

# Modern Slavery in Supply Chains Reporting Requirement Submission to Attorney-General's Department

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## Your details

<b>Name/organisation</b> If you are providing a submission on behalf of an organisation, please provide the name of a contact person.	Australian Lawyers for Human Rights Contact: Benedict Coyne (President)
<b>Contact details</b> Please provide one or all of the following: postal address, email address or phone number.	<a href="mailto:president@alhr.org.au">president@alhr.org.au</a> and <a href="mailto:bhr@alhr.org.au">bhr@alhr.org.au</a>

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AUSTRALIAN  
LAWYERS  
FOR  
HUMAN RIGHTS

PO Box A147  
Sydney South  
NSW 1235  
[president@alhr.org.au](mailto:president@alhr.org.au)  
[www.alhr.org.au](http://www.alhr.org.au)

20 October 2017

Transnational Crime Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

By email: [slavery.consultations@ag.gov.au](mailto:slavery.consultations@ag.gov.au)

Dear Committee Secretary

### **Submission on Modern Slavery in Supply Chains Reporting Requirement – Public Consultation Paper and Regulation Impact Statement**

Australian Lawyers for Human Rights (**ALHR**) thanks you for the opportunity to make a submission in response to the *Modern Slavery in Supply Chains Reporting Requirement Public Consultation Paper and Regulation Impact Statement* published by the Minister for Justice on 16 August 2017 (**Consultation Paper**).

ALHR has also made a submission to the Inquiry into establishing a Modern Slavery Act in Australia (**Inquiry**) dated 27 April 2017 responding to the Inquiry's Terms of Reference. This submission supplements ALHR's previous submission.<sup>1</sup>

#### **ALHR**

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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<sup>1</sup>

Prepared by ALHR's Business and Human Rights Subcommittee

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## Recommendations

### Recommendation 1:

Forced marriage should only be excluded from definition of modern slavery for the purpose of the reporting requirement, it should still be considered by the proposed Modern Slavery Act.

### Recommendation 2:

That the definition of a reporting 'entity' should:

- a) be broad and be aligned where possible to the wide definition of entity in Australian tax law;
- b) include groups of entities;
- c) include both entities headquartered in Australia, and entities that have any part of their operations in Australia; and
- d) include the Government.

### Recommendation 3:

An entity's revenue for the reporting requirement should be defined by reference to the concept of 'aggregated turnover' in Australian tax law.

### Recommendation 4:

The appropriate annual reporting threshold for an entity is an aggregated turnover of \$25 million, or failing that, an absolute maximum of \$60 million.

### Recommendation 5:

An entity's 'operations' should be defined broadly and not limited to activities undertaken in order to generate revenue or increase the value of assets.

### Recommendation 6:

An entity's 'supply chains' should be:

- a) defined broadly and go beyond the first tier of the supply chain;
- b) not be limited to core suppliers; and
- c) include overseas suppliers.

### Recommendation 7:

The definitions of 'supply chain' and 'operations' should also take into account the definitions of 'business activities', 'business relationships' and 'value chain' in the United Nations Guiding Principles on Business and Human Rights.

### Recommendation 8:

The costing of the regulatory impact of the reporting requirement should take into account benefits to entities of complying with the reporting requirement.

### Recommendation 9:

That the following additional reporting criteria be mandatory:

- a) the number and nature of any incidences of modern slavery detected during the reporting period along with steps taken to respond and remediate such issues and ensure they do not occur in future;
- b) the training on modern slavery provided to staff; and
- c) a description of how employees or others can report modern slavery risks or incidences, the entity's grievance mechanisms and policies for remedying harm including compensatory schemes.

**Recommendation 10:**

The following amendments should be made to the proposed mandatory reporting criteria:

- a) Criteria 2 '*The modern slavery risks present in the entity's operations and supply chains*' should, in line with the wording in the UK Act, include 'and the steps taken to assess and manage the specific risks identified'; and
- b) Criteria 3 '*The entity's policies and process to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff)*' should have further guidance and requirements about the performance indicators of 'effectiveness' of an entity's policies and processes.

**Recommendation 11:**

Modern Slavery Statements should be:

- a) required to meet minimum content standards set out in Regulations or Government guidance;
- b) required to include a link to the Central Repository site to allow for stakeholders to understand the context to the statement and allow comparison with other statements; and
- c) included in the entity's Annual Report.

**Recommendation 12:**

The Modern Slavery Act should require that that:

- a) Modern Slavery Statements include a specific reference to their board's approval; and
- b) the content of Modern Slavery Statements must not be misleading or deceptive, as those terms are currently understood within Australian law.

