to be developed under the Modern Slavery Act that will identify any government agency or State-owned corporation that fails to comply with any of those requirements – that is, a public register of non-compliant government agencies.

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[183] *Commonwealth Modern Slavery Statement 2021-22* at 21.
[184] Submissions #20, #24, #28, #38, #84, #86, #114,

The NSW Anti-Slavery Commissioner released a Discussion Paper in 2022 that outlined propositions for clarifying expectations of government agencies to meet their 'reasonable steps' and due diligence obligations.[185] Among the reporting obligations expected of NSW agencies is to report on the reasonable steps being taken to ensure the removal of products of modern slavery from public procurement in NSW.[186]

A private member's Bill was introduced into the ACT Legislative Assembly in March 2023 to require ACT Government Directorates and territory entities to submit voluntary statements under the Commonwealth Act. The Bill would also establish a statutory office of Anti-Slavery Commissioner in the ACT Human Rights Commission.

Other Australian jurisdictions have issued executive policies and guidelines on the steps that government agencies should take to eliminate modern slavery in government procurement. An example is the Queensland Government, 'Eliminating modern slavery in government supply chains' (March 2022). In Western Australia, the *Procurement (Debarment of Suppliers) Regulations 2021* provides that a supplier may be debarred from supplying goods, services or works to a State agency if it has failed to comply with reporting requirements applying to it under the Commonwealth Modern Slavery Act.[187]

The Commonwealth convenes the Intergovernmental Network on Modern Slavery in Public Procurement as a forum for Commonwealth, state and territory governments to share information and collaborate on approaches to address modern slavery risks.

### Commonwealth Modern Slavery Statements

Three Commonwealth Statements have been published since the Act commenced. The third statement, published in December 2022, lists 98 non-corporate entities that are covered by the statement.

It is readily apparent that considerable thought and work has gone into preparing the three statements:

- They outline the Commonwealth's six year reporting program, comprising four phases – Foundation, Discovery, Implementation and Review
- Measures that will be undertaken in those phases are explained – such as training, supply chain mapping, mitigation strategies, and an audit of federal government supply chains
- Resources that have been developed are noted – such as model contract clauses, a risk screening tool, a supplier questionnaire, reporting templates, and a rapid response framework
- High risk areas in government procurement are identified – investments, cleaning and security services, textiles procurement, construction and procurement of information technology hardware
- There is a separate discussion of how each of the mandatory reporting criteria in the Modern Slavery Act are being met
- The consultations undertaken internally and externally in preparing the statement are explained
- Key developments between the previous and the latest statement are listed
- Commonwealth Statements have developed from one year to the next – for example, a new feature of the third statement (of close to 90 pages) is a separate section on each government portfolio.

There was minimal direct comment during consultations for this review on the content of the Commonwealth Statement. The consultations concluded before publication of the Commonwealth's third statement – which may address some of the comments made in submissions about the first two Commonwealth statements. For example, a few submissions observed that the Commonwealth Statements were largely descriptive, contained inadequate detail on individual portfolios, did not contain criteria for measuring effectiveness and impact, and were shorter and more general in tone than some of the leading statements from corporations and charities.[188]

Five comments in submissions can be noted for future consideration:

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[185] NSW Anti-Slavery Commissioner, 'NSW public procurement and modern slavery', Discussion Paper (Sept 2022).
[186] Submission #136.
[187] Submission #84.
[188] Eg, submissions #21, #42, #53, #56, #75, #103, #112, #116, #120.

- The submission from the Monash Centre for Financial Studies reviewed the Commonwealth's second statement, applying the same framework the Centre applies to the statements of ASX300 entities.[189] The Centre found the Commonwealth's statement overall to be informative and to address the mandatory reporting criteria. However, several recommendations were made for including additional information – such as the major locations of overseas suppliers, efforts taken to map out extended supply chains beyond tier one, more details about due diligence actions, and available grievance and remediation processes.
- Another submission observed that the Commonwealth Statement could go further in explaining the special steps the Commonwealth can take to detect and address modern slavery risks – such as the software that it uses to raise red flag alerts, covert investigations it could undertake to check suppliers, and accessing customs data to explore links between suppliers and known modern slavery cases.[190]
- Public awareness of the Commonwealth Statement was said to be low. Given its importance as a benchmarking tool, it was recommended that more be done to promote the Commonwealth Statement, including by making reporting entities more aware of the statement.[191]
- There may be some unproductive duplication of effort in Commonwealth supply chain analysis. A supplier that has been sourced by a Commonwealth corporate entity through a whole-of-government procurement arrangement may be reported upon both by that entity and in the Commonwealth Statement.[192]
- The submission from the NSW Anti-Slavery Commissioner urged the Commonwealth to take note of stronger features of the new NSW framework, established in January 2022 – such as the legal duty imposed on agencies by the Public Works and Procurement Act to take reasonable steps not to procure goods and services tainted by modern slavery; the independent modern slavery audits of agencies undertaken by the NSW Auditor-General; and the consultation between the Commissioner, the NSW Procurement Board and the Auditor-General to ensure the effectiveness of modern slavery due diligence.[193] The Commissioner contrasted those requirements with the Commonwealth legal stipulation that, according to this submission, goes no further than to encourage procurement officers to consider modern slavery in the context of a general prohibition on condoning dishonest, unethical or unsafe supplier practices.[194] A possible step forward is to require agencies to include details of their anti-slavery activities in agency annual reports, and for those report sections to be subject to an annual audit program.

Those are matters that could properly be considered by relevant departments and the Commonwealth Anti-Slavery Commissioner, in particular, could establish a program for consulting widely, in and outside government, on the adequacy of the Commonwealth annual statement. Recommendation 19 proposes that the Department put an annual review arrangement in place.

### Alignment of Commonwealth, state and territory modern slavery reporting

The Issues Paper for this review noted that the reporting requirements in the Commonwealth Modern Slavery Act do not apply to state, territory and local governments (s 8). This is in line with Australian federal arrangements that generally respect the self-governing status of each jurisdiction. The implied constitutional principle of intergovernmental immunity also poses a potential obstacle to a Commonwealth law regulating the management of state public services.[195]

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[189] Submission #85.
[190] Submission #103.
[191] Submissions #26, #119.
[192] Submission #35.
[193] Submissions #136; see also #53, #57.
[194] Imposed by the *Commonwealth Procurement Rules 1 July 2022 (No 2)* (Cth) and the *Public Governance, Performance and Accountability Rule 2014* (Cth). See also I Landau & J Howe, 'Government Purchasing and the Implementation of Modern Slavery Legislation' (2022) 44 *Sydney Law Review* 347.
[195] *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria* (1995) 184 CLR 188

It is nevertheless open to state, territory and local government agencies to report voluntarily under the Commonwealth Act. That is required or encouraged in some Australian jurisdictions.

Several submissions to this review urged that active steps be taken to ensure alignment between Commonwealth, state and territory modern slavery programs and reporting obligations, requirements and standards.[196] This could include an independent assessment of the annual statements from all levels of government.[197] Another option may be cooperation between governments to facilitate effective supply mapping and risk analysis.[198]

Those matters are in part being pursued at present by the Commonwealth-convened Intergovernmental Network on Modern Slavery in Public Procurement. Doubtless, too, the Anti-Slavery Commissioner will become closely involved in consulting with State and Territory colleagues.

**Recommendation 19**

The Attorney-General's Department establish a formal arrangement for annual review of the Commonwealth Modern Slavery Statement, and to consider the role of the Anti-Slavery Commissioner in that review.

[196] Submissions #21, #28, #53, #72, #93, #110, #114, #116,
[197] Submission #85.
[198] Submission #136.

# Chapter 10: Enforcement of the reporting obligation

## Introduction

A common thread in the consultations for this review was that modern slavery reporting in Australia can be upgraded. That is not a surprising view, given the comment in the *Guidance for Reporting Entities* that a principle of 'continuous improvement' underpins the Act: 'statements should improve in quality and demonstrate progress over time as the business community increases its understanding of modern slavery'.[199]

There were mixed views on whether improvement is underway, whether it is taking the right path and, aside from that, whether an assumption of voluntary improvement and compliance is sound.

This chapter examines proposals that have been made for strengthening the enforcement powers in the Modern Slavery Act. The specific issues considered are penalties, infringement notices, publicising the identity of non-compliant entities, complaint handling, and debarment from government procurement (other enforcement options are briefly noted). By and large those enforcement options are ones that require amendment of the Act or a different use of powers already available.

The discussion in this chapter overlaps with other chapters that discuss options for improving the standard of reporting:

- Chapter 11 discusses options for upgrading the administration of the Modern Slavery Act with a view to facilitating better reporting
- Chapter 12 discusses the role that an Anti-Slavery Commissioner could play in stimulating or commanding better reporting.

To provide context for that overall discussion, this chapter commences with a summary of the arguments put to this review for strengthening the regulatory and enforcement structure of the Act.

## The case for strengthening the regulatory and enforcement framework

There were three main themes in the arguments put to this review for a strengthened enforcement framework.

### Inferior standard of modern slavery reporting

It was firstly argued that the quality of modern slavery statements is deficient. This criticism was put, with varying intensity, in the submissions from all quarters – civil society, business, unions, charities, researchers and professional and representative organisations. The arguments were commonly based on the findings reached in independent studies of the first round of modern slavery reporting mentioned in Chapter 2. There were similar criticisms across the studies that a significant proportion of modern slavery statements did not expressly address known modern slavery risks, did not identify risks beyond tier 1 of supply chains, showed inadequate risk assessment, and had insufficient detail on the methodology used to assess the effectiveness of due diligence processes.

The need to act on the findings of those studies is reinforced, it was argued, by the fact that two of the independent studies have been repeated for the second round of modern slavery reporting and found continuing deficiencies. While improvements in reporting were noted, it was said that more could be done:

- The *Broken Promises* study,[200] conducted by several academic and civil society organisations, found that 66% of a sample of entities in the second reporting round had failed to address all mandatory reporting criteria (down from 77% in the earlier sample from the *Paper Promises* report), 56% of commitments made in the first round were unfulfilled, 67% of entities failed to demonstrate in their

[199] *Guidance for Reporting Entities* at 15.
[200] Human Rights Law Centre, *Broken Promises: two years of reporting under Australia's Modern Slavery Act* (Nov 2022); and submissions #9, #38, #109.

report that they were taking effective action, and second round statements could not be found on the Register for 7 entities that had submitted statements in the first round.

- The Monash Centre for Financial Studies 2022 update on reporting by ASX100 companies found substantial improvement in reporting but still gave a 'fail' grade to the reports of 9 entities.[201] The report concluded that the quality of modern slavery reporting was uneven, and commented that the largest companies on the ASX should all aim for top grades in their modern slavery reporting.

A submission to this review from a professional accounting organisation referred to 'the large number of businesses who remain unaware of the existence of the Act and/or of their reporting obligations under the Act'.[202]

While those criticisms of modern slavery reporting are widely acknowledged, some observers comment that the study findings should not be accepted uncritically. The criteria used in the studies are not identical to the mandatory reporting criteria in the Modern Slavery Act. Nor, as to all criteria, is there an agreed or objective standard for reporting, either for compliance or for 'best practice' reporting.

Nor should one assume, it is argued, that an apparent weakness in a modern slavery statement points to a lack of commitment by the reporting entity. There may be unstated reasons for what is left unsaid, and these studies do not explore causes or explanations for non-compliance.[203] Entities are still finding their way in knowing what is expected, and what will be classified as non-compliance. Generally, there was broad agreement throughout this review that government guidance documents could be expanded to give specific guidance on what is required or expected, particularly on identifying risk, due diligence and effectiveness.

### Meagre use of existing compliance powers

The second basis on which the call for a strengthened enforcement framework is put is that the Commonwealth has not made adequate use of the existing compliance powers in the Modern Slavery Act. The Minister may request an entity to explain within 28 days why it has not complied adequately or at all with the reporting requirement, or request an entity to take specified remedial action to ensure compliance (s 16A). The Minister may publish the identity of an entity that does not comply with the request. To date, no entity's name has been published under this procedure.

It should be recognised that the Government expressly stated in the Guide that over the first reporting period of the Act (the first three years) the focus would be on working with reporting entities to ensure they understand their obligations under the Act and that where instances of non-compliance were identified, the Government would engage with non-compliant entities to support them to comply. Only in cases of deliberate and/or severe non-compliance would the Government consider publicly identifying the non-compliant entity. As reported in the Annual Reports, apparent entity non-compliance has related more to entity experience with the Act, rather than deliberate non-compliance.

A less formal compliance option is that the Minister may elect not to register a modern slavery statement that is assessed as not complying with the requirements of the Act (s 19). There has been frequent use of this mechanism – the Department (through the MSBEU) scrutinises all statements before they are published on the Register; it corresponds with entities about possible non-compliance; statements are not published on the Register if they fail to comply with the governing board approval and signature requirements of the Act; and the Department's annual report on the Act provides statistics and commentary on compliance issues and trends.[204]

A perceived weakness in the Department's scrutiny activities is that there is no published list of the names of entities that are required to report under the Act. As a consequence, the most serious non-compliance action

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[201] Monash Centre for Financial Studies, *Modern Slavery Disclosure Quality Ratings: ASX100 Companies Update 2022*; and submission #85.
[202] Submission #51. See also submissions #40, #89.
[203] Submission #90.
[204] Attorney-General's Department, *Implementing the Modern Slavery Act 2018: The Australian Government's Annual Report, 1 January 2021 – 31 December 2021.*

– failure to report – may fall under the scrutiny radar. The practical difficulties of this issue have been dealt with in Chapter 10.

Building on that picture, submissions to this review argued that compliance enforcement would be elevated in importance if the Act contained a greater range of powers and sanctions. It would send a clearer message to entities that compliance was important and that non-compliance could be dealt with effectively, sternly and publicly.

### Alignment with regulatory best practice

The third basis on which a strengthened enforcement framework was called for is that the Modern Slavery Act compares unfavourably with other Commonwealth regulatory models, including those dealing with reporting obligations.

This argument was put in two ways. One was by reference to the highly regarded theory of effective regulation known as responsive regulation.[205] The theory is classically represented as a pyramid of enforcement options and powers. At the base of the pyramid are soft-regulatory options that promote voluntary compliance, principally through interaction – responsive supervision – between the regulator and the regulatee. The regulator can respond to unresponsiveness and serious breaches by moving up the pyramid and invoking options that are progressively more severe, replacing education and persuasion (at the base) with direction and sanction (at the apex). Formal powers that may be exercised at the middle stage include infringement notices and enforceable undertakings.

The expectation is that the spread of regulatory work will reflect the pyramidal structure. The bulk of regulatory work will aim for voluntary compliance, with penalties and prosecution as a last resort option. Those severe sanctions nevertheless play an important influential role of reminding market players of what may follow if voluntary compliance strategies are ineffective.

Another way the argument was put was by reference to a report of the Australian Law Reform Commission on *Corporate Criminal Responsibility*. The Commission applied the concept of a 'smart regulatory mix' to describe the regulatory framework necessary to deal with transnational crime and corporate human rights impacts (giving modern slavery as an example).[206]

The smart regulatory mix would include both criminal and non-criminal regulatory mechanisms designed to work in a complementary way to respond to conduct of varying seriousness and culpability. The smart regulatory mix options listed by the Commission range progressively through: voluntary guidelines and commitments: complaints mechanisms; statutory disclosure requirements; mandatory due diligence and civil regulatory mechanisms; civil or criminal liability for failure to prevent specified misconduct; and direct criminal liability for commission of a fault offence. Again, the range of options is designed to incentivise meaningful corporate behaviour.

Submissions to this review noted that many other Commonwealth statutes reflect those theories of responsive regulation and smart regulatory mix. Regulators that have access to a range of regulatory options, ranging from the consensual to the punitive, include the Australian Charities and Not-for-Profits Commission (ACNC),[207] Australian Competition and Consumer Commission (ACCC),[208] Australian

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[205] Articulation of the theory in Australia is often traced to I Ayres & J Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (OUP, 1992). Different theories of regulation are explained in Senate Standing Committee on Economics, *The Performance of the Australian Securities and Investments Commission* (2014) Ch 4, 'Regulatory theories and their application to ASIC'. See submissions #15, 24, #69, #109, #127.
[206] ALRC, *Corporate Criminal Responsibility* (Report No 136, 2020) at 467 – 474. See submissions #21, #84, #116, #136.
[207] *Australian and Not-for-Profits Commission Act 2012* (Cth) Ch 4.
[208] *Competition and Consumer Act 2010* (Cth); Australian Consumer Law, *Compliance and Enforcement: How Regulators Enforce the Australian Consumer Law* (2017).

Transaction Reports and Analysis Centre (AUSTRAC),[209] and the Australian Information Commissioner (OAIC) for privacy regulation.[210]
This modern approach to regulation is supported by the *Regulatory Powers (Standard Provisions) Act 2014* (Cth). The Act lays down a framework of standard regulatory provisions that can be adopted by other Acts. These include civil penalties, infringement notices and enforceable undertakings.

The Modern Slavery Act, it was argued, should be strengthened by alignment with this widely respected and endorsed approach to business regulation in Australia.

## Penalties

The topic of penalties hovers over the design and development of Australian modern slavery reporting laws. It was a prominent issue in the inquiry conducted by the Joint Standing Committee that led to the *Hidden in Plain Sight* report. The Committee struck a balance between competing views by recommending that penalties apply from the second year of reporting onwards for entities that fail to report.[211] The three-year review of the Act should consider the issues of penalties for failure 'to adequately report on the prescribed reporting areas', and failure 'to take action, or sufficient action, on modern slavery found within [a] supply chain'.

The Government did not fully accept those recommendations, instead preferring an approach that 'Businesses that fail to take action will be penalised by the market and consumers and severely tarnish their reputation'.[212] The need to further review the issue was nevertheless set in place. Section 24 of the Act requires the three-year to consider 'whether additional measures to improve compliance with the Act and any rules are necessary or desirable, such as civil penalties for failure to comply with the requirements of this Act'.

Penalties have likewise been a central topic in the design of other modern slavery reporting laws. The NSW Modern Slavery Act, before it was amended in 2021 to remove the reporting obligation on the private sector, provided that a civil penalty may apply if a business that was required to prepare an annual modern slavery statement either failed to do so or knowingly included materially false information in its statement.[213] The maximum penalty was 10,000 penalty units (then $1.1M).