**Recommendation 13:**

The Central Repository should:

- a) be continuously updated, free and designed to allow comparison and scrutiny of Modern Slavery Statements;
- b) be easily searchable across a wide range of indicators including whether an entity has complied with the reporting requirement and/or is subject to any penalties;
- c) be run by the Attorney General Department or ASIC, or in the alternative a civil society organisation with Government funding and support; and
- d) be a central hub for Government and civil society guidance and commentary on the reporting requirement.

**Recommendation 14:**

The Australian Modern Slavery Act should provide for:

- a) Financial penalties in the form of fines for:
  - i. non-compliance with the requirement to issue a Modern Slavery Statement;
  - ii. Modern Slavery Statements that are not signed by a director, approved by the entity's board and linked on the entity's website in a prominent position; and
  - iii. failure to meet mandated minimum content requirements for Modern Slavery Statements (as set by Government guidance or regulation).
- b) Non-financial penalties for entities that do not comply with the reporting requirements by publication of a list of non-compliant entities on the Central Repository website and preclusion from tendering for Government contracts.

- c) An Anti-Slavery Business Advisory Service to be established, and adequately funded (potentially under the auspices of the Independent Anti-Slavery Commissioner), to provide advice to businesses on the requirements for complying with the new Australian Modern Slavery Act.

**Recommendation 15:**

All entities should be required to publish their Modern Slavery Statements five months after the end of the Australian financial year.

**Recommendation 16:**

The reporting requirements should not be phased-in for large entities, in particular reporting entities with an annual revenue of \$60 million or over.

**Recommendation 17:**

The Government should arrange for an independent review within at least three years of the effectiveness of the the reporting requirement. The review should consider:

- a) the reporting threshold;
- b) the amount of the penalties for failing to comply with legislation;
- c) the functioning of the Central Repository;
- d) the adequacy of guidance and advice available for business;
- e) levels of compliance with the reporting requirement;
- f) the quality of the content of Modern Slavery Statements;
- g) whether sufficient resources are available for monitoring compliance with the reporting requirement; and
- h) areas for improvement by Government or business in supporting or responding to the reporting requirement.

**Recommendation 18:**

The Government should fund the Government department running the Central Repository or a civil society body, to undertake annual monitoring and benchmarking of entities' compliance with the reporting requirement. The results should be published on the Central Repository website.

**Recommendation 19:**

Option One and Option Two proposed by the Consultation Paper are not appropriate responses to combat the complex issue of modern slavery.

**Recommendation 20:**

The Modern Slavery Act should establish an IASC modelled on the UK IASC, who is empowered and adequately funded to:

- a) provide training and written guidance to business about best practice in responding to modern slavery reporting requirements and understanding and complying with the UNGPs;
- b) critically analyse the Government's response to modern slavery and making recommendations on how it could be improved, including recommendations regarding co-ordination across Government departments;
- c) undertake legislative reviews at periodic intervals of domestic legislation relating to modern slavery, including a periodic review of the Australian Modern Slavery Act;
- d) monitor implementation of the National Action Plan to Combat Human Trafficking and Slavery;
- e) raise public awareness of modern slavery;

- f) provide support to victims of modern slavery and assisting with ensuring they have access to appropriate re-dress;
- g) monitor and report on the Government's implementation of the 20 recommendations in the Joint Committee on Law Enforcement 2017 report, *An inquiry into human trafficking, slavery and slavery like practice*; and
- h) monitor Australia's compliance with relevant international treaties, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

## 1. Consultation Question 1 - Is the proposed definition of 'modern slavery' appropriate and simple to understand?

- 1.1 The Consultation Paper proposes to define modern slavery as encompassing conduct that constitutes an offence under Divisions 270 and 271 of the *Criminal Code 1995* (Cth) for 'human trafficking, slavery and slavery-like practices' including: debt bondage, deceptive recruiting for labour or services, forced labour, servitude and slavery.<sup>2</sup> ALHR supports the use of Australia's existing framework, where possible as a basis for the definitions used in the proposed Modern Slavery Act.
- 1.2 The Consultation Paper proposes to exclude practices such as forced marriage that are unlikely to be present in business operations and supply chains from the reporting requirements. However, even if forced marriage is specifically excluded, it would still be most appropriately addressed by the Modern Slavery Act (as against alternative legislation) as it constitutes a form of servitude and often co-exists with economic servitude.
- 1.3 The Consultation Paper proposes to adopt reporting requirements for businesses that are substantially similar to those already existing in the UK "to ensure the business community does not need to comply with inconsistent regulation across jurisdictions".<sup>3</sup> However, Consultation Paper's proposed definition of modern slavery is inconsistent with the wording in the UK *Modern Slavery Act 2015 (UK Act)* definition of human trafficking<sup>4</sup> and slavery, servitude and forced or compulsory labour.<sup>5</sup> Therefore careful guidance should be provided by Government to specifically highlight any differences between the scope of the reporting requirements.