The Independent Review of the UK Modern Slavery Act in 2019 recommended that Government bring forward proposals for the gradual introduction of sanctions for non-compliance with the reporting obligation.[214] The sanctions would commence with a warning letter, and rise to a fine (as a percentage of turnover), a court summons or disqualification of a director. A similar range of penalties can be applied under many of the European due diligence laws.[215]

Not surprisingly, the topic of penalties figured as a major topic in this review.[216] There were essentially three schools of thought:
The first is that it remains undesirable to introduce penalties into the Act.[217] Modern slavery reporting is an evolving discipline and is likely to continue improving. The surest foundation for continued improvement, it is argued, is stronger government guidance and multi-stakeholder collaboration to better understand how modern slavery risks can be addressed in multifarious and complex supply chain networks. The advent of an Anti-Slavery Commissioner could bolster that evolutionary process. There is also a risk, it is argued, that a punitive regime will encourage a legal compliance culture rather than a supportive and open-minded culture.

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[209] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) Part 15.
[210] *Privacy Act 1988* (Cth) Part VIB.
[211] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (2017) Rec 19, para 5.171.
[212] Second Reading Speech for the Modern Slavery Bill, House of Representatives, 28 June 2017 at 6755.
[213] *Modern Slavery Act 2018* (NSW) s 24.
[214] *Independent Review of the Modern Slavery Act: Final Report* (2019) Recommendations 25, 31.
[215] See Appendix E to this report; and submission #109.
[216] Submissions that together provide a full examination of the issue are #11, #103, #109.
[217] Submissions #46, #71, #73, #82, #95, #100, #104, #105, #113, #114, #132, #134.

The second school of thought is that penalties should be introduced for unequivocal reporting failures that breach objective standards.[218] Four common suggestions are:

- *Failure to submit a statement*: the key issues would be whether the entity falls above the reporting threshold (that is, whether it is a 'reporting entity' as defined in the Act), and whether there was inexcusable failure by the entity to submit within a reasonable time after the end of the reporting period.
- *Submission of a materially false statement*: a typical qualification on offences of this type is that the entity has knowingly or recklessly included false or misleading information in a statement.
- *Failure to comply with a statutory direction to take specified remedial action* to ensure compliance with the reporting requirements of the Act. This example is discussed further below, since much depends on the specified remedial action that is required to be taken.
- *Failure to have a due diligence system in place*: Recommendation 11 in Chapter 7 proposes that entities be required by the Act to have in place a due diligence system that meets requirements that are set out in rules made under the Act.

The third school of thought is that penalties should apply broadly to any failure to satisfactorily address all mandatory reporting criteria.[219] The offence could be framed in that general way, or instead be particularised – for example, as a failure to report on specific modern slavery risks or incidents that were reasonably detectable in the entity's supply chains, or a failure to take due diligence action in relation to such risks or incidents.

A range of subsidiary issues can also arise. For example, if it is an offence not to comply with a statutory direction or infringement notice, who can issue that direction/notice – the Minister, or an Anti-Slavery Commissioner? What procedure applies to the issue of the notice and the opportunity to respond? Similarly, as to monetary penalties, are they imposed on the entity that submitted a statement or on the responsible member of the entity that approved the statement? And what is the penalty scale?

Subsidiary issues of that kind are not taken up directly in this report, as the response to those issues is largely conditional on the prior and unresolved question of what form the penalty offences take.

### Analysis

The topic of penalties will not go away. Most of the submissions to this review that argued against penalties qualified that opposition by saying that it was premature to introduce penalties, or that modern slavery reporting had not matured to the point that penalties had a role to play.

This review believes that, at a minimum, penalties should apply to the four examples given above that would be a breach of an objective standard – failure to submit a statement, submission of a false statement, failure to have a due diligence system in place, and (subject to what is said below) failure to comply with a statutory direction to take specified remedial action. This is proposed in Recommendation 20, but with the qualification that the penalty provisions should not apply to entities within the $50-$100M reporting band until two years after they become subject to the reporting requirements in the Act.

The reason for introducing penalties into the Act can be shortly stated. It is incongruous that the Modern Slavery Act imposes a reporting duty as regards a matter of fundamental global human rights importance but contains no robust procedure to ensure that duty is performed. The experience to date in Australia has not borne out the promise that good faith and the fear of adverse publicity are enough to ensure that statements will be submitted by all entities that are required to do so.

It is customary in Australian legislation that duties to submit reports or information to government are accompanied by offence provisions for failing to report or for submitting false information. There are countless offence provisions of that kind in Australian statutes. If similar offences were introduced into the

[218] Submissions #41, #56, #64, #98, #107, #126, #127.
[219] Submissions #24,#75, #84, #85, #89, #99, #102, #110, #112, #119, #133, #134.

Modern Slavery Act, it is reasonable to speculate that only on rare occasions would a prosecution be commenced and a penalty imposed. The accepted wisdom is that offence provisions of that nature drive home the importance of the duty to report and to do so faithfully. The spectre of possible conviction becomes a vibrant element of the conversations occurring within entities and the business community about reporting obligations. This stratagem receives strong endorsement in regulatory theory, as outlined at the beginning of this chapter.

The difficult issue is whether penalties should apply more broadly, in effect to a failure to submit an adequate modern slavery statement, or a failure to display due diligence in responding to modern slavery risks.

Those options are not recommended in this report. There is likely to be an element of subjective judgement involved in deciding if reporting is adequate or effective. What constitutes adequate reporting is an essential conversation in the context of modern slavery reporting, but there is a risk of it being a confined and guarded conversation if a motivating objective is to avoid the threat of penalty.

A strong feature of the Australian modern slavery reporting agenda is the collaboration and open conversation that has occurred between government, business, civil society and researchers. The introduction of penalties for inadequate reporting could undermine those developments by altering the conversation (and the participants) into one about legal compliance and regulatory risk management.

There is also an important practical dimension to consider in developing and placing reliance on a far-reaching penalty regime. If an entity resists the decision to impose a penalty the matter can only be resolved by a court. In Australia a conclusive determination to impose a monetary fine is classified as an exclusively judicial function that can only be exercised by a federal court under Chapter III of the Constitution.[220] By and large, court proceedings – particularly those contesting punitive action by a government agency – can be time-consuming and resource intensive.

A substitute procedure is for a government officer to issue an infringement notice requiring payment of a specified penalty. The entity can choose to pay that penalty, or instead defend the matter in court (much like an on-the-spot driving fine). Alternatively, and without declaring its hand, the entity could question the decision to issue the infringement notice on administrative law grounds. Formal options for doing so are by a complaint to the Commonwealth Ombudsman, a request for a statement of reasons under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13, or by commencing proceedings under that Act for a declaration that the decision to issue the notice was legally flawed. Among the grounds for seeking the declaration would be that there was a breach of procedural fairness in the decision to issue the notice, the decision lacked a sound evidentiary basis, or the decision maker failed to consider a relevant matter.[221]

The importance attached to procedural and legal regularity in the issue of infringement notices is already embedded in the Modern Slavery Act. Section 16A(5) provides that an entity may apply to the Administrative Appeals Tribunal for review of a decision by the Minister to place a notice on the Register that the entity has failed to respond properly after being notified of non-compliance with the reporting requirements of the Act.

It is not unrealistic to expect that disputation would become an active feature of the regulatory landscape if penalties were applied to inadequate reporting of a substantive kind. Thousands of entities report under the Act and face the prospect of a ruling that their reporting is inadequate. Many of those entities will have ready access to professional legal services and would resist an adverse ruling that carried a punitive stigma.
For those reasons this review does not support the proposal to introduce penalties that are far-reaching in scope. Doing so could introduce a regulatory dynamic that ran counter to the present emphasis on learning, transparency and collaboration. It could become time-consuming and distracting for government to decide whether the penalty pathway should be pursued. As a practical matter, a new departmental section would probably have to be created to issue infringement notices or commence civil penalty proceedings, as the

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[220] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
[221] R Creyke, M Groves, J McMillan & M Smyth, *Control of Government Action: Text, Cases & Commentary* (2022).

style of that work would potentially conflict with the other informal advisory and support work that is currently undertaken by the MSBEU.[222]

The final point to comment on is how the existing notice procedure in s 16A of the Modern Slavery Act would fit within this proposed scheme – that penalties be applied to unequivocal reporting breaches, but not to inadequate reporting. Section 16A authorises the Minister to make a written request to an entity to 'undertake specified remedial action' to comply with a requirement under ss 13 or 14 of the Act to give a modern slavery statement. One of the requirements in ss 13 and 14 is that a statement complies with s 16 of the Act which specifies the mandatory reporting criteria.

Some of the requirements in ss 13 or 14 are of an objective kind – such as ensuring that a statement was approved by the principal governing body of the entity, is signed by a responsible member and describes the process of internal consultation that was undertaken in preparing the statement. On the other hand, a less definitive standard in s 16 is that a statement 'describe the risks of modern slavery practices in the operations and supply chains of the reporting entity'.

Whether a failure to comply with a Minister's request under s 16A should be a penalty offence depends (on the reasoning above) on the nature of the Minister's request. It is unnecessary to take this issue further in this review, other than to reiterate the distinction earlier drawn between breaches of objective statutory standards and breaches of standards that are more elastic in nature. The practical resolution may be to revise the Minister's power in s 16A to differentiate between different kinds of notice, and to attach penalties to some but not other breach notices. That distinction lies behind the wording of Recommendation 20, proposing that it be an offence to fail to take 'specified remedial action' to comply with the reporting requirements of the Act.

A final point to note is that existing offence provisions in other Commonwealth legislation may potentially apply to modern slavery reporting. An example is that a penalty can be applied under the *Australian Consumer Law* s 18 for engaging in conduct in trade or commerce that is misleading or deceptive.[223] The Department may examine, in reviewing the *Guidance for Reporting Entities*, whether to draw attention to provisions of that kind

## Publicising the identity of non-compliant entities

An underlying premise of the Modern Slavery Act is that publication of statements on the Register will stimulate consumer and investor scrutiny of statements, and that in turn will affect business reputation and competitiveness.

An apparent gap in that premise is that there is no published list of entities that have failed to comply with their reporting obligation.[224] That gap can be filled, it is argued, by publication of three lists:

- *List 1*: the names of entities that submitted a modern slavery statement that is published on the Register. This would make it easier to navigate the Register without having to use the search function.
- *List 2*: The names of entities that were required to submit a statement by reason of falling within the definition of 'reporting entity' for a particular reporting year. A comparison of this and the preceding list would make it easier to identify entities that had failed to submit a statement. (The *Hidden in Plain Sight* report recommended a list of this kind.[225])
- *List 3*: The names of entities that submitted a statement that did not comply with the reporting requirements in the Act, including the mandatory reporting criteria. This would enliven consumer and

[222] Submission #103.
[223] Submission #126.
[224] Submissions #38, #49, #53, #104, #109, #118, #126, #127, #129.
[225] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight* (2017) Rec 18, para 5.142.

investor scrutiny. A public register of this kind is required to be established in NSW by the Anti-Slavery Commissioner applying to government agencies.[226]

In principle, those are prudent suggestions. Self-evidently, a public register should achieve the intended purpose of being a useable database that sheds light on the adequacy of the actions of those who have or are required to place information on the register.

It then becomes a question of whether it is practicable to construct each list. That is doubtful.

List 1 is unlikely to pose a practical problem, even though the list would comprise thousands of names. Compilation of this list would be easier if (as proposed in Recommendation 15) every statement included a coversheet, that could be designed as an online form that fed into an internal database. The coversheet could list the names of entities covered by a joint statement, and note any change in an entity's name in the reporting year. The list could have permutations – for example, an alphabetical list of entities, separate lists of entities by industry sector, and hypertext links to entity statements on the Register. Recommendation 22 proposes that the Department publish an annual list of statements published on the Register.

List 2 would have to be compiled by government, principally by accessing taxation records on corporate revenue. Even if that was straightforward the practical challenge for government would be to examine if an entity was covered by a joint statement, had gone through a corporate restructure or renaming since the date of the last available tax information, or had fallen below the reporting threshold since submitting its last taxation return.[227] Currently, taxation records would only be available for entities above the $100M mark. There is also the risk of non-Australian entities not being captured.

Even if those tasks were manageable it is questionable whether the time spent doing them would be disproportionate. List 1, of the names of entities that *had* reported, would assist in identifying those which *hadn't*.

Another pragmatic step would be to require any entity that had submitted a statement in an earlier year but was not doing so in the current year to notify the department and of the reason why. This would at least address the problem raised in the *Broken Promises* report that there was no available explanation as to why seven entities had submitted statements in the previous year but not in the following year.

A new offence of failing to report under the Act (Recommendation 20) is also directed at the same objective of ensuring that the reporting obligation is not disregarded and may be detected.

List 3 would pose no practical difficulty if it was a list only of entities that had been adjudged by a court to be in breach of a reporting obligation. However, it is likely that such a list would be small and add little to what is otherwise known.

Many submissions to this review argued that there should be a comprehensive published list of non-compliant entities – often dubbed a 'naming and shaming' strategy. The submissions pointed to the impact of the independent studies of modern slavery reporting that list the names of entities in the study and the assessment finding or score given to each entity.

The current practice of the MSBEU is to examine all statements upon submission to assess if they formally comply with the requirements of the Act.[228] A statement that is likely to be non-compliant for not including details of principal governing body approval or the signature of a responsible member is not published on the Register, is returned to the entity, and may be re-submitted in a revised form. A statement that is assessed as likely to be non-compliant for not adequately addressing the mandatory reporting criteria may be published on the Register and the entity may be advised of this assessment and given guidance for future statement preparation.

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[226] *Modern Slavery Act 2018* (NSW) s 26.
[227] Submission #121 questions the methodology currently used to estimate the number of reporting entities, and argues that the Register overstates this figure.

The Act already provides for a mechanism to publicly identify serious cases of non-compliance. This is a discretionary power for serious cases and importantly provides for merits review of such an action. In the Government's most recent Annual Report on the implementation of the Act, apparent non-compliance appears to reflect a lack of familiarity and experience amongst some entities with the Act and the supporting guidance rather than deliberate non-compliance.

On balance, it is therefore recommended that the Attorney-General's Department examine the practicability of making available additional information regarding reporting entities' compliance under the Modern Slavery Act (Recommendation 23).

## Using government procurement processes as a compliance and enforcement tool

A well-established trend in government and private sector procurement is to have regard to whether a tenderer is complying with laws and principles relating to human rights, workplace safety, anti-discrimination and institutional integrity. Tenderers are often required to address those issues in their tender proposals. Anecdotally, entities comment that they frequently access the Register during procurement processes to examine the statements lodged by tenderers. Contracts with suppliers may include a clause requiring continuing adherence to modern slavery principles and reporting processes.[229]

This issue is addressed at length in the annual Commonwealth Modern Slavery Statements. They explain the steps taken by government to develop model tender and contract clauses, risk screening tools, supplier questionnaires, a rapid response framework to address modern slavery risks in procurement during emergency situations, and a Performance Review Framework.

The 2021-22 Commonwealth Statement explained that tenderers are required to identify, assess and address risks of modern slavery in the provision of goods and services. Collaborative work was undertaken with external bodies such as the Cleaning Accountability Framework to better understand risks in the Government's procurement processes for cleaning services. It was noted that the 'Toolkit of Resources for Government Procurement Officers' had been downloaded 10,000 times from the Register. There is an Interdepartmental Committee on Modern Slavery in Public Procurement.

In NSW the *Public Works and Procurement Act 1912* imposes a duty on government agencies to 'take reasonable steps to ensure that goods and services procured by and for the agency are not the product of modern slavery within the meaning of the *Modern Slavery Act 2018*' (s 176(1A)). A major focus of the recent work of the NSW Anti-Slavery Commissioner has been to articulate the 'reasonable steps' that agencies should take to comply with that statutory duty.[230]

In Western Australia, the *Procurement (Debarment of Suppliers) Regulations 2021* provides that a supplier may be debarred from supplying goods, services or works to a State agency if it has failed to comply with the reporting requirements applying to it under the Commonwealth Modern Slavery Act.

Several submissions to this review urged that measures of that kind be made explicit in the Commonwealth modern slavery policy framework.[231] That could be done in several ways, for example:

- The Government statement responding to this review could confirm that priority and preference will be given in government procurement to businesses that meet a high standard in modern slavery reporting. This would essentially echo present practice, but would link that practice more explicitly to the operation of the Modern Slavery Act.
- Commonwealth legislation could provide (in similar terms to NSW legislation) that government agencies have a duty take reasonable steps to ensure that goods and services are not obtained from any business that has failed to comply with the reporting requirements of the Modern Slavery Act, or

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[229] Though it has been questioned whether those contract clauses ('extraneous purpose clauses') can be legally effective: N Seddon, *Government Contracts* (7th ed, 2023) at [1.23]
[230] Eg, NSW Anti-Slavery Commissioner, 'NSW public procurement and modern slavery', Discussion Paper #001 (Sept 2022).
[231] Eg, submissions #84, #86, #89, #91, #102, #109, #112, #136. See also F McGaughey et al, 'Public Procurement for Protecting Human Rights' (2022) 47 *Alternative Law Journal* 143.

has otherwise engaged in actions that contribute to the risk of modern slavery. A provision along those lines could be added, for example, to the *Public Governance, Performance and Accountability Act 2013* (Cth).[232]

- The Australian Law Reform Commission report on *Corporate Criminal Responsibility* recommended that the Commonwealth develop a debarment regime to restrict corporations convicted of Commonwealth offences from obtaining government contracts.[233]

Measures of that kind do not fall squarely within the Terms of Reference for this review and, accordingly, are not the subject of a recommendation. They are matters that the Attorney-General's Department may choose to take up with other agencies.

## Complaint mechanisms

Complaint and grievance processes have a role to play at many stages in managing modern slavery risks – in the complaint and whistleblowing procedures put in place by entities and their suppliers, in 'hotline' mechanisms developed by law enforcement and similar agencies, in the regulatory oversight work of an Anti-Slavery Commissioner, and in government administration of the Register. The common theme in all those mechanisms is that a formal complaint/grievance channel should be accessible by workers, advocates and civil society observers, as they can be aware of problematic issues that may escape the notice of employers and government agencies.[234]

It is appropriate, accordingly, that a formal procedure be established by which a member of the public can make a complaint to the Department regarding entity reporting under the Act and the publication of statements on the Register. If such a procedure is established it is unavoidable that complaints will be received about the content or quality of published statements. However, there are well-established precedents for requiring that complaints follow a two-stage process: a person must first make a complaint to the entity concerned, and if dissatisfied with the response may take that complaint to the separate complaint handling body. That, for example, is the process adopted by public and private sector ombudsman, privacy commissioners and human rights and anti-discrimination agencies.[235]

A complaint procedure could be established either within the Modern Slavery Act or by executive action. Recommendation 24 proposes that the Department consider establishing a complaints mechanism by executive action.

## Other enforcement proposals

A few other suggestions for enforcement options made in the submissions can be briefly noted:

- Consideration be given to adding a provision to the *Corporations Act 2001* (Cth) for the disqualification of a person as a director of a corporation for a breach by that person of the reporting requirements of the Modern Slavery Act.[236]
- Consideration be given to exclusion from the Australian Stock Exchange of an entity that is in breach of its reporting obligations under the Modern Slavery Act.[237]
- Consideration be given to introducing a procedure requiring an entity to give an enforceable undertaking that it will comply properly with the reporting requirements of the Modern Slavery Act; breach of that undertaking would be a civil penalty offence.

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[232] Submission #136.
[233] ALRC, *Corporate Criminal Responsibility* (Report No 136, 2020) Rec 10; submissions #109.
[234] Submissions #2, #24, #41, #84, #97, #102.
[235] Eg, *Privacy Act 1988* (Cth) s 40.
[236] Submission #109. The Corporations Act contains disqualification provisions in Part 2D.6.
[237] Submission #21.

**Recommendation 20**

The Modern Slavery Act be amended to provide that it is an offence for a reporting entity:

- to fail, without reasonable excuse, to give the Minister a modern slavery statement within a reporting period for that entity
- to give the Minister a modern slavery statement that knowingly includes materially false information
- to fail to comply with a request given by the Minister to the entity to take specified remedial action to comply with the reporting requirements of the Act
- to fail to have a due diligence system in place that meets the requirements set out in rules made under the Act.

The penalty offence provisions should not apply to an entity with a consolidated annual revenue of between $50-100M until two years after the entity has become subject to the reporting requirements of the Act.

**Recommendation 21**

The Modern Slavery Act be amended to provide that an entity that will not be lodging a modern slavery statement in a year following the earlier lodgement of a statement, will notify the Minister before the end of the reporting year, with an explanation as to why a statement will not be lodged that year.

**Recommendation 22**

The Attorney-General's Department compile, and publish on the Modern Slavery Statements Register, an annual list of entities that have submitted statements that are published on the Register.

**Recommendation 23**

The Attorney-General's Department examine the practicability of making additional information available regarding reporting entities' compliance with the reporting requirements of the Modern Slavery Act.

**Recommendation 24**

The Attorney-General's Department examine the practicability of establishing a procedure for the receipt and investigation of complaints from the public regarding entity reporting under the Modern Slavery Act.

# PART 3 – REVISING THE ADMINISTRATION OF THE MODERN SLAVERY ACT

# Chapter 11: Executive administration of the Modern Slavery Act

## The executive role in administering the Act

This chapter deals with an assortment of issues that are partly covered in other chapters. The reason for taking them up again in this chapter is they have the common theme that all concern the executive role of the Attorney-General's Department in administering the Act.

The present arrangement is that the Department discharges essentially all the functions necessary for the operation of the Act. As explained in Chapter 2, the Department manages the Register, it receives and examines all statements before they are accepted for publication on the Register, publishes the *Guidance for Reporting Entities*, operates an online helpdesk to provide advice and support to the business community about reporting obligations, convenes several consultation groups and interdepartmental committees, prepares the Commonwealth Modern Slavery Statement, compiles an annual report to Parliament on the operation of the Act, and provides policy advice to government on the operation of the Act.

Most if not all those functions could be transferred to the Anti-Slavery Commissioner when that office is established. There are well-established precedents for that being done. Statutory agencies such as the Office of the Australian Information Commissioner, the Australian Human Rights Commission, the Australian Charities and Not-for-Profits Commission and the Workplace Gender Equality Agency perform a wide range of regulatory, reporting, investigatory, educational and advisory functions in relation to government and the private sector. By and large, the portfolio departments for those agencies discharge only the function of providing advice to government.

The NSW Modern Slavery Act envisages that the Anti-Slavery Commissioner in that state will discharge all the key functions that form part of the modern slavery program. This includes public facing functions of an advocacy, advice and support nature, as well as internal government coordination functions to monitor the effectiveness of government policies and to develop a procurement framework attuned to modern slavery concerns.

This report supports the current Commonwealth arrangement in which the Attorney-General's Department continues to play a substantial administrative, coordination and leadership role. A core element of the Commonwealth's work in this area is to manage the Register. For practical reasons that function should remain with the Department. It is a high-workload administrative task that is poised to grow over time.

It is hard to see any added value in transferring that function to the Anti-Slavery Commissioner. The function remains the same in whatever hands it rests. The risk, in fact, is that the function would overload the other work of the Commissioner if a transfer occurred. Managing the Register would have to take priority over other work. A breakdown in the successful operation of the Register would strike at the heart of the objectives of the Modern Slavery Act.

Many activities performed under the Modern Slavery Act are connected to the operation of the Register. They include examining statements to check for compliance with the Act, issuing notices to entities that are non-compliant, and providing advice to entities both informally and through the publication of the *Guidance for Reporting Entities*. Those functions should remain with the Department (though, as noted below, consultation with the Commissioner can occur in discharging them).

Overall, where executive administration of the Modern Slavery Act should sit is a matter for government, which would also involve consideration of what is beneficial to reporting entities, the timing of these decisions, and practical implementation.

Many recommendations are made in other chapters of this report for enhancing the modern slavery reporting process. They are generally framed as recommendations that should be acted upon by the Department. Among them are recommendations to:

- further develop the *Guidance for Reporting Entities* (Recommendations 5, 6, 7, 10, 16, 25)
- develop a template, coversheet and online portal for statement preparation (Recommendations 13, 14, 15)
- prepare an annual list of reporting entities (Recommendation 22)
- examine the practicability of making additional information available regarding reporting entities' compliance with the reporting requirements under the Act (Recommendation 23)
- consult with business about areas of legislative uncertainty in the Act (Recommendation 17), and
- establish a complaint handling procedure relating to entity reporting under the Act (Recommendation 24).

It is important at this point to add that the Department's work in managing the Register and liaising with business was commended by many participants in this review. There were comments that the work undertaken by the Modern Slavery Business Engagement Unit has been positive, helpful, capable and committed.[238]

This chapter builds on the earlier recommendations by proposing additional functions and activities. Most of them can be undertaken either by the Department or the Commissioner – though a preference for one or the other is expressed in this report. The topics discussed are:

- *Reporting guidance*: many suggestions have been made to this review for extending the current *Guidance for Reporting Entities*. It is proposed that this work remain with the Department, though there is a role for the Commissioner in releasing specialist or targeted guidance.
- *Declaration of high-risk matters*: the proposed new procedure of publishing occasional declarations of high risk matters that are to be addressed in modern slavery reporting and due diligence programs could be discharged either by the Commissioner or the Minister.
- *Facilitating industry and stakeholder collaboration*: this should be a leading role of the Commissioner and, depending on the nature of the task, will continue to be undertaken by the Department.
- *Establishing a statement review program*: this could be led by the Commissioner, in consultation with the Department.
- *Upgrading the Online Register of Modern Slavery Statements*: it is proposed that this function remain with the Department.
- *Conducting a periodic review of the operation of the Modern Slavery Act*: this could be done either by the Commissioner or through an independent review process instigated by the Minister.

## Reporting guidance

The *Guidance for Reporting Entities*, supported by the advice and consultation work of the MSBEU, has played a central role in implementing the Modern Slavery Act in Australia. Heavy reliance is placed on that assistance. In the online survey of reporting entities conducted by this review, 85% of the 500 or so respondents said they made use of the guidance material in preparing their latest modern slavery statement, and 8% had contacted the online helpdesk.[239]

Numerous suggestions were made to this review for extending and adapting the guidance material to deal with issues that had arisen in practice. This was sometimes put on the basis that the initial emphasis in the guidance documents was understandably placed on statement preparation and compliance with the Act.[240] It is now time, it was suggested, to shift gear and address deeper issues – such as how to undertake due diligence, measuring the effectiveness of risk management activities, and specifying the minimum expectations for acceptable modern slavery reporting.

[238] Eg, submissions #90, #103, #109, #112, #127.
[239] Appendix D, Figure 8.
[240] Submissions #50, #51, #53.

The following discussion aims to draw out themes in the suggestions that were made for extending the current guidance material. It is readily apparent that the individual suggestions will require consultation across the range of interested stakeholders, and collaboration between the Department, the Commissioner, and forums such as the MSEAG.

It is clear too that it will take some time to work through these suggestions. To that end, Recommendation 25 proposes that the Department develop and publish a forward work program on the review of the *Guidance for Reporting Entities* and other guidance material. That will enable a decision to be made on whether particular suggestions can be taken up by the Commissioner, either in separate publications that provide specialist guidance, or in consultation forums convened by the Commissioner.

Recommendation 26 proposes that the Act be amended to provide expressly that the Minister shall arrange for guidelines to be published on Part 2 of the Act (the reporting requirements for single, joint and Commonwealth statements) and that reporting entities are to be encouraged to have regard to any such guidelines. That already occurs, but this recommendation will elevate the status of the guidelines.

There are many precedents for guidelines being given a legislative anchor in that way.[241] A statute may sometimes add that the bodies to whom the guidelines are directed *must* have regard to them.[242] That formulation is not adopted in Recommendation 26 because the obligation is difficult to enforce in practice, and may at times run up against the practical dilemma that the guidelines are out-of-date.[243]

Recommendation 9 in Chapter 6 proposes that the Department commence an examination of whether the mandatory reporting requirements should be prescribed in a rule made under the Act, rather than (at present) in the Act itself. That would facilitate elaboration of the reporting requirements, without detracting from the current style and brevity of the Act, and in a form that could more easily be amended.

Another prefatory remark is that the *Guidance for Reporting Entities* already provides guidance of the kind that was suggested in some submissions (an example given in Chapter 6 is the current guidance on mandatory reporting criterion number 5: 'effectiveness'). That, again, is an issue that can be taken up during the Departmental review.

For ease of reference, the following summary of suggestions for improved guidance material repeats some of the discussion from earlier chapters.

### Mandatory reporting criteria

Chapters 6 and 7 discussed suggestions that were made for amending the current guidance on the mandatory reporting criteria in s 16 of the Act. They include:

- *Criterion 2*: clarify whether particular activities fall within 'operations' or 'supply chains'
- Expand on how those terms apply to upstream and downstream modern slavery risks, and in particular to risks beyond tier 1 of a supply chain
- *Criterion 4*: consider whether to revise the current guidance on assessing modern slavery risks on aspects such as organisational mapping, internal teamwork, worker engagement, grievance mechanisms, and staff training; and reduce the overlap between this and criterion 3 (describing risks)
- *Criterion 5*: give greater direction on how effectiveness can be assessed through adoption of qualitative and quantitative metric and performance indicators
- *Criterion 6*: explain more fully the information to be provided in describing consultation between affiliated entities
- *Criterion 7*: expand on the other types of information that can be provided, such as external collaboration and liaison activities

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[241] Eg, *Privacy Act 1988* (Cth) ss 26V, 28.
[242] Eg, *Freedom of Information Act 1982* (Cth) s 93A(2).
[243] Eg, see the discussion of this issue in relation to the FOI Act guidelines in M Batskos, 'The Unsettled Status of FOI Guidelines of the Australian Information Commissioner' (2021) 101 *AIAL Forum* 65.

- *Statement approval*: give more practical guidance (with optional templates) for meeting the approval and signature requirements of the Act
- *Joint statements*: consider whether current guidance on joint statements is adequate.

### Tailored guidance

The *Guidance for Reporting Entities* notes throughout that an entity's reporting statement will need to be tailored to factors such as the nature and size of the entity, its business operations and supply chains, and the modern slavery risks that it identifies. These factors may change over time. Examples are given in the Guide of how variables of that kind can be addressed in a statement.

It was suggested that this feature of the Guide be developed further on the back of the experience of reporting in the first three years. Three areas were singled out for the development of tailored guidance:

- tailored guidance for particular sectors such as the financial, tertiary, manufacturing, charity and residential sectors (chapter 6)
- guidance that addresses particular types of risk in more detail, such as child labour or sexual exploitation, and
- guidance adapted to smaller entities, in the event that the reporting threshold is lowered below $100M (see Chapter 5). A variation of this suggestion is that specific guidance be developed for not-for-profit bodies, and for Aboriginal and Torres Strait Islander organisations that are reporting entities.

Those (and similar) suggestions could be taken up in separate publications by the Department or the Commissioner, or as a multi-stakeholder initiative between government, industry and civil society to develop specialist publications that are broadly recognised or endorsed. Precedents of that kind that already exist (from non-government partnerships) are the publications 'Addressing Modern Slavery in the Clean Energy Sector'[244], 'Modern Slavery within Maritime Shipping Supply Chains'[245] and the 'Cleaning Accountability Framework'.[246]

### Good reporting practice

The Modern Slavery Act sets a minimum standard for modern slavery reporting, to the extent that statements are required to address the seven mandatory reporting criteria and comply with other approval and signature requirements in the Act.

There was a strong call for the guidelines to go a step further.[247] This was put in various ways – the guidelines could define what is best practice (as distinct from legally required); elaborate on what is an acceptable standard for reporting; explain what government is looking for; give examples of best practice reporting; define what is meant by continuous improvement; create an open-source benchmarking framework; provide targets to be met, such as the percentage of lower tier suppliers to be mapped; nominate tools, software or blockchain technology that will assist in addressing risks and supply chain mapping; explain how external verification or audit can be used to gauge statement quality; or work with bodies such as Standards Australia to develop an ISO standard for reporting and certification.

Some of those suggestions are probably partially met already in supplementary guidance documents that are separately published on the Register. The documents relating to several of the mandatory reporting criteria provide hypothetical examples of 'A good practice response', 'A compliant response' and 'A non-compliant response'. It may be that that supplementary guidance is not well-known.

At any rate, the diverse list of suggestions given above for elaborating on 'good reporting practice' sufficiently illustrate that a project along those lines will be extensive and require ongoing discussion and refinement

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[244] Jointly produced by the Clean Energy Council and Norton Rose Fulbright; see submission #49, #53.
[245] Jointly produced by the United Nations Global Compact Network Australia and the Maritime Union of Australia; see submissions #58, #134.
[246] Jointly produced by the Property Council of Australia and the Cleaning Accountability Framework: see submission #39.
[247] Submissions #25, #32, #33, #43, #44, #50, #81, #82, #84, #89, #94, #96, #98, #102, #103.

between the various stakeholders in this process. The proposal in Recommendation 25 for a forward work program to be developed for revision of current guidance materials could contribute to the broader objective of defining good practice.

### Guidance on remediation and victim support

A frequent criticism of current modern slavery reporting is that, across the thousands of statements published on the Register, few specific modern slavery incidents or cases have been reported on. One line of explanation is that the Act does not require entities to go the extra step of identifying cases. Recommendation 8 proposes that be changed.

The *Guidance for Reporting Entities* partially addresses this topic – in Appendix 3, 'How do I respond to a case of modern slavery?' There was a call for additional specific guidance to be provided.[248] Considerable work of this nature has already been done – such as 'The UN "Protect, Respect and Remedy" Framework for Business and Human Rights'.

### Other matters

Other matters that were suggested for treatment in the guidelines can be noted briefly:

- the current status of the guidance document 'Information Sheet: COVID-19 and Modern Slavery Risks'
- the degree of reliance that can be placed on the statements of other entities that are part of the reporting entity's supply chain, and
- the potential relevance of provisions such as s 18 of the *Australian Consumer Law* that proscribes misleading and deceptive conduct in the course of trade or commerce (Chapter 10).

Some of the independent surveys of modern slavery statements referred to in Chapter 2 make suggestions on steps that could be taken by government to improve modern slavery reporting.

## Declaration of high-risk matters

The core of any effective strategy to combat modern slavery must be a focus on areas where the slavery risk is greatest. This may be a region, location, industry, product, supplier or supply chain.

It is implicit in the modern slavery reporting process that entities must pay close attention to that aspect. An entity's statement is required by the Act to deal with modern slavery risks in its operations and supply chains, and the actions it has taken to address those risks.

It was urged that the Modern Slavery Act go a step further by creating a mechanism for overtly identifying high risk matters that entities must address in their statements. A typical suggestion is that the Minister or the Anti-Slavery Commissioner be empowered under the Act to make a written declaration of a region, location, industry, product, supplier or supply chain that is regarded as carrying a high modern slavery risk. Several submissions gave examples of high high-risk topics that could potentially fall under this procedure – such as disposable gloves, electronic hardware, cotton products, bricks and palm oil.[249] The Commonwealth Statement lists high risk areas in government procurement – investments, cleaning and security services, textiles procurement, construction and procurement of information technology hardware.

An entity, in preparing its annual statement, would be required to consider whether a declared risk appeared in its operations or supply chains. If so, the entity would be expected – or required, in a manner set out in the declaration[250] – to address that risk specifically in its statement. The entity could also be required by the Act to take due diligence action directed at the particular risk.
There are precedents in Australia and overseas for mechanisms of this kind. In Australia the *Recycling and Waste Reduction Act 2020* (Cth) authorises the Minister to publish annually a Priority List of waste material

[248] Submissions #50, #69, #112, #113, #122.
[249] Submission #103.
[250] Submissions #10, #56.

that may be the subject of special regulation, such as an export prohibition.[251] In the US the Department of Labor publishes a List of Goods Produced by Child Labor or Forced Labor.[252] As at September 2022 the List comprised 159 goods from 78 countries and areas. The main purpose of the List is to raise public awareness of forced and child labor, promote efforts to combat them and to be a resource for organisations engaged in due diligence assessment of their supply chains.[253]

As regards the Modern Slavery Act, it is suggested that a high-risk declaration procedure would have several advantages.[254] It would help improve modern slavery reporting by drawing the attention of entities to matters they must consider, and make it easier to assess and compare individual statements. An intended flow-on effect is that modern slavery safeguards would become far stronger by highlighting risks that warrant special attention in the global economy. An example given is that a company may find it invidious to declare that forced labour is possibly occurring in one of its supply chains in a specific region, particularly if the forced labour is state-sanctioned.[255] That is often given as an explanation at present as to why statements do not identify or describe risks that are a matter of public record.[256]

There would, however, be trade obligations and bilateral sensitivities in making and complying with such a declaration that would need to be given careful consideration.

There were doubts raised in some submissions about the wisdom of introducing this mechanism into the Act.[257] It would not, it is said, remove the difficulty or sensitivity that entities can face in raising contentious issues that may be suspected but not proven, or that can have unintended consequences for foreign workers when aired publicly. The alternative is for these matters to be explored on a case-by-case basis between entities, the Anti-Slavery Commissioner, and government trade and foreign affairs portfolios.

Another concern was that this procedure could result in a disproportionate focus being given to some issues rather than to the whole modern slavery risk landscape. The procedure could also impose an added regulatory burden on sectors that are regarded as high risk but are already subject to extensive government regulation: horticulture was given as an example.[258]

On balance, this review believes that a mechanism of this kind should be a part of the Modern Slavery Act, as proposed in Recommendation 27. The particular form of mechanism can be taken up separately in the process underway to establish the office of Anti-Slavery Commissioner (though, as noted above, the power could alternately rest with the Minister).