## 2. Consultation Question 2 - How should the Australian Government define a reporting 'entity' for the purposes of the reporting requirement? Should this definition include 'groups of entities' which may have aggregate revenue that exceeds the threshold?

- 2.1 ALHR supports the proposal in the Consultation Paper to define 'entity' broadly to include:
  - a range of entities including bodies corporate, unincorporated associations or bodies of persons, superannuation funds and approved deposit funds;<sup>6</sup> and
  - entities headquartered in Australia, or entities that have any part of their operations in Australia.<sup>7</sup>
- 2.2 The definition of a reporting 'entity' should be sufficiently broad to encompass the multitude of entities that may form an economic group that effectively operates as a single entity with the one "controlling mind". This will assist in limiting the ability of

<sup>2</sup> Consultation Paper, 14

<sup>3</sup> Ibid, 16

<sup>4</sup> *Modern Slavery Act 2015* (UK), 2

<sup>5</sup> *Modern Slavery Act 2015* (UK), 1

<sup>6</sup> Consultation Paper, 15

<sup>7</sup> *ibid*

businesses to attempt to “structure” out of the scope of the modern slavery reporting requirements and will protect the integrity of the modern slavery reporting measures.

- 2.3 The complexity and nuances of Australia’s business environment mean that large businesses often utilise a variety of corporate structures regularly, for example involving a series of companies (both registered in Australia as well as foreign jurisdictions), unit trusts and in the case of privately owned groups, discretionary trusts. The use of trusts within a business corporate structure is particularly unique to Australian business, and the use of trusts is especially common within privately owned business structures. Another feature of the Australian business environment is the predominant role of privately owned groups. For example, per the 2016 *IbisWorld Special Report: The Top 500 Private Companies in Perspective*, 30% of Australia’s \$4.7 trillion revenue was generated by private companies as compared to the 32% generated by listed companies.<sup>8</sup>
- 2.4 Valuable insight may be gained in this respect from tax law, which has over many years been tailored to the business environment and business practices in Australia. ALHR recommends using the concept of “aggregated turnover” as defined within Australian tax law<sup>9</sup> to determine if an entity is a reporting entity for the purposes of the proposed *Modern Slavery Act*. In our view, this will ensure that the effective definition of a reporting entity has sufficient breadth to encompass any economic group and its constituent entities controlled by the one “controlling mind”, where the aggregated turnover of the group exceeds the prescribed threshold. The definition should also require that the economic group to which the reporting entity belongs carries on business, or part of a business, in any part of Australia to ensure that the necessary nexus to Australia exists.
- 2.5 Under Australian tax law, the concept of ‘aggregated turnover’ is used to determine whether an entity is eligible to access certain tax concessions by reference to whether the aggregate turnover of the economic group to which the entity belongs meets the relevant threshold test.<sup>10</sup> Therefore, referencing the use of aggregated turnover as used within tax law should not add any additional complexity.

#### *‘Aggregated Turnover’ and associated definitions under Tax Law*

- 2.6 Broadly, aggregated turnover is defined in the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**) ss.328-115, to include the sum of the following turnovers:
1. the annual turnover of the relevant entity being tested;
  2. the annual turnover of an entity that is connected with the relevant entity; and
  3. the annual turnover of an entity that is an affiliate of the relevant entity.
- 2.7 However, aggregated turnover does not include any amounts derived as a result of related party dealings between any of the relevant entity, connected entity or affiliates. The definition of aggregated turnover in turn includes the use of the following defined terms: ‘Annual turnover’; ‘Entity’; ‘Connected entity’; and ‘Affiliate’. A high level summary of these defined terms is set out below.