Any mechanism should align with the Government's country-agnostic approach to address modern slavery which recognises that all instances of modern slavery, in any country or region, are all egregious and necessary to address. Consistent with the UNGPs, Australia's approach is for entities to work collaboratively to address all modern slavery risks, wherever they arise, and to ensure responses prioritise the best interests of victims.

## Establishing a statement review program

It was acknowledged firmly in this review that external review, verification and auditing of statements can be a valuable part of the statement preparation process.
In the online survey of reporting entities undertaken for this review, roughly 17% of entities said they had obtained external assurance of their statement before it was submitted through the Register, and 28% said

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[251] Submission #90.
[252] The List is prepared under the *Trafficking Victims Protection Reauthorisation Act of 2005*, s 105(b)(2).
[253] The List operates alongside s 307 of the US *Tariff Act* under which the US Customs and Border Patrol can make a 'Withhold Release Order' that blocks the importation of foreign merchandise that is reasonably suspected of involving forced or indentured labor.
[254] Submissions #73, #84, #85, #103, #136.
[255] Submissions #21, #67, #112.
[256] Submission #96.
[257] Submissions #46, #98, #126.
[258] Submission #3.

they had engaged external assistance to prepare their statement.[259] The review was also told of both structured and informal peer review processes set up either among entities or by professional organisations to review and provide feedback to participants on their annual statements. It is clear, too, that entities pay close attention to the independent surveys of statements that have been undertaken by academic and civil society bodies.

It was suggested to this review that government should embark on an active statement review program on the quality of statements to provide feedback and improve reporting.[260] These range from suggestions that government undertake a close analysis of every statement (a big challenge given the thousands of statements submitted each year), or that government conduct a selective audit program on selected batches of statements, or convene multi-stakeholder panels that would do a batch analysis and prepare reports that would be taken up in other consultation forums.

The creation of a review program is a matter that can appropriately be taken up by the Anti-Slavery Commissioner. No specific recommendation is made in this report given that a separate process is underway within government to establish that office.

## Facilitating industry and stakeholder collaboration

A recurring theme in this review – and in the preceding discussion in this chapter – is that the modern slavery challenge must be tackled on a collaborative basis. That is also the opening message in the *Guidance for Reporting Entities* – 'Collaboration is key to combating modern slavery'. The message is depicted in a graph illustrating the collaborative roles to be played by government, business, investors, consumers and civil society.[261]

Government has taken this issue up in a structural way by creating networks such as the National Roundtable on Human Trafficking and Slavery and the Modern Slavery Expert Advisory Group. Non-government networks have similarly been established following the commencement of the Modern Slavery Act. Two examples are the South Australian Modern Slavery Network[262] and the Human Rights Resource and Energy Collaborative.[263] Bodies such as the UN Global Compact Network Australia (UNGCNA) play an active role in bringing stakeholders together to share experience and ideas.[264]

These developments are mentioned at this point to underline their importance in the overall modern slavery framework in Australia. As discussed in Chapter 12, it is envisaged that the Anti-Slavery Commissioner will play a leadership role in facilitating collaboration and the further evolution of dynamic networks.[265]

## Online Register of Modern Slavery Statements

The Register is established as required by the Act so that modern slavery statements will be publicly and freely accessible. At the time of this review over 7,000 statements were published on the Register, relating to nearly 8,000 entities headquartered in over 50 countries. Over 2.2 million searches had been performed on the Register. Internationally, it is the first government-run register of its kind.

The Register is administered by the MSBEU in the Attorney-General's Department, with a third-party administrator. Most statements uploaded to the Register are fully keyword searchable and can also be searched by key sectors such as sector, revenue level and where the entity is headquartered. One of the four workstreams of the MSBEU is to develop and maintain the Register; this involves consultation with business and civil society and through user testing.

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[259] Appendix D, Figure 8.
[260] Submissions #21, #24, #43, #44, #51, #103.
[261] *Guidance for Reporting Entities*, Figure 2 at p 11.
[262] Submission #75.
[263] Submission #129.
[264] Submission #134.
[265] Submission #103.

The unanimous response of participants in this review is that the Register is a valuable service. It provides maximum transparency of statements lodged by entities under the Act. Many people commented that the Register is a helpful source of data and information that is regularly accessed for a variety of purposes – general interest, business accountability, auditing suppliers, staff training, procurement processes and business due diligence analysis.

An equally strong view is that access and search features of the Register could be improved. It was described, for example, as a 'stagnant library', a repository rather than a searchable database.[266] A few participants commented that it was generally easier to find a statement through an internet-based search than through the Register search function.

A large number of practical suggestions were made for enhancing the search function to allow for a more simplified search process for individual statements and categories of information. The suggestions have not been separately appraised by this review, but will be listed so that they can be taken up by the MSBEU in its current work program (Recommendation 28):

- Searches using a company name will often return a list of all statements that mention that company. This could be avoided with better search filters or if ABNs were stored in a separate data field, particularly if there are multiple ABNs associated with a company.[267]
- Search filters should be introduced for elements such as the reporting period, mandatory reporting criteria, specific terms (such as 'urban facilities' or a company trade name), employee numbers, and if it is an ASX100 entity.[268]
- There is a time difference between lodgement and publication to account for the assessment process; date stamping of statements may help.[269]
- Introduce more flexibility into the lodgement process – for example, allow entities to lodge a free-form-text version of their statement (in addition to a PDF), and run Optical Character Recognition (OCR) over all statements when lodged.[270]
- Include a feedback/comment/pop-up survey function on the website.[271]

Other recommendations earlier in this report also aim to enhance the value of the Register website and the searchability function. These include recommendations for publication of a list of reporting entities (Recommendation 22), requiring entities to complete a statement coversheet that addresses specified matters (Recommendation 15), and the development of a template for optional use by reporting entities (Recommendation 13).

Two other suggestions that can be noted briefly are: that an entity should be required to publish its annual statement on its own website (a requirement of the UK Act);[272] and that an entity should notify all employees when a statement is lodged.[273] Those suggestions can appropriately be taken up in the review of the *Guidance for Reporting Entities*.

## Periodic review of the Act

There was broad agreement among participants in this review that a regular statutory review process of the kind required of this review would be valuable.

It is possible that important changes will be made either to the Modern Slavery Act or to administrative arrangements following this report. If so, another review would provide an important opportunity to examine the success and impact of those changes. Equally, the global setting for modern slavery risks is forever

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[266] Submissions #62, #42.
[267] Submissions #35, #39, #85, #113, #114.
[268] Submissions #57, #62, #63, #69, #84, #94, #97, #110, #112.
[269] Submissions #69, #85, #113.
[270] Submissions #53, #134.
[271] Submission #112.
[272] *Modern Slavery Act 2015* (UK) s 54; see submission #112.
[273] Submission #119.

changing, and a periodic review would provide a good opportunity to take stock of those developments. A practice of regular review aligns also with the underlying objective of continuous improvement in how human rights abuses and modern slavery risks are managed.

The general preference was for a review in another three years (or three years after any changes are enacted following this review); a few submissions opted for a five-year review. There was an equal division of opinion on whether the review should be led by the Anti-Slavery Commissioner, or through an independent process instigated by the Minister. Recommendation 29 embodies that flexibility by proposing that the Minister cause a review to be undertaken by a person appointed by the Minister, who may be the Anti-Slavery Commissioner.

**Recommendation 25**

The Attorney-General's Department, in consultation with the Anti-Slavery Commissioner, develop and publish a forward work program for reviewing and updating the *Guidance for Reporting Entities* and other guidance material.

**Recommendation 26**

The Modern Slavery Act be amended to provide (expressly) that the Minister shall arrange for guidelines to be published on the reporting requirements in Part 2 of the Act, and that reporting entities shall be encouraged to have regard to any such guidelines.

**Recommendation 27**

The Modern Slavery Act be amended to provide that –

- the Minister or the Anti-Slavery Commissioner may make a written declaration of a region, location, industry, product, supplier or supply chain that is regarded as carrying a high modern slavery risk, and
- the declaration may prescribe the extent to which reporting entities must have regard to that declaration in preparing a modern slavery statement under the Act.

**Recommendation 28**

The Attorney-General's Department have regard to suggestions discussed in Chapter 11 of this report for improving the Online Register for Modern Slavery Statements.

**Recommendation 29**

The Modern Slavery Act s 24 be amended to provide that a further review of the kind described in that section be undertaken in another three years by a person appointed by the Minister, who may be the Anti-Slavery Commissioner.

# Chapter 12: The role of an Anti-Slavery Commissioner in modern slavery reporting

## Creation of an Anti-Slavery Commissioner

The Australian Government has committed to establishing an independent office of Anti-Slavery Commissioner. A separate project to scope options was initiated by a Budget announcement in October 2022 that required the Attorney-General's Department 'to scope options to establish an Anti-Slavery Commissioner to work with business, civil society and state and territory governments to support compliance with Australia's *Modern Slavery Act 2018* and address modern slavery risks in supply chains'.[274]

The Government commitment builds on similar proposals made in earlier parliamentary inquiries – by the Joint Standing Committee on Foreign Affairs, Defence and Trade in the *Hidden in Plain Sight* report in 2017; the Parliamentary Joint Committee on Law Enforcement inquiry into human trafficking and slavery in 2017; and the Senate Legal and Constitutional Affairs Legislation Committee report on the Modern Slavery Bill in 2018.

This review of the Modern Slavery Act can feed into that separate project to establish the office of Commissioner. To that end, the Issues Paper for this review invited submissions on two questions:

- What role should an Anti-Slavery Commissioner play in administering and enforcing the reporting requirements in the Modern Slavery Act?
- What functions and powers should the Commissioner have for that role?

A large majority of the submissions to this review addressed those two questions, but also ranged beyond. With only a few exceptions, all submissions expressed strong support for creating the office of Commissioner to play a leadership and regulatory role in overseeing the operation of the Modern Slavery Act.[275] The observation made in nearly all submissions was that the Commissioner should be an independent statutory office that was properly resourced to play an effective role in combating modern slavery.

This review is looking only at the Commissioner's role in supporting compliance with the Modern Slavery Act. Other issues being considered in the separate project include whether there should be a legislative basis for the Commissioner (Modern Slavery Act, or another Act?[276]), the method and terms of appointment of the Commissioner, the functions and powers of the office, and its relationship to Parliament. A few general observations will nevertheless be made about the broader setting, as the Commissioner's Modern Slavery Act role will sit within it.

A Commonwealth Commissioner will be compared to two existing commissioner offices with the same title, in the United Kingdom and NSW. Those offices were briefly described in the Issues Paper for this review.[277] The Commonwealth Commissioner will be differently placed to the other commissioners, as it will be a national office in a federal system. For example, the UK Commissioner (in a unitary state) has broad functions that include identifying and supporting victims of modern slavery and prosecuting offenders. The NSW Commissioner has responsibility for monitoring State government policies and procurement activity.

The Commonwealth Commissioner will also join a modern slavery framework that is well-established, broad-based and active across government and the private sector. Notably, the Modern Slavery Act will be well into the third if not the fourth reporting period.

The significance of that point was discussed in Chapter 10. The view expressed was that the Attorney-General's Department should retain its current responsibility of managing the Register for Modern Slavery

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[274] Australian Government, *Budget Measures: Budget Paper No 2* (25 October 2022) at 54.
[275] Opposition to the proposal was expressed in submissions #78 (arguing the proposal was premature without a cost/benefit analysis), #105 (expressing doubt that the office was necessary), and #128 (arguing that the office would not be identifying the real causes of migrant worker exploitation).
[276] Eg, as a commissioner within the Australian Human Rights Commission: submission #73.
[277] Issues Paper at 48.

Statements. Other functions are attached to that responsibility – such as the receipt and examination of modern slavery statements to assess their compliance with the reporting requirements of the Act, the issue of non-compliance notices, the publication of the *Guidance for Reporting Entities,* the operation of a helpdesk, and convening the Modern Slavery Expert Advisory Group.

Correspondingly, it was proposed in Chapter 10 that new or additional work that was connected to the operation of the Register should be discharged (partially at least) by the Department – such as enhancing the guidance material, upgrading the Register, developing reporting templates, and refining non-compliance standards.

That leaves the question – what role should the Commissioner play in supporting compliance with the Act and addressing modern slavery risks in supply chains?

Before addressing that question specifically, it is helpful to provide additional context by discussing the reasons why there is strong support for an Anti-Slavery Commissioner, and the broad role the Commissioner might play.

### The strong support for an Anti-Slavery Commissioner

Many submissions to this review thought it important to explain why they strongly supported the Government decision to establish an independent office of Anti-Slavery Commissioner.[278] The following themes stood out.

Commentators see a need for a high-profile, specialist and committed office that can provide national leadership in raising awareness of modern slavery risks and ensuring those risks are addressed. The Commissioner can play a national coordinating role across all sectors – government, industry, unions, professional associations, civil society, not-for-profit bodies, research institutions and the community. A central role of the office will be to forge agreement and united action on common goals – chiefly the elimination of slavery risks, the protection of vulnerable people, and remediation and victim support.

The scale of the global challenge – up to 50 million people in situations of modern slavery on any day – reinforces the need for specialist insight and skills being brought to those tasks. While the Commissioner's office will not itself have all the answers or resources for that challenge, it will be well placed to draw on that expertise in other quarters and encourage it being shared. This is particularly important, it is argued, if Australia enters a new phase of requiring due diligence by business and government in addressing modern slavery risks.

Another line of argument in support of an Anti-Slavery Commissioner stems from dissatisfaction with the current standard of modern slavery reporting in Australia. It is envisaged that the Commissioner would be active in drawing public attention to deficiencies in reporting and shaping strategies to address them. The Commissioner could do this by developing specialist guides and resources, or arranging for others to do this on a collaborative basis.

Phrases used by commentators to describe those various Commissioner roles included 'human rights advocate', 'promoter in chief', 'critical friend for business', 'trusted adviser' and 'knowledge hub for best practice'.[279]

There was a large area of common ground in submissions to this review as to the functions and powers the Commissioner should have. But there was also different emphasis from one submission to the next on the preferred style and priorities of the Commissioner. In general terms, this was along three lines:

- Some submissions emphasised the 'soft power' role of the Commissioner in public advocacy and education, of issuing guidance on modern slavery risks, giving sound-out advice, and promoting and facilitating collaboration among others to lift performance standards.

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[278] Submissions that give a representative sample of issues relating to the Commissioner are #21, #24, #26, #28, #38, #39, #41, #43, #55, #57, #75, #84, #89, #98, #103, #109, #112, #116, #126, #127, #134.
[279] Eg, submissions #95, #106, #126, #132.

- Others emphasised that the Commissioner should be a strong regulator, targeting non-compliance with reporting standards, holding business to account for due diligence and reporting failures, and standing ready to use the full range of regulatory sanctions.
- Victim protection and support was a third area of emphasis, with some seeing that as the central object of modern slavery laws, and a neglected area where the Commissioner could make a profound and humane difference.

Those approaches are not mutually exclusive. It is likely that all would be supported, to some degree or another, by the standard functions and powers of a Commissioner. It is not necessary to take this point any further in this chapter, other than to note that the style and priorities of an independent statutory regulator frequently have less to do with the specific powers conferred on the office and more to do with the thinking and preference of the particular occupant of the office. The style of the office typically evolves and changes over time.

### The Anti-Slavery Commissioner's broad role

The functions and powers of a statutory regulator (or commissioner) are usually of two kinds: there is a standard set of functions to pursue the objects of the statutory scheme, and specialist powers for the unique role of the office.

The focus of this chapter is upon specialist powers that should be given to the Anti-Slavery Commissioner. The standard regulatory functions should nevertheless be noted briefly, as they would underpin most of the Commissioner's work in supporting compliance with the Modern Slavery Act.
The legislation establishing an office of commissioner will ordinarily confer the following *generic* functions on the office:

- to advocate for and promote awareness of the objects of the Act (in this instance, combating modern slavery)
- to provide information, advice, education, training and assistance in relation to the Act
- to monitor the operation and effectiveness of relevant government laws and programs, and report to government
- to co-operate and work jointly with others in achieving the objects of the Act
- to collate data, conduct research and hold inquiries
- to convene any advisory committee or other consultative forum that is established by the Act.

The *specialist* functions of a commissioner/regulator will (as noted) depend on the unique role of the office. They may range across complaint handling, adjudication, conciliation, auditing, code making, accreditation, certification, law enforcement referral and drawing on powers from the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (such as infringement notices and enforceable undertakings).

The full range of specialist functions that should be given to an Anti-Slavery Commissioner is appropriately the concern of the separate scoping project that is underway in the Department. It may assist that process to note the range of suggestions made to this review (no view is expressed on the appropriateness of any suggestion or whether it would be adequately supported by the standard or generic functions of the office). The range of functions include:

- Coordinating the whole-of-government response to modern slavery, both at national and federal level, including overseeing implementation of the *National Action Plan to Combat Modern Slavery 2020-25*, chairing the National Roundtable on Human Trafficking and Slavery and liaising with the Ambassador to Counter Modern Slavery, People Smuggling and Human Trafficking
- Liaising with industry, civil society, academia, and professional associations regarding Australia's response to modern slavery
- Capacity building within business and government on their due diligence obligations in responding to modern slavery risks
- Publishing an annual list of regions, locations, industries, products, suppliers or supply chains that carry a high risk of modern slavery (this list could link into modern slavery reporting, as discussed below)

- Providing support and assistance to victims of modern slavery, including overseeing support and referral assistance mechanisms, administering a national victim compensation scheme, and hosting a confidential reporting hotline
- Improving coordination between criminal justice agencies in identifying and prosecuting modern slavery cases, receiving incident reports from business, referring matters for investigation, and assisting in the prosecution of offenders
- Administering the government grant funding program that supports civil society initiatives
- Conducting own motion investigations into modern slavery risks in industry sectors in Australia
- Leading due diligence on public sector procurement practices
- Commissioning research on human trafficking and modern slavery
- Reporting directly to the Parliament, and publishing an annual report on modern slavery trends in Australia.

### The Anti-Slavery Commissioner role in relation to modern slavery reporting

The discussion of this issue in Chapter 11 proposed that the Commissioner and the Department share the role of furthering compliance with the Modern Slavery Act. The Department would continue to manage the Register, receive modern slavery statements, examine their compliance with the Act, engage with entities to provide feedback and to respond to queries, publish the *Guidance for Reporting Entities,* and liaise with business and the wider community on those functions.

What special role should the Commissioner have in this process? Would additional statutory powers be required by the Commissioner? The discussion of this issue in Chapter 11 proposed as follows:

- *Reporting guidance*: The primary task of publishing the *Guidance for Reporting Entities* and other guidance material on modern slavery reporting would remain with the Department. The Commissioner would play a supplementary role in releasing specialist or targeted guidance. To set the context for that shared role, Recommendation 25 proposes that the Department, in consultation with the Commissioner, publish a forward work program on the review of all guidance material.

  Work of this nature by the Commissioner would probably be supported by the standard/generic functions of the office. However, to convey a more explicit public message, the statute establishing the Commissioner could refer specifically to this function of issuing guidance on compliance with the Modern Slavery Act reporting requirements. Recommendation 30 so provides, but notes (for caution) that the Commissioner's guidance must not be inconsistent with any guidance issued by the Department under the Act.

- *Declaration of high-risk matters*: Recommendation 27 proposes that the Modern Slavery Act authorise either the Minister or the Commissioner to make a written declaration of a region, location, industry, product, supplier or supply chain that is regarded as carrying a high modern slavery risk. The declaration could set out how entities were required to respond in preparing their annual modern slavery statement.

  As discussed in Chapter 11, any mechanism should align with the Government's country-agnostic approach to address modern slavery. Little more needs to be said about this recommendation, other than that its importance was stressed repeatedly by participants in this review. It was said that a mechanism of this kind that overtly identified high risk issues and how they should be addressed would go a long way in improving modern slavery reporting and due diligence work.

  Most commentators preferred that this function of issuing declarations be given to the Commissioner rather than the Minister, to ensure that it was discharged within an independent, specialist office. On the other hand, the Minister may be better placed to understand if trade obligations or bilateral sensitivities are relevant to a declaration.
- *Establishing a statement review program*: It was proposed in Chapter 11 that this project be led by the Commissioner, in consultation with the Department to look at the quality of statements. The program could be undertaken in diverse ways – as a selective audit/examination by the

Commissioner of selected batches of statements, or through multi-stakeholder panels established by the Commissioner with external stakeholder bodies.

No special power would be needed in the Act to support this function.

- *Facilitating industry and stakeholder collaboration*: This is seen as a significant role of the Commissioner, in line with the overarching principle that 'Collaboration is key to combating modern slavery'.

  The aim of the collaboration would partly be to raise awareness of the modern slavery program. In addition, it is suggested, the Commissioner could coax others to join in developing practical resources and tools, such as modern slavery risk identifiers, effectiveness benchmarks, remediation pathways, survivor support initiatives, supply chain mapping, supplier questionnaires, auditing protocols and industry codes of practice. A related suggestion is that the Commissioner could establish a program to encourage voluntary reporting under the Act, particularly in areas where there is a heightened risk of domestic slavery and sexual exploitation.[280]

  This collaborative work would come within the Commissioner's generic functions, though the Commissioner's functions could be so framed in the Act as to make this an explicit role.

- *Conducting a periodic review of the operation of the Modern Slavery Act*: Recommendation 29 proposes that the Act be amended to require the Minister to arrange for a subsequent three-year review of the Act, to be undertaken by the Commissioner or another person appointed by the Minister.

Special roles for the Commissioner were also supported in two other chapters:

- *Commonwealth Modern Slavery Statement*: Recommendation 19 proposes that the Attorney-General's Department establish arrangements for an annual review of the Commonwealth Modern Slavery Statement, and consider requesting the Commissioner to discharge this role. A review of this kind should involve both internal government and external consultation.
- *Due diligence*: Chapter 7 recommended that an obligation be imposed on reporting entities to have a due diligence system in place. It was envisaged that the Commissioner would play an important role in monitoring if entities were faithfully complying with that obligation.

Two other specific functions/roles suggested to this review were:

- *Regulatory compliance*: It is suggested that the Commissioner have access to the full regulatory mix of powers that will be utilised to ensure compliance with the modern slavery reporting function, including the due diligence component. Options canvassed in submissions to this review are that the Commissioner have power to investigate complaints against reporting entities, conduct own motion investigations into entity conduct, exercise coercive investigatory powers, issue infringement and penalty notices, refer matters to law enforcement and prosecution authorities, and apply to a court for a civil penalty order.

  It is premature to respond to those suggestions or make recommendations. The broad role of the office is yet to be determined by Parliament.

- *International liaison*: It was proposed that the Commissioner play a role internationally in linking with other government and non-government bodies to explore global slavery risks, due diligence requirements, and remediation and support options.

  Well-established protocols are already in place for Australia's international engagement, as discussed in Chapter 2. No doubt an early activity of the Commissioner will be to discuss this with other Australian Government agencies and to explore options for the Commissioner's involvement.

  One point to note in particular is the comment in Chapter 3 that the Commissioner should be involved in discussions with other countries that have modern slavery reporting regimes to explore options for alignment, reciprocal statement recognition and development of agreed modern slavery

[280] Submission #108.

reporting standards. The Commissioner, as a specialist Australian office in this area, would undertake this work alongside other Australian Government departments. This would be similar to the work of the Australian Human Rights Commission in the international space.

## Closing observation

There are high expectations that the Anti-Slavery Commissioner will play a pivotal role in lifting both recognition within Australia of modern slavery risks and the standard of business performance in addressing those risks – to 'move the dial', as it were. Business, equally, has expressed strong support for the new office and a desire to work closely with it in identifying special risks and devising strategies for responding.

It is encouraging that there is widespread support for the office to be dynamic and cover a lot of ground. That will be both a comfort and a practical challenge for the new office. This draws attention to a provision in both the UK and NSW Modern Slavery Acts that require the Commissioner, as soon as reasonably practicable after appointment, to prepare a strategic plan that outlines the Commissioner's key objectives and priorities for between one to three years.[281]

**Recommendation 30**

The legislation establishing the office of Anti-Slavery Commissioner provide expressly that a function of the Commissioner is to issue guidelines on special issues relating to the reporting requirements in Part 2 of the Modern Slavery Act. Any guidelines must not be inconsistent with guidelines that the Minister has arranged to be published under the Act.

[281] *Modern Slavery Act 2015* (UK) s 42; *Modern Slavery Act 2018* (NSW) s 11. The NSW Commissioner published a discussion paper to commence that process soon after appointment – 'Developing a strategic plan to combat modern slavery', Discussion Paper #002 (Oct 2022). See also an early speech by the Commissioner – '"First Principles" in combating modern slavery in New South Wales' (13 August 2022).

# Chapter 13: Other issues raised in this review

## Introduction

Many people in consultations and submissions thought it important to place modern slavery reporting in context by noting other control/mitigation strategies that can have equal or greater effectiveness. Many submissions acknowledged that these issues fell outside the terms of reference for this Review, but nevertheless thought it important to place comments on the record.

This chapter briefly notes some of the other issues raised in the review, and provides references to the submissions that discuss these issues in a substantive way. It is hoped this chapter may assist any discussion of those issues that occurs in another context or forum.

## Issues raised

Key issues outside the Review's Terms of Reference that were raised in consultations and submissions are detailed briefly below:

- *Victim compensation*: A number of submissions discussed the need for Australia to consider a national compensation scheme for victims of modern slavery.[282] Discussions on this topic varied, with some submissions expressing support for this as a standalone scheme and others drawing linkages between the Modern Slavery Act and such a scheme. For example, some submissions recommended that any funds collected through civil penalties associated with the Act should be directed to such a national compensation scheme. [283] Others have called directly for the Act to provide for access to justice for victims of modern slavery through the inclusion of compensation and other supports. [284]

- *Victim support*: There was discussion about a need for increased victim support mechanisms presented in a number of submissions. Many of these points were made in relation to discussion around victim compensation. On this matter, it is worth noting that the Government maintains existing mechanisms for supporting victims of modern slavery, the key avenue being the Support for Trafficked People Program administered by the Department of Social Services and delivered nationally by the Australian Red Cross.

  Submissions which discussed the need for greater victim support tended to group this under proposals for what a Commonwealth Anti-Slavery Commissioner could oversee.

- *Import bans*: Approximately one sixth of submissions mentioned the concept of an import ban for goods made with forced labour. Some recommended Australia implement a framework similar to the US Tariff Act,[285] with others advocating to see the *Customs Act 1901* amended to introduce a forced labour import ban.[286] Only two submissions recommended Australia implement a framework akin to the US Uyghur Forced Labour Prevention Act. [287]

  Key points raised in submissions were that an import ban would improve the conditions of exploited workers overseas, encourage businesses to take further action to address modern slavery risks in their overseas supply chains, prevent items made using modern slavery from entering Australia, and complement and strengthen the Act. Little evidence has been provided to-date to substantiate these claims which may be due to authors knowing this issue was outside the scope of the Review.

- *Competition law:* Competition law was raised as a possible barrier to industry collaboration by some *stakeholders* in consultations and in a small number of submissions to the review.[288] The concern

[282] Submissions #17, #21, #28, #55, #77, #80, #86, #92, #108, #112, #116, #119, #122, #127, #130.
[283] Submissions #18, #28, #75.
[284] Submissions #17, #19 #110.
[285] Submission #28, #92.
[286] Submissions #61, #120, #133.
[287] Submissions #42, #48.
[288] Submissions #42, #44, #46

was that competition law may hinder reporting entities sharing information and approaches about identifying and addressing modern slavery risks in their supply chains. This matter may require further consideration.

- *Financial assistance to non-government organisations undertaking work that contributes solidly to the government program*: A small number of stakeholders made note that the majority of independent (non-government) analyses of modern slavery statements have been undertaken by NGOs or academics. Some have highlighted that a commitment to continuing this work is unsustainable without dedicated funding.

  In a similar vein, a couple of submissions comment on principles that should guide the current government funding program in this space, recommending a return to a service-based model of funding for civil society groups who are members of the National Roundtable on Human Trafficking and Slavery. [289]

  Others raised concerns that resources which have been devoted to implementing the Act may have come at a cost of funding efforts to respond to other forms of modern slavery. [290]

- *Creation of private rights of action*: This is discussed in detail in Chapter 7 on due diligence.

[289] Submission #130.
[290] Submission #55.

# APPENDIX A – Terms of Reference

## Objective

The review will consider the operation of the Commonwealth Modern Slavery Act 2018 (the Act) over the first three years and whether any additional measures are necessary or desirable to improve compliance with the Act and the operation of the Act.

## Context

Modern slavery practices are major violations of human rights and serious crimes. Modern slavery practices include trafficking in persons, slavery, and slavery-like practices including forced labour, servitude, debt bondage, deceptive recruiting, forced marriage, and the worst forms of child labour. The Commonwealth Modern Slavery Act established Australia's national Modern Slavery Reporting Requirement. The Act was established through extensive consultations with the Australian business community and civil society, including investors. The Australian Parliament passed the Act on 29 November 2018 and the reporting requirement came into effect on 1 January 2019.

The reporting requirement is focused on large businesses, the Commonwealth, and other entities that have capacity and leverage to drive change throughout their supply chains. Under the UN Guiding Principles on Business and Human Rights, entities have a responsibility to respect human rights in their operations and supply chains, including taking action to prevent, mitigate and where appropriate, remedy modern slavery in entity operations and supply chains.

Three years after the commencement of the Act, the Government is undertaking this statutory review in accordance with Section 24 of the Act.

The Modern Slavery Act is one part of Australia's broader response to modern slavery domestically and overseas. It complements Australia's existing criminal justice response to modern slavery, which includes a National Action Plan to Combat Modern Slavery, specialist police investigative teams and a dedicated victim support program.

## Matters to be considered by the review

1. The review is to consider and report on:
   a) the operation of the Act and any rules over the period of 3 years after the Act's commencement;
   b) compliance with the Act over that period;
   c) whether additional measures to improve compliance with the Act are necessary or desirable, such as
   d) civil penalties for failure to comply with the requirements of the Act;
   e) whether a further review of the Act should be undertaken, and if so, when;
   f) whether it is necessary or desirable to do anything else to improve the operation of the Act and any
   g) rules; and
   h) whether the Act should be amended to implement review recommendations.

2. The review should also have regard to:
   a) the extent to which the mandatory reporting criteria set out in Section 16 of the Act are appropriate;
   b) the appropriateness of the $100 million reporting entity threshold, reporting periods and reporting deadlines; and
   c) whether it is necessary or desirable for an independent body, such as an Anti-Slavery Commissioner, to oversee the implementation of the Act and/or the enforcement of the Act.

3. The review will look specifically at the Australian context with respect to available legal frameworks and powers. Noting this, the review will consider relevant international legislation to consider whether reporting requirements may be harmonised across jurisdictions where feasible.

## Conduct of the review

The review will draw on a range of sources. The review will:

- Provide an Issues Paper for public consultation.
- Invite submissions on matters for consideration in the review.
- Meet with stakeholders on specific matters arising from the Issues Paper and submissions.
- Consider related research and reports, including, but not limited to:
  - The following Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) reports, and the October 2020 Australian Government response to the JSCFADT reports:
    - Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia; and
    - Modern Slavery and Global Supply Chains: Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia.

## Reviewer

The review will be undertaken by Professor John McMillan, AO, supported by the Attorney-General's Department.

## Timing and outcomes

The review will commence on 31 March 2022 and will be completed within 12 months after it starts.
A review report will be publicly available and tabled in each House of the Australian Parliament within 15 sitting days of that House after the completion of the report.

# APPENDIX B – List of organisations who provided a written submission to the review

| NO. | PERSON / ORGANISATION | NO. | PERSON / ORGANISATION |
|---|---|---|---|
| **1.** | Australian National & University of South Australia | **2.** | Yourtown |
| **3.** | Citrus South Australia | **4.** | Linda Steele (University of Technology Sydney) |
| **5.** | Unpublished submission | **6.** | Australian Department of Foreign Affairs and Trade |
| **7.** | Cleaning Accountability Framework | **8.** | Dymocks |
| **9.** | Dinshaw, F (Australian Human Rights Law Centre), Nolan, J (UNSW), Sinclair, A (Business and Human Rights Resource Centre), Marshall, S (RMIT), Pryde, S (UNSW), McGaughey, F (University of Western Australia), Boersma, M University of Notre Dame), Keegan, P (Baptist World Aid), Bhakoo, V (University of Melbourne) and Adams, K (Human Rights Law Centre) | **10.** | Investors Against Slavery and Trafficking |
| **11.** | Flinders University | **12.** | Indo-Pacific Enhanced Engagement Infrastructure Directorate |
| **13.** | Project Paradigm | **14.** | Coalition Against Trafficking in Women |
| **15.** | Anderson, A and Harris, S (Macquarie Law School) | **16.** | Association of Mining and Exploration Companies |
| **17.** | The Freedom Hub | **18.** | Dr Ramona Vijeyarasa (University of Technology Sydney) |
| **19.** | The Business and Human Rights Resource Centre | **20.** | SeqWater |
| **21.** | Be Slavery Free Coalition | **22.** | SA Power Networks |
| **23.** | Choice | **24.** | Marshall, S and Pinnington, B (RMIT) |
| **25.** | PwC Australia | **26.** | Insurance Council of Australia |
| **27.** | The University of Sydney | **28.** | The Salvation Army |
| **29.** | Allens | **30.** | EY |
| **31.** | Responsible Investment Association Australasia Human Rights Working Group | **32.** | Oritain |
| **33.** | Deloitte | **34.** | Dumay, J (Macquarie Business School), Guthrie, J (Macquarie Business School), Dodd, T (Adelaide Business School) and Michaelson, G (Macquarie Business School) |
| **35.** | Reserve Bank of Australia | **36.** | Rest |

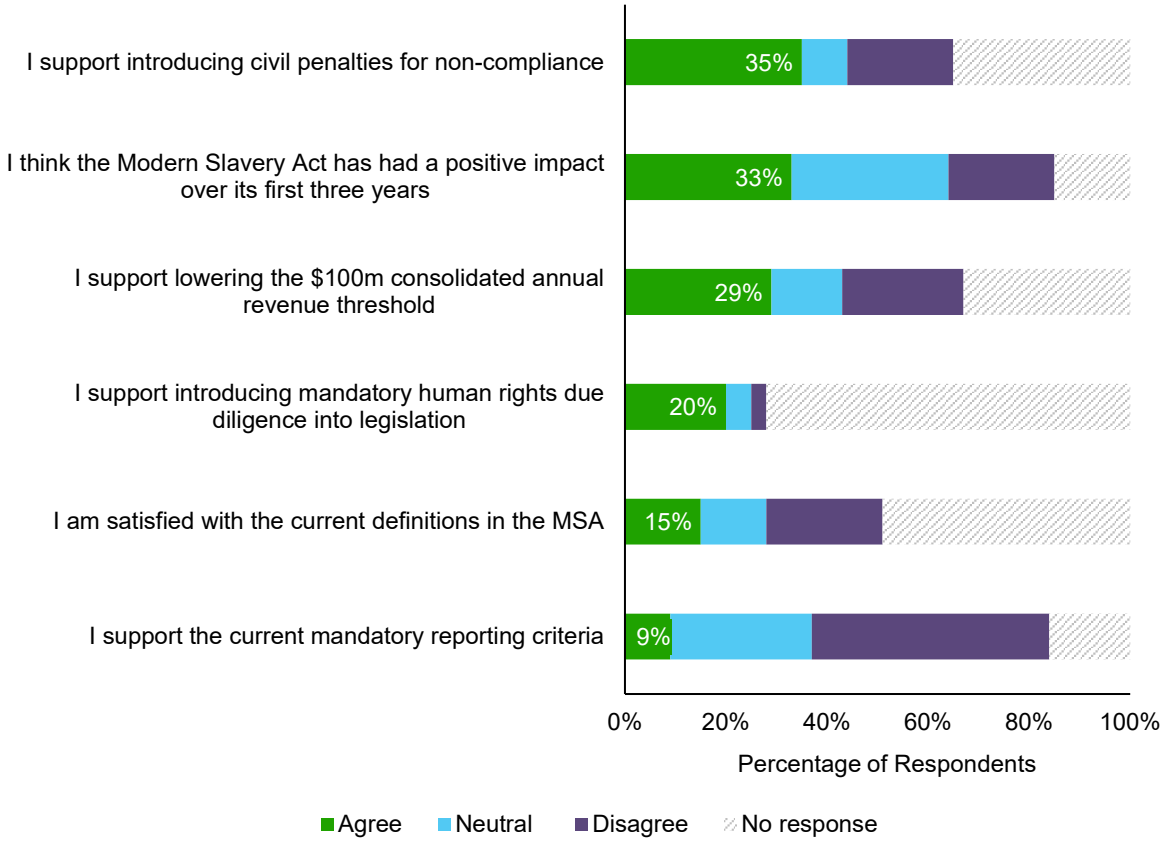
| | | | |
|---|---|---|---|
| **37.** | United Workers Union | **38.** | Human Rights Law Centre |
| **39.** | Property Council of Australia | **40.** | Australian Catholic Bishops Conference |
| **41.** | Australian Institute of Company Directors | **42.** | Unpublished submission |
| **43.** | Woolworths | **44.** | Australian Retailers Association |
| **45.** | AGL Energy | **46.** | National Retail Association |
| **47.** | Aware Super | **48.** | Coalition to End Forced Labour in the Uyghur Region |
| **49.** | Clean Energy Council | **50.** | Infrastructure Sustainability Council |
| **51.** | CPA Australia & Chartered Accountants Aus & NZ | **52.** | Finance Against Slavery and Trafficking |
| **53.** | Norton Rose Fulbright | **54.** | End Transplant Abuse in China |
| **55.** | Project Respect | **56.** | Kyla Raby (University of South Australia) |
| **57.** | KPMG Australia | **58.** | Maritime Union of Australia |
| **59.** | Responsible Investment Association Australia | **60.** | Unpublished submission |
| **61.** | Baptist World Aid | **62.** | Catholic Health Australia |
| **63.** | Water Services Association Australia | **64.** | Voices of Influence Australia |
| **65.** | Santos | **66.** | The University of Queensland |
| **67.** | Ethical Partners Funds Management | **68.** | First Sentier Investors |
| **69.** | Queensland University of Technology Centre for Decent Work and Industry | **70.** | Corrs Chambers Westgarth |
| **71.** | DLA Piper | **72.** | Chartered Institute for Procurement and Supply |
| **73.** | Governance Institute | **74.** | Australian Financial Markets Australia |
| **75.** | South Australian Modern Slavery Network (Worker-Focused Group) | **76.** | Principles for Responsible Investment |
| **77.** | Anti-Slavery Australia | **78.** | Housing Industry Australia |
| **79.** | Lernia, C & Kotoky, S (University of Sydney) | **80.** | ReThink Orphanages |
| **81.** | Business Council of Australia | **82.** | Australian Council of Superannuation Investors |
| **83.** | Australian Retirement Trust | **84.** | International Justice Mission |
| **85.** | Monash Centre for Financial Studies | **86.** | HWL Ebsworth |
| **87.** | Australian Uyghur Tangritagh Women's Association | **88.** | Australian Department of Education |
| **89.** | Walk Free | **90.** | Accord |

| | | | |
|---|---|---|---|
| **91.** | NSW Council for Civil Liberties | **92.** | International Organization for Migration |
| **93.** | Andrew Young | **94.** | Informed 365 |
| **95.** | International Corporate Governance Network | **96.** | Edge Environment |
| **97.** | Dr Johannes Dumay (Macquarie University) | **98.** | Herbert Smith Freehills |
| **99.** | Ms Sapphire Loebler | **100.** | Australian Industry Group |
| **101.** | Global Reporting Initiative | **102.** | United Kingdom Anti-Slavery International |
| **103.** | Uniting Church of Australia, Synod of Victoria and Tasmania | **104.** | Financial Services Council |
| **105.** | Unpublished submission | **106.** | Australian Super |
| **107.** | BHP | **108.** | Save the Children |
| **109.** | Nolan, J (University of New South Wales), McGaughey, F (University of Western Australia), & Boersma, M (The University of Notre Dame) | **110.** | Australian Lawyers for Human Rights |
| **111.** | Australian Small Business and Family Enterprise | **112.** | Australian Human Rights Commission |
| **113.** | Australian Banking Association | **114.** | Unpublished submission |
| **115.** | Business Council of Co-operatives | **116.** | Australian Council of Trade Unions |
| **117.** | Unpublished submission | **118.** | The Benevolent Society |
| **119.** | Retail Supply Chain Alliance | **120.** | Amnesty International |
| **121.** | Clark, C (Victoria University) and Krambia-Kapardis, M (University of Technology, Cyprus) | **122.** | Australian Red Cross |
| **123.** | NatRoad | **124.** | Migrant Justice Institute |
| **125.** | Australian Federal Police | **126.** | Pillar Two |
| **127.** | Law Council of Australia | **128.** | Scarlet Alliance |
| **129.** | Human Rights Resource and Energy Collaborative | **130.** | Australian Catholic Religious Against Trafficking and Catholic Religious Australia |
| **131.** | SlaveCheck | **132.** | Australian Chamber of Commerce and Industry |
| **133.** | Marmo, M (Flinders University) and Bandiera, R (Maynooth University) | **134.** | United Nations Global Compact Network Australia |
| **135.** | Tech Council of Australia | **136.** | NSW Anti-slavery Commissioner |

# APPENDIX C – Overall responses to key consultation topics

The below graph provides a breakdown of the overall response to six key consultation topics expressed in written submissions and responses to the online questionnaire.

**Figure 1: Overall responses to key consultation topics expressed in written submissions and online questionnaire**



# APPENDIX D – Overall responses to online survey for reporting entities

The Attorney-General's Department conducted an online survey as part of the review to obtain the views of entities that submitted a modern slavery statement under the Act. The online survey was issued on 22 November 2022 and was sent to over 4,000 reporting entities who had lodged statements on the Online Register for Modern Slavery Statements. The survey contained 22 questions that sought information about the reporting entity and their experience in preparing and submitting a modern slavery statement. The survey form recommended that the business unit/function that has responsibility for developing the entity's statement complete the survey

496 responses were received to the online survey. The figures below represent overall responses to some of the questions featured in the survey.

**Figure 1: Breakdown of respondents by sector**

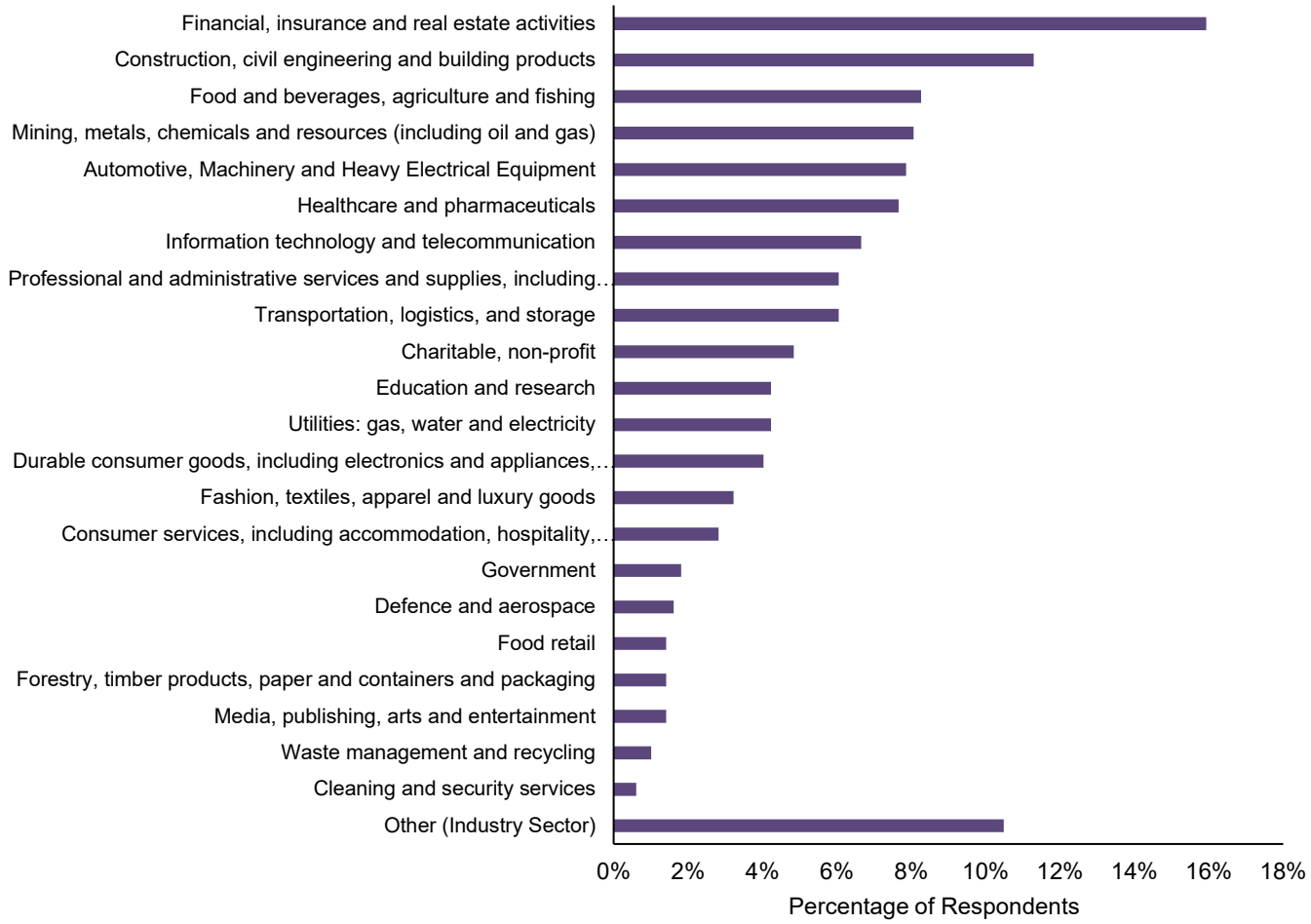


**Figure 2: Reporting periods of respondents**

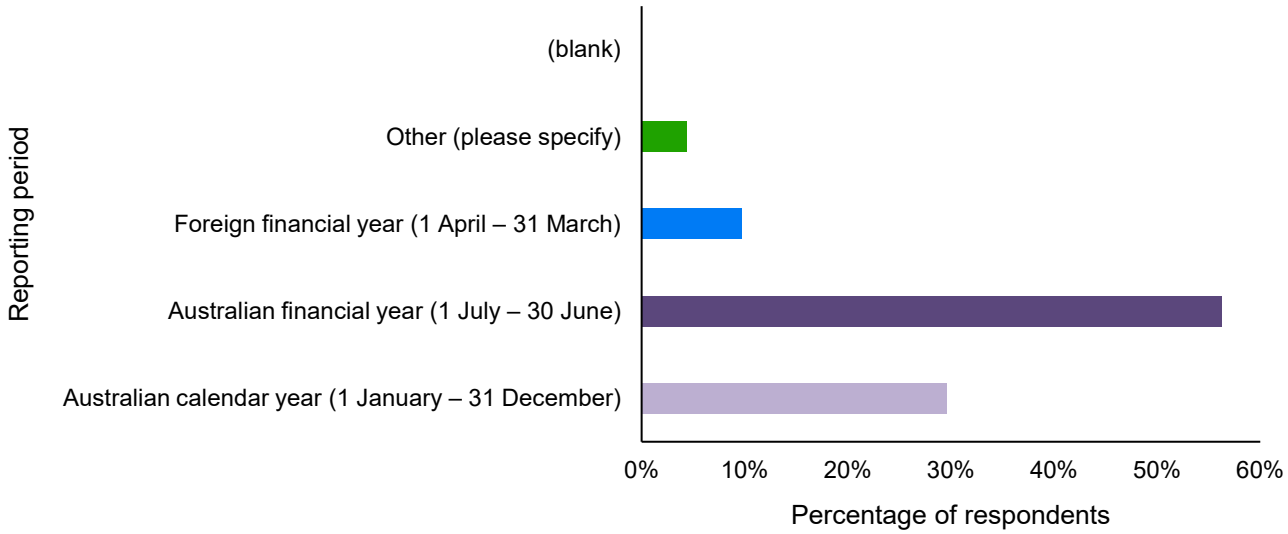



**Figure 3: Annual consolidated revenue of respondents at the time of submitting most recent modern slavery statement**

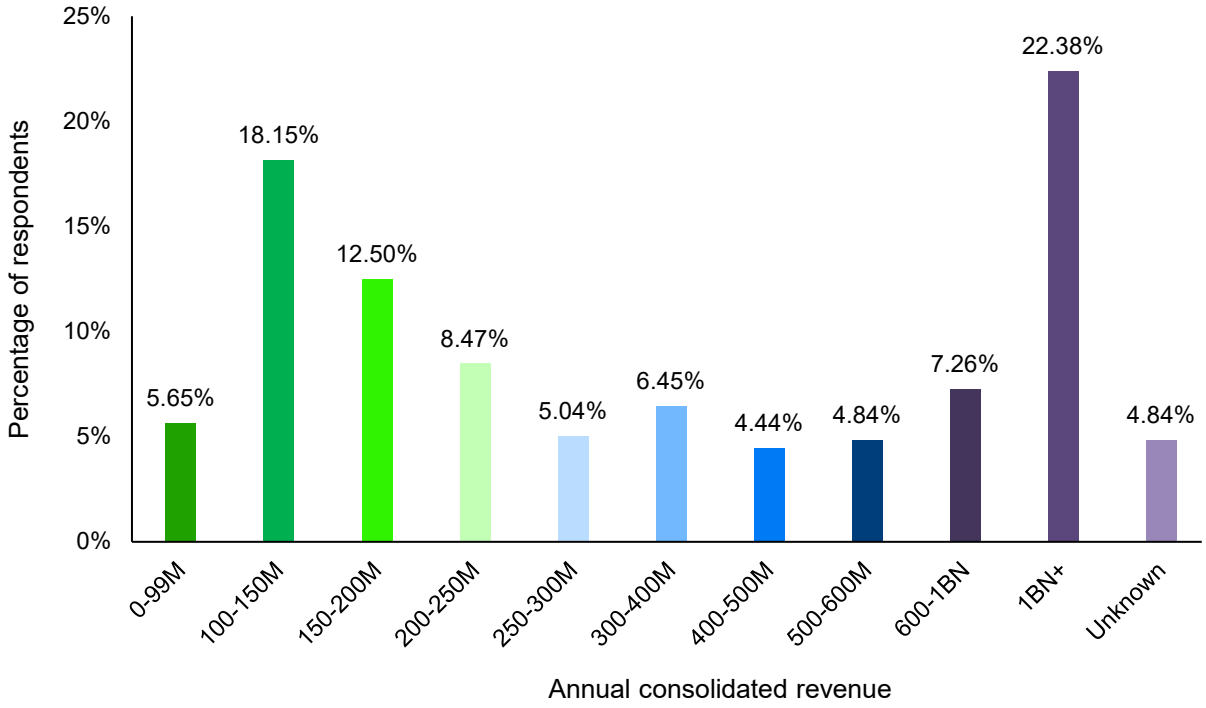


**Figure 4: Support for the annual reporting requirement of the Modern Slavery Act (the Act)**

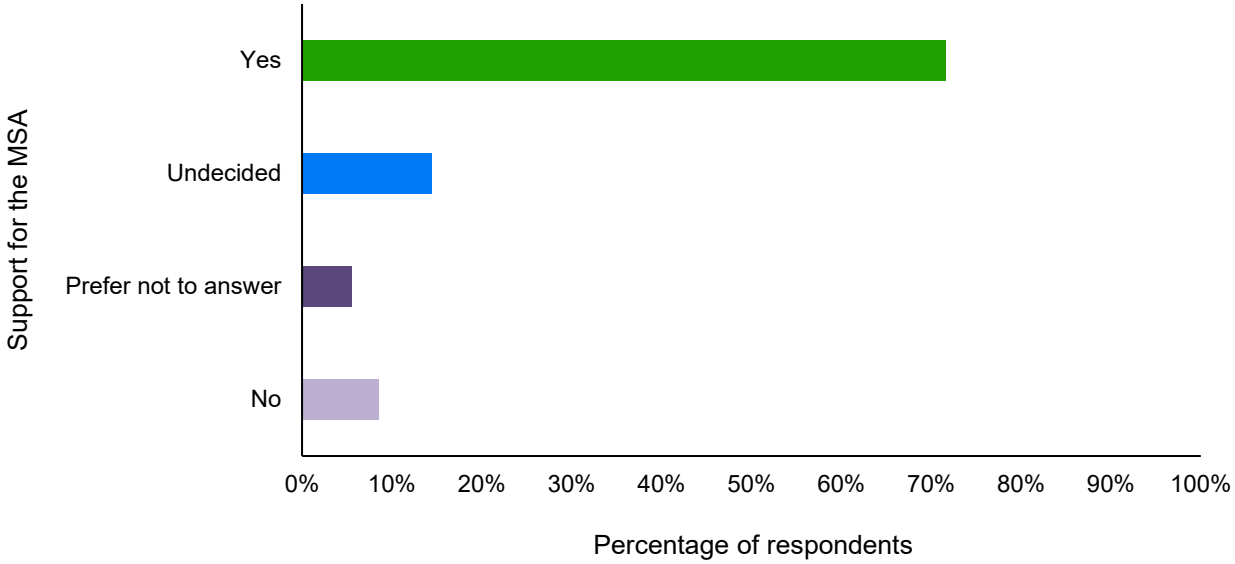



**Figure 5: Approximate number of domestic and international suppliers in respondents' supply chains at the time of preparing most recent modern slavery statement**

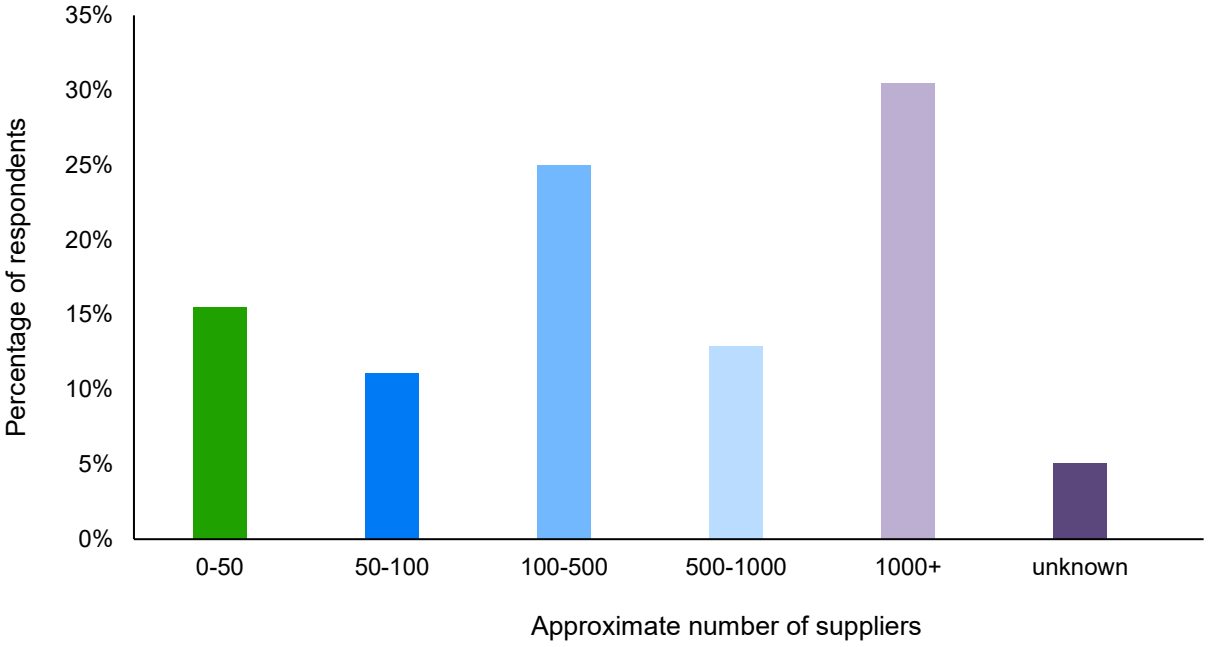


**Figure 6: Areas of difficulty experienced by respondents when preparing most recent modern slavery statement**

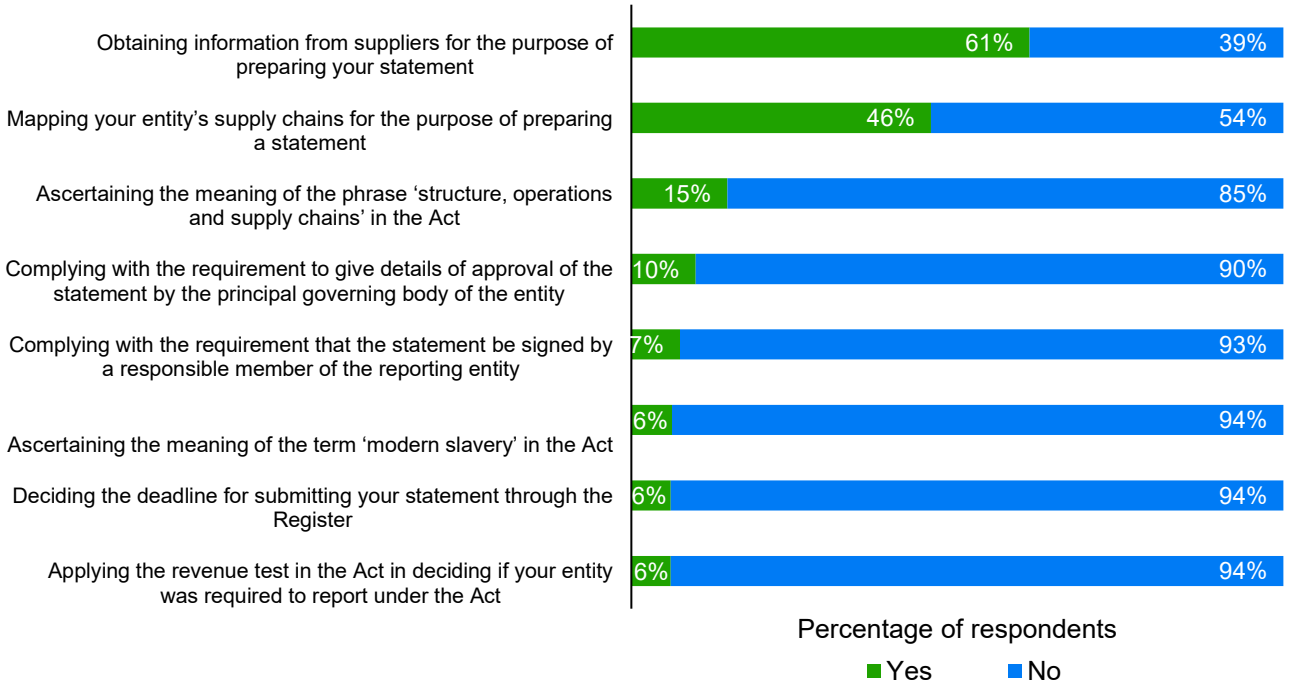



**Figure 7: Difficulty posed by reporting criteria under the Act**

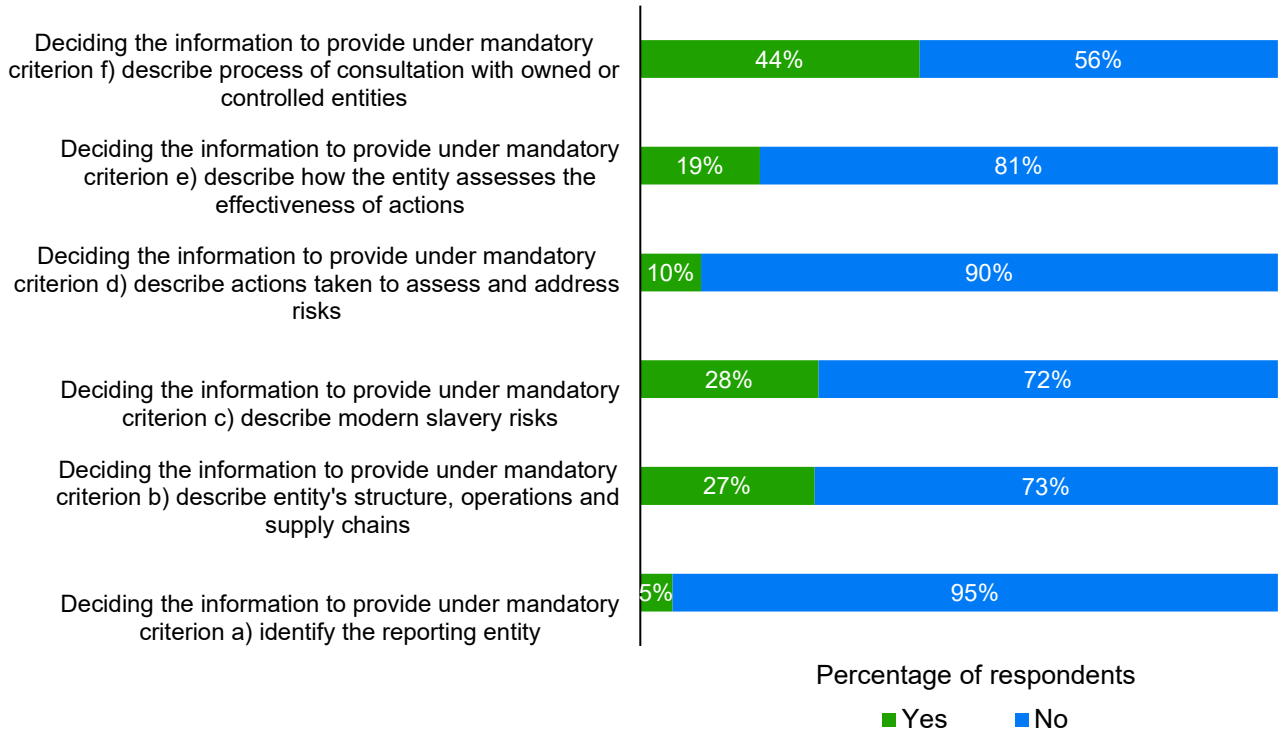


**Figure 8: Propotion of respondents who engaged in external assistance/assurance and supplier consultation**

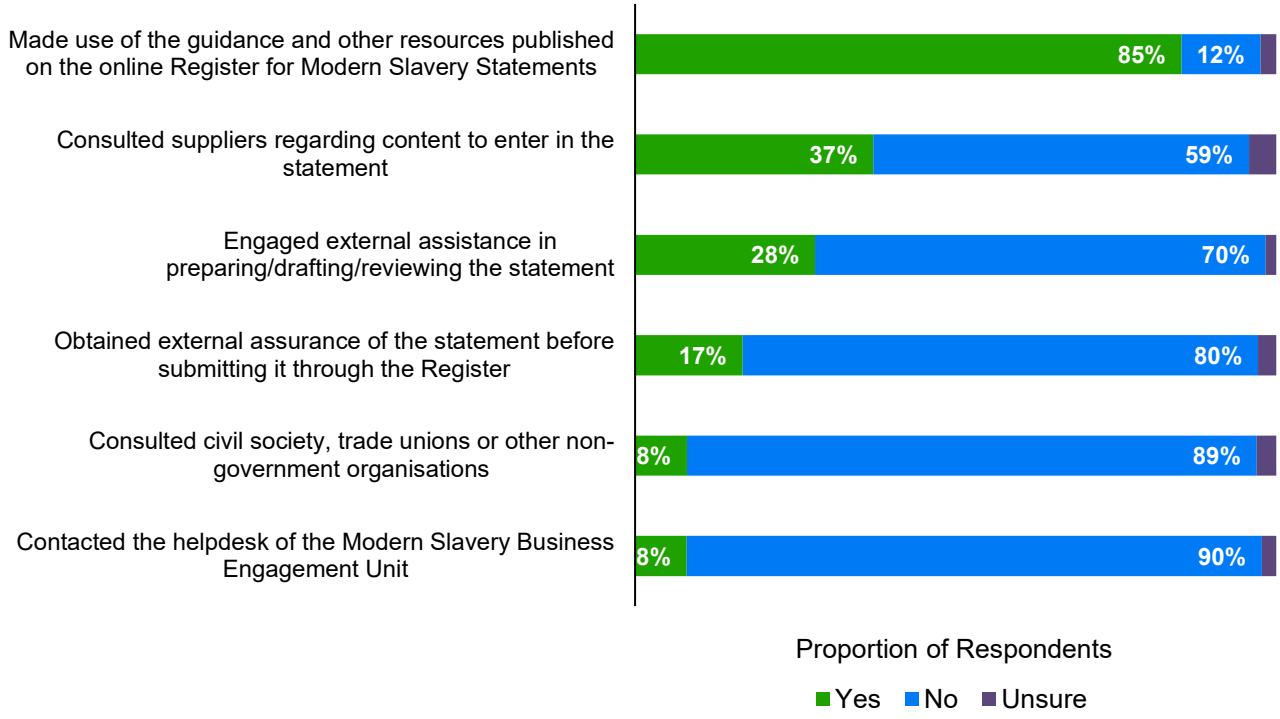



**Figure 9: Level of engagement of leadership teams in preparing most recent modern slavery statements**

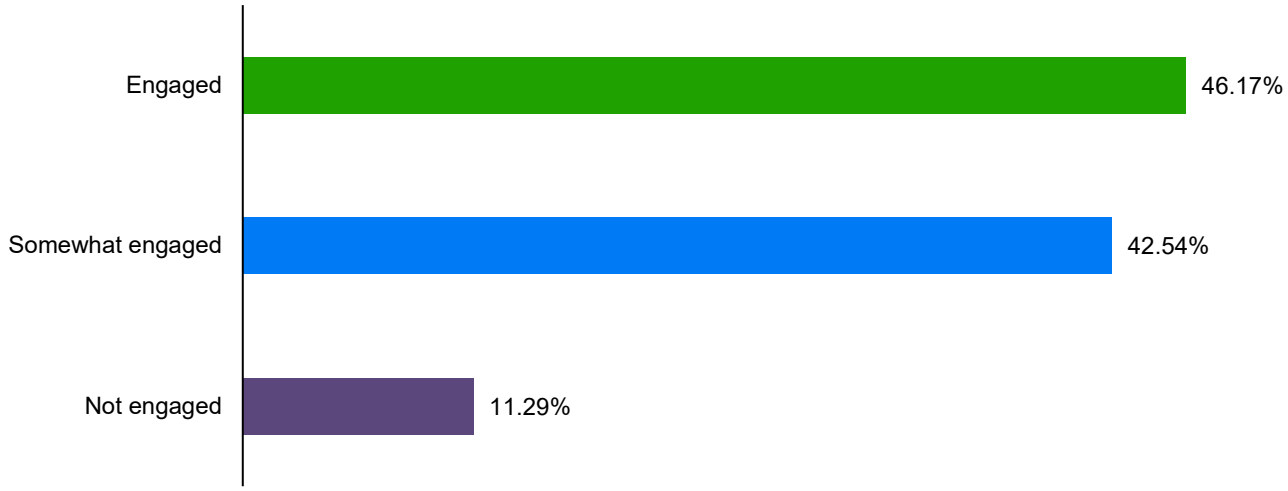


**Figure 10: Estimated costs to prepare most recent modern slavery statement**

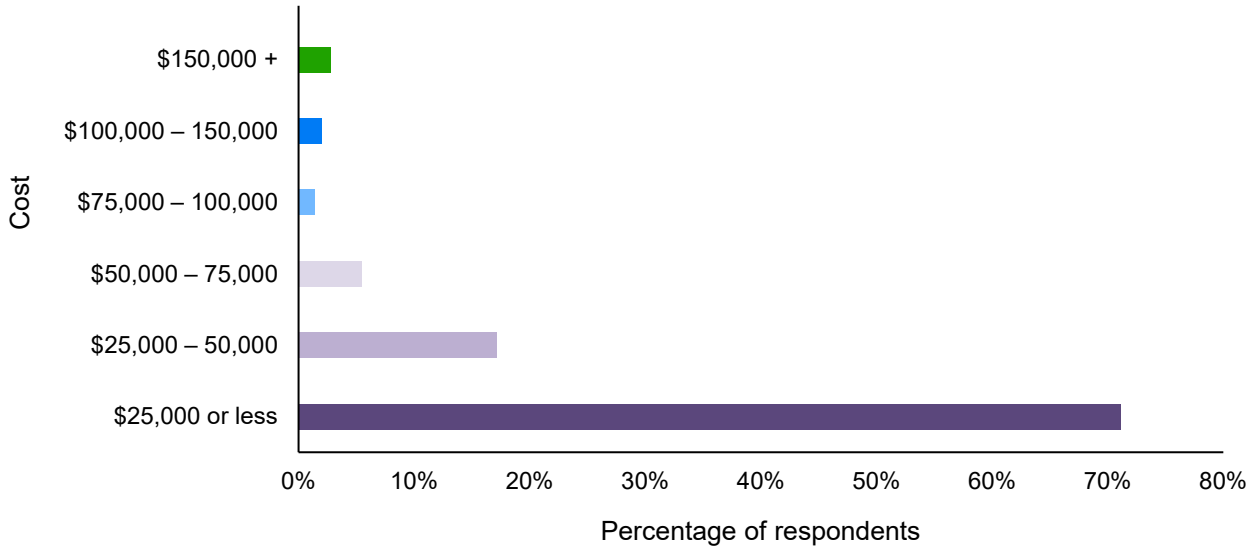



**Figure 11: Percentage of respondents that provide training to staff on modern slavery risks, including requirements of the Act**

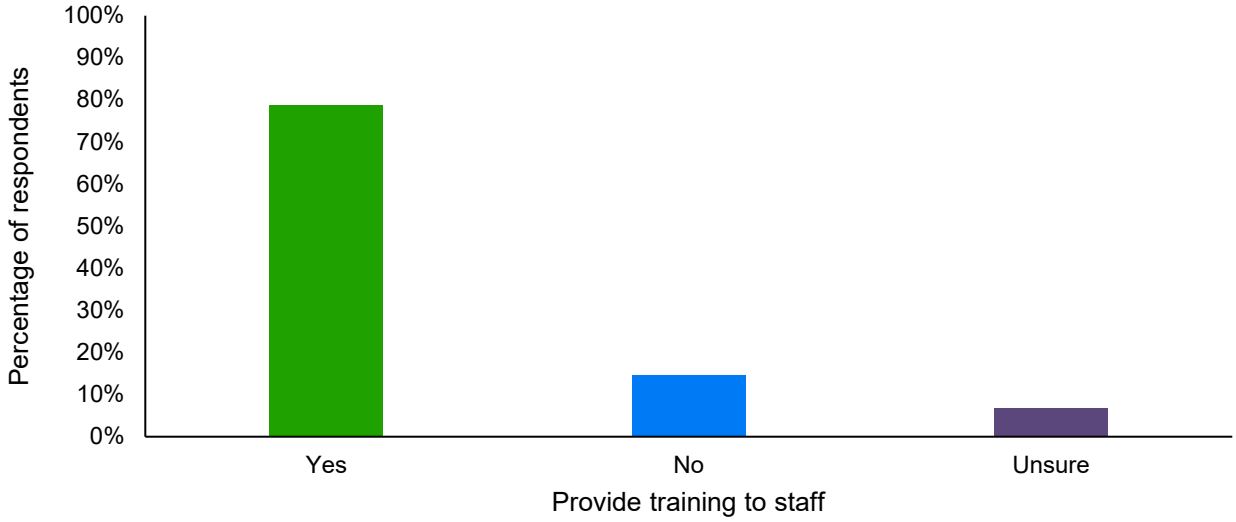


**Figure 12: Changes respondents have implemented either following or as a response to the commencement of the Act**

# APPENDIX E – Table of comparative international developments

The below table has been taken from Annexure B of a submission made to the Review on behalf of the Human Rights Law Centre (submission #38)

| Jurisdiction | Legislation / Proposal | Summary | Penalties |
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| New Zealand | *Modern Slavery Consultation Paper* | In April 2022, the New Zealand Government announced its intention to introduce a disclosure and due diligence-based legislative framework for combating modern slavery.[291]<br><br>Under the proposal, all organisations would be subject to new responsibilities across their operations and supply chains, with more responsibilities for larger organisation:<br><br>• All entities would be required to take reasonable and proportionate action if they become aware of modern slavery in their international operations and supply chains and/or modern slavery or worker exploitation in their domestic operations and supply chains;<br>• All entities would be required to undertake due diligence to prevent, mitigate and remedy modern slavery and worker exploitation by New Zealand entities where they are the parent or holding company or have significant contractual control<br>• Medium and large entities would be required to report annually on the due diligence they are undertaking to address modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains | The New Zealand Government is considering penalties to apply for failing to comply with obligations at each company size threshold. It is also considering other tools including infringements, improvement notices, enforceable undertakings and publication of good/bad practices. Examples of penalties provided as a reference include employment legislation providing for minimum wage standards:<br><br>• Penalties for seeking payment in return for a job, failing to pay/underpaying wages, and failing to provide holiday and annual leave or entitlements are up to NZD **$10,000** (approx AUD $8,966) **for an individual and NZD $20,000** (approx AUD $17,930.46) **for a corporation**. In the case of a pecuniary penalty for serious breaches of minimum entitlement provisions, up to NZD $50,000 (approx AUD $44,826.16) for an individual and up to the greater of NZD $100,000 (approx AUD $89,652.32) or 3 times the financial gain for a body corporate.<br>• Penalties for requiring excessive working hours are up to **$10,000 for an individual and $20,000 for a corporation**. In the case of failing to comply with a duty under the Health and Safety at Work Act, it is up to $50,000 for an individual who is not a person conducting a business or undertaking (PCBU) or PCBU |

[291] New Zealand Government, Ministry of Business, Innovation and Employment, *Discussion Documents: A Legislative Response to Modern Slavery and Worker Exploitation*, 8 April 2022 <https://www.mbie.govt.nz/dmsdocument/19734-discussion-document-a-legislative-response-to-modern-slavery-and-worker-exploitation>

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| | | • Large entities would be required to meet due diligence obligations to prevent and mitigate modern slavery in their international operations and supply chains, and modern slavery and worker exploitation in their domestic operations and supply chains | officer, up to $100,000 for an individual who is a PCBU or a PCBU officer; and up to NZD $500,000 (approx AUD $448,230) for any other person.<br>• Penalties for failing to maintain employment records are **up to $10,000 for an individual and $20,000 for a corporation.** |
| UK | *Modern Slavery Act 2015 (UK)*<br>*Modern Slavery Amendment Bill 2021*<br>*Proposed mandatory human rights and environmental due diligence laws* | In the UK there have been bills and proposals to amend existing legislation. In 2021, the *Modern Slavery Amendment Bill 2021* was introduced in the House of Lords. The proposed legislation makes it an offence to supply a false slavery and human trafficking statement, punishable by a term of imprisonment and/or a fine amounting to 4% of global turnover of the relevant commercial organisation, to a maximum of £20 million. The proposed legislation also establishes minimum standards of transparency in supply chains in relation to modern slavery and human trafficking, including:<br>• a requirement that the commercial organisation publish and verify information about the country of origin of sourcing inputs in its supply chain;<br>• arrange for credible external inspections, external audits, and unannounced external spot-checks; and<br>• report on the use of employment agents acting on behalf of an overseas government.<br>Under the proposed legislation, the Independent Anti-Slavery Commissioner has the power to issue a formal warning to a commercial organisation which fails to meet these requirements. Further, if a commercial organisation continues to source from suppliers or sub-suppliers which fail to demonstrate minimum standards of transparency after having been issued a formal warning by the Independent Anti-Slavery Commissioner, it commits an offence, punishable by a | • No current provision for monetary penalties with a breach of the Act.<br>• However, the bill, *Modern Slavery Amendment Bill 2021,* introduces proposed sanctions, including a term of imprisonment and/or a fine amounting to **4% of global turnover** of the relevant commercial organisation, to a **maximum of £20 million.** |

fine amounting to 4% of global turnover of the relevant commercial organisation, to a maximum of £20 million.

More broadly, a coalition of 63 UK businesses, investors and civil society organisations have also called for the UK government to adopt mandatory human rights and environmental due diligence laws to identify, assess and mitigate the risks to all human rights and the environment posed by corporate activities.[292]
The proposed legislation is modelled on recommendations issued by the UK's Joint Committee on Human Rights in its report on 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability'.[293] In that 2018 report, the Committee made the following recommendation:

> *"We recommend that the Government should bring forward legislation to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human right abuses for all companies, including parent companies, along the lines of the relevant provision of the Bribery Act 2010. This would require all companies to put place effective human rights due diligence processes (as recommended by the UN Guiding Principles,) both for their subsidiaries and across their whole supply chain. The legislation should enable remedies against the parent company and other companies when abuses do occur, so civil remedies (as well as criminal remedies) must be provided. It should include a defence for companies they had conducted effective human rights due diligence, and the burden of proof should fall on companies to demonstrate this has been done."*[294]

[292] Letter from the 63 businesses, investors and civil society organisations to the House of Commons, 30 September 2022, <https://media.business-humanrights.org/media/documents/2022_Joint_business_investor_CSO_letter_on_human_rights_due_diligence_legislat_XFDmyAJ.pdf>
[293] House of Lords, House of Commons, *Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, 6th Report of Session 2016-17, 29 March 2017, <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>
[294] Ibid 59.

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| | | These recommendations follow some assessment of the effectiveness of a 'duty to prevent' model with regard to improving corporate efforts around due diligence and risk mitigation. In 2019, the Bribery Act 2010 (UK) underwent post-legislative scrutiny by a House of Lords Committee, with the overall findings positive in terms of its ability to shift corporate behaviour and reduce corruption through the inclusion of due diligence requirements as a defence to a duty to prevent foreign bribery. The Committee found:<br>*"the Act is an excellent piece of legislation which creates offences which are clear and all-embracing. At a time when much corruption is on a global scale, the new offence of corporate failure to prevent bribery is regarded as particularly effective, enabling those in a position to influence a company's manner of conducting business to ensure that it is ethical, and to take steps to remedy matters where it is not."*[295] | |
| US | *California - Transparency in Supply Chains Act*<br>*New York – Proposed Sustainability and Social Accountability Act*<br>*Federal – Tariff Act 1930*<br>*Uyghur Forced Labor Prevention Act*<br>*Proposed* Fashioning Accountability and Building Real Institutional Change | The Californian *Transparency in Supply Chains Act* provides for a disclosure-based regime for retailers and manufacturers doing business in California, with annual worldwide gross receipts of $100 million or more. Companies must report on their efforts to eradicate slavery and human trafficking from the supply chain. Companies must make disclosures, on their website, relating to verification, audits, certification, internal accountability, and training.<br><br>In New York, there are also efforts to introduce a stronger disclosure and action standard in New York through the Sustainability and Social Accountability Act (A8352/S7428), which would impose social and | • In California, there are no penalties for non-compliance with the Act.<br>• In New York, failure to comply with specific reporting requirements may lead to penalties (such as injunctions or damages) or fines of **up to 2%** of their annual revenues over **$450 million**. Further, the Attorney General and private citizens will have the ability to enforce the law against non-compliant companies. |

[295] House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: post-legislative scrutiny*, Report of Session 2017-19, 14 March 2019, <https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf> 3. Note also that the legislative approach was replicated in the context of tax evasion facilitation in the UK Criminal Finances Act 2017

environmental disclosure requirements on global fashion brands operating in New York.

At a federal level, section 307 of the US *Tariff Act 1930* prohibits the importation of merchandise mined, produced or manufactured, wholly or in part in any foreign country, by forced or indentured labour, including forced child labour.[296] Anyone may petition the regulator to investigate allegations of forced labour,[297] who will detain imports under a 'Withhold Release Order' where evidence reasonably, but not conclusively, indicates that they are produced or manufactured in whole or in part by forced labour.[298]

Under the US regime, goods will be released where the importer provides evidence that the goods were not produced with forced labour within three months (or re-exports its products).[299] Where the importer fails to produce such evidence, or where the regulator conclusively makes a 'finding' that the imports were made with forced labour,[300] the goods will be destroyed or subject to seizure and summary forfeiture proceedings.[301]

Further, the *Uyghur Forced Labor Prevention Act* (**UFLPA**) was signed into law on 23 December 2021 and came into effect in June 2022. The UFLPA creates a rebuttable presumption that all goods manufactured in Xinjiang are made with forced labour, unless the Commissioner of Customs and Border Protection (**CBP**) determines the importer has complied with specific conditions and provided evidence demonstrating the goods were not produced with forced labour. This has

[296] *Tariff Act 1930* 19 USC § 307 (2010).
[297] 19 C.F.R. § 12.42(b) and (d), <https://www.law.cornell.edu/cfr/text/19/12.42>.
[298] 19 C.F.R. § 12.42(e), <https://www.law.cornell.edu/cfr/text/19/12.42>.
[299] 19 C.F.R. § 12.43, <https://www.law.cornell.edu/cfr/text/19/12.43>.
[300] 19 C.F.R. § 12.42(f), <https://www.law.cornell.edu/cfr/text/19/12.42>.
[301] Unless the importer avails themselves of further appeals processes. See 19 C.F.R. § 12.44(a) and (b), <https://www.law.cornell.edu/cfr/text/19/12.44>.

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| | | been accompanied by the US Department of Homeland Security's Strategy to Prevent the Importation of Goods Mined, Produced or Manufactured with Forced Labor in the People's Republic of China and CBP importer guidance to assist the business community.<br><br>The *Fashioning Accountability and Building Real Institutional Change* (FABRIC) Act (S4213) has been introduced in the US Senate. The Bill has not yet passed the Senate and has been referred to the Committee on Finance. If passed, the Bill would:<br><br>• establish joint and several liability requirements for brands that hold them and their manufacturing partners accountable for their labour practices, this provision enables workers to pursue legal remedy from the brands and retailers whose business practices lead to labour abuses;<br>• establish a nationwide garment industry registry through the Department of Labor to promote transparency;<br>• set hourly pay in the garment industry and eliminate "piece rate" pay until the minimum wage is met; and<br>• encourage domestic manufacturing through the introduction of grants and reshore tax credits. | |
| Canada | *Bill S-211*<br>*Bill C-262*<br>*Bill C-263*<br>*Integrity Declaration on Doing Business with Xinjiang Entities* | In Canada, several bills in relation to modern slavery and/or human rights due diligence measures have been introduced into Parliament.<br><br>Bill S-211 (an Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*)* (currently being scrutinised by the Canadian Parliament's foreign affairs committee) imposes similar reporting obligations to the current Act, but includes additional measures including penalties, | Under Bill S-211:<br><br>• Minister may require entity to take any measures the Minister considers to be necessary to ensure compliance with reporting obligations (Section 18).<br>• Every person or entity that fails to comply with the reporting obligations, a ministerial order under section 18 or obstructs a Minister's investigation, is guilty of an offence punishable |

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| | | liability for directors and officers of companies, and additional powers of enforcement.<br><br>Bill C-262 proposes to establish a duty on businesses to prevent adverse human rights impacts, and to develop and implement due diligence procedures. This Bill also provides for access to remedy by people whose human rights are adversely impacted. Accompanying this Bill is Bill C-263, which establishes a Commissioner for Responsible Business Conduct Abroad for the purpose of enforcing the proposed laws.<br>Canada also has introduced an import ban on goods made with forced labour, and has issued an *Integrity Declaration on Doing Business with Xinjiang Entities* which is required to be completed by Canadian companies that are (1) sourcing directly or indirectly from Xinjiang or from entities relying on Uyghur labour; (2) established in Xinjiang; or (3) seeking to engage in the Xinjiang market, before receiving services and support from the Trade Commissioner Service (**TCS**). By signing the declaration, the representative attests that the company is aware of the human rights situation in Xinjiang and the elevated risk this poses, and that it understands that the TCS expects Canadian companies to operate in a manner that respects human rights, including with respect to forced labour, all applicable laws, as well as to operate transparently and in a manner that seeks to meet or exceed international standards such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles. It also affirms that the company is not directly or indirectly sourcing products from Chinese entities implicated in forced labour or other human rights violations related to Xinjiang. | on summary conviction and liable to a fine of **not more than $250,000** (approx AUD $276,812) (Section 19(1))<br>• Knowingly making any false or misleading statement / providing false or misleading information to a Minister or a delegate is guilty of an offence punishable on summary conviction and liable to a fine of **not more than $250,000** (see above) (Section 19(2)).<br>• Directors/Officers/Agents/Mandataries of the person/entity who directed, authorised, assented to, acquiesced in, or participated in the commission of an offence is a party to and guilty of the offence and liable on conviction to the punishment provided for the offence, whether or not the person/entity has been prosecuted or convicted (Section 20). |
| EU | *Proposed Directive on Corporate Sustainability Due Diligence* | In February 2022, the European Commission published a draft *Directive on Corporate Sustainability Due Diligence,* which would require certain companies to conduct human rights and environmental due | • **Member states are required to impose sanctions applicable to infringements of national provisions** adopted pursuant to the Directive that are 'effective, proportionate and dissuasive' (Article 20(1)). |

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| | | diligence.[302] If adopted, EU member countries will have two years to transpose the Directive into national laws. The proposed Directive applies to EU companies and non-EU companies operating in the EU, subject to certain employee and turnover thresholds. Articles 5 to 11 broadly outline due diligence procedures imposed on companies as required by the directive, including:<br>• Integrating due diligence into company policies;<br>• Identifying actual or potential adverse impacts;<br>• Preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent;<br>• Establishing and maintaining a complaints procedure;<br>• Monitoring the effectiveness of their due diligence policies and measures;<br>• Publicly communicating on due diligence<br>EU members would need to ensure that companies can be held liable for damages if '*an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised…occurred and led to damage'*.[303] | • Due account to be taken of company's efforts to comply with any remedial action required, investments made, targeted support and collaboration with other entities to address adverse impacts in value chains (Article 20(2)).<br>• Sanctions should be related to company turnover, and sanction decisions by authorities should be published (Article 20(3)).<br>• Member States also to ensure that companies are liable for damages (Article 22). They must ensure their laws, regulations and administrative provisions (regarding infringements of directors' duties) also apply to the provisions of the proposal.<br>• Civil liability without prejudice to the civil liability of a company's subsidiaries or of any direct and indirect business partners in the value chain.<br>• Member States to ensure that the liability is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State. |
| France | *Duty of Vigilance Law* | The French *Duty of Vigilance* law remains one of the seminal European laws requiring large companies to establish, effectively implement and publish vigilance measures to identify risks and prevent severe impacts on human rights and the environment. It also provides for civil liability in the event of breach. | • 3 Tiered System: (1) Formal Notice; (2) Possibility of seeking an injunction from a judge; (3) Judge has ability to impose fine.<br>• A person having a legal interest in bringing proceedings may, after a formal notice has remained unsuccessful after 3 months, ask the judge (ruling in summary proceedings where necessary), to order the establishment, disclosure and effective implementation of |

[302] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>
[303] Ibid Article 22.

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| | | | vigilance measures, including under penalty payment.<br>• In the event of damage, any person having an interest in bringing proceedings may bring an action before the court, seeking compensation, including if the damage takes place abroad. Onus on plaintiff to demonstrate breach of duty of vigilance, the harm, and causal link. |
| Germany | *Act on Corporate Due Diligence Obligations in Supply Chains* | Germany's *Law on Supply Chains* was adopted on 11 June 2021, entering into force on 1 January 2023. The law places due diligence measures on companies, who must make reasonable efforts to ensure there are no violations of human rights in their own business operations and in the supply chain.* Notably, the law contains a staggered application and financial penalties. | • Where a company fails to comply with due diligence obligations, the Act provides for sanctions in the form of periodic penalty payments of up to **EUR 50,000** (approx AUD 74,525) in administrative enforcement proceedings and/or fines, which can amount up to **EUR 8 million** (approx AUD 11.9 million).<br>• If the company has an annual revenue of above EUR 400 million (approx AUD 596 million), a regulatory offence may even be punished with an administrative fine of up to **2% of a company's global revenue**.<br>• Amount of fine determined by significance of the violation, economic circumstances of the company and the circumstances that militate in favour of and against the company. |
| Netherlands | *Due Diligence on Child Labour Law*<br>*Proposed Responsible and Sustainable International Business Conduct Act* | The Dutch *Child Labour Due Diligence Act* was introduced in 2019, imposing obligations on companies operating in the Netherlands to conduct due diligence related to child labour, and submit statements to a public authority. This legislation was intended to come into force in 2022.* In an announcement on 6 December 2021, the Foreign Trade and Develop Minister announced a government decision to develop and introduce a national law on human rights and environmental due diligence given the delays with the European Commission proposal. | Under the *Due Diligence on Child Labour Law*<br>• Complaint is filed with the offending company by the complainant (victims, consumers, other stakeholders), asking for a response and instructing the company to resolve the issue. Where the company does not resolve the matter within 6 months, the regulator will act as a mediator, and will provide the company with a legally binding course of action. |

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| | | In November 2022, the proposed *Responsible and Sustainable International Business Conduct Act* was re-submitted to the Dutch parliament following a review of the first draft. The proposal imposes a duty of care to prevent adverse impacts on human rights or the environment for companies offering goods and services to the Dutch market to prevent. Under the proposal there will be general duty of care for all companies offering goods and services to the Dutch market; and due diligence obligation for companies with 250+ employees, and/or 50 million revenues, and/or 43 million assets (2 out of 3). After 6 years the due diligence obligation will also apply to companies with 50+ employees after an evaluation of the law. | • Failure to follow the instructions or complete them within an allotted timeline may result in fines or additional penalties.<br>• Fines for failing to file a declaration start at **€4,350** (approximately AUD 6,483.56) and penalties increase exponentially for companies found to have inadequate due diligence or lack of an appropriate plan of action to detect and prevent the use of child labour.<br>• Companies that fail to comply can be subject to fines of **up to €870,000** (approximately AUD 1,29 million), or 10% of total worldwide revenue, if the fine is not deemed an appropriate penalty.<br>• If a company receives two fines for breaching the Law within five years, the responsible company director is liable for up to **two years of imprisonment** under the Economic Offences Act.<br><br>Under the proposed *Responsible and Sustainable International Business Conduct Act*<br><br>• Companies have a duty to remediate or enable remediation of harms they cause or to which they contribute. If they fail to so, they are subject to an administrative penalty of no more than **10% of net turnover.** |
| Norway | *Transparency Act 2021* | Norway's *Transparency Act* was passed on 10 June 2021, and effective 2 July 2022. The *Transparency Act* requires companies to perform human rights due diligence assessments, with reports on those assessments to be made available digitally on the companies' website.* Notably, individuals have the right to request information from a company on their due diligence management, the information being required to be provided within 2 months. | 1. Where the Norwegian Consumer Authority finds an enterprise is in breach of the Act, they will obtain a written confirmation (from the enterprise) that the illegal conduct will cease, or issue a decision (Section 9).<br>2. The Norwegian Consumer Authority can make a prohibition order, enforcement penalty order or an infringement penalty order (Section 11).<br>3. Enforcement penalty may be established as a running charge or lump sum. Emphasis shall be |

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| | | | given to the consideration it must not be profitable to breach the decision. The Minister may issue regulations regarding the imposition of enforcement penalties.<br>4. An infringement penalty may be imposed when the infringement has been committed by someone acting on behalf of the enterprise. Infringement penalties for wilful/negligent infringements may be imposed on natural persons. The penalty is determined by considering the severity, scope and effects of the infringement. The infringement is due for payment 4 weeks after the decision is made. A final decision concerning an infringement penalty constitutes a ground for enforcement of the amount due. |
| Switzerland | *Articles 964a-964c, 964j-964l of the CO, and Article 325ter of the Criminal Code* | Switzerland enacted new legislation, in effect from 1 January 2022. Articles 964a-964c CO provide for reporting obligations covering companies' policies on carbon emissions, social issues, labour issues, human rights, corruption, and due diligence procedures. Similarly, 964j-964l CO and the Federal Council Ordinance create due diligence obligations in relation to child labour in minerals and metals from conflict zones in supply chains of Swiss companies. This is supplemented by Article 325ter of the Criminal Code, which covers penalties in relation to reporting obligations. | • **Fines of 100,000 CHF** (approximately AUD $142,118) for intentionally providing a 'false indication' in the reports above, or failing to maintain the reports.<br>• Where failures are negligent rather than intentional, a **fine of 50,000 CHT** (approximately AUD $71,059) may be imposed. |
| United Nations | *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and* | There have been several rounds of treaty negotiations at the United Nations on a "*Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*". The latest draft was released in August 2021, and mandates corporate due diligence across all internationally recognised human rights, including the right to a clean, healthy and sustainable | • The treaty would require States to impose administrative, civil and criminal penalties on actors failing to satisfy due diligence duties of care. |

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| *Other Business Enterprises* | environment. Further, it would require States to impose administrative, civil and criminal penalties on actors failing to satisfy due diligence duties of care. |