<sup>8</sup> Business Council of Cooperatives and Mutuals, *IbisWorld Special Report: The Top 500 Private Companies in perspective* (September 2016). Corollary to this is that 30% of Australia’s \$4.7 trillion revenue is derived within private group structures

<sup>9</sup> Corporations law also provides for the consideration of a company’s consolidated revenue for the purposes of determining whether an entity constitutes a large or small corporation. However, as Corporations law has been designed specifically for the purposes of body corporates, we do not believe that these definitions are broad enough (without significant modification) for the purpose of the proposed *Modern Slavery Act*

<sup>10</sup> For example, small business entities are eligible for a number of tax concessions. In order to determine whether an entity constitutes a small business entity, regard must be had to the entity’s ‘aggregated turnover.’ See *Income Tax Assessment Act 1997* (Cth) ss.328-110. (“ITAA97”)



### *Annual Turnover*

- 2.8 ITAA97 ss.328-120 defines ‘annual turnover’ as effectively ordinary income derived in the ordinary course of carrying on a business. Importantly, this definition only takes into account business turnover. The use of aggregated turnover in the modern slavery context will ensure that predominantly passive investment entities (i.e. an entity which predominantly derives passive income such as interest or dividends) will not inadvertently be caught within the scope of the modern slavery reporting requirements.

### *Entity*

- 2.9 An ‘entity’ is defined very broadly within the Australian tax legislation. Under ITAA97 ss.960-100, an ‘entity’ is defined as meaning any of the following:

- an individual;
- a body corporate;
- a body politic;
- a partnership;
- any other unincorporated association or body of persons;
- a trust;
- a superannuation fund; and
- an approved deposit fund.

ALHR supports the use of similar terminology to ensure that any entity that carries on a business, would be required to report where the aggregated turnover of the group to which it belongs exceeds the prescribed threshold.

### *Connected Entity and Affiliate*

- 2.10 A ‘connected entity’ is defined in ITAA97 ss.328-125 broadly as an entity, in which the relevant entity, together with its affiliates, has effectively a 40% interest. Whether a discretionary trust is a connected entity is broadly based on whether the discretionary trust is controlled by the relevant entity and its affiliates.
- 2.11 An ‘affiliate’ is defined in ITAA97 ss.328-130 broadly as an individual or company that acts or could reasonably be expected to act in accordance with the directions or wishes of the relevant entity in relation to the business affairs of the individual or company.
- 2.12 Using the above definitions would ensure that an economic group with a single “controlling mind” is considered as a whole.

### *Foreign jurisdiction definitions of reporting entity*

- 2.13 A reporting entity for the purposes of s.54 of the UK’s *Modern Slavery Act 2015 (UK Act)* is broadly a body corporate or partnership which:
- carries on business, or part of a business, in any part of the UK; and
  - supplies goods and services; and
  - has a total turnover, as defined in *The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 (UK) (UK Regulations)* of not less than the prescribed threshold of £36 million.
- 2.14 The UK Regulations define ‘total turnover’ as the turnover of the relevant organisation and the turnover of any of its subsidiaries (as long as they carry on business in the UK, not entirely overseas). The above UK definition utilises concepts similar to that of aggregated turnover, and aims to capture economic groups with a total turnover above the prescribed threshold. The UK definition will not capture business operations

undertaken within trust structures, and therefore may not be suited to the nuances of the Australian business context.

- 2.15 The *California Transparency in Supply Chains Act of 2010 (Californian Act)* requires every retail seller and manufacturer doing business in the state of California and having annual worldwide gross receipts that exceed USD\$100 million to make a disclosure for the purposes of the Californian Act.<sup>11</sup>
- 2.16 The Californian Act references the Californian Revenue and Taxation Code for the definition of relevant terms such as “gross receipts”.<sup>12</sup> This cross-referencing allows for consistency when applied by businesses, and reduces the need to “reinvent the wheel”.

#### *Government*

- 2.17 The Government does not, at this stage, propose to include the federal government in the reporting requirement,<sup>13</sup> rather it is seeking other ways to address the risk of modern slavery within the Government supply chain. Given the significant value of public procurement of goods and services, ALHR submits that the Australian *Modern Slavery Act* should:
- require that the Government be subject to the same reporting requirement. However if this is not the case in the short term, we submit this issue should be re-considered by the Government within 3 years of the commencement of the new Act; and
  - include a requirement that the Government can only contract with entities who are compliant with the modern slavery reporting requirements (see Item 9).

### **3. Consultation Question 3 - How should the Australian Government define an entity’s revenue for the reporting requirement? Is \$100 million total annual revenue an appropriate threshold for the reporting requirement?**

#### *Revenue definition*

- 3.1 An entity’s revenue for the purposes of the reporting requirement should be defined in terms of business turnover similar to the definitions used in both the UK Act and the Californian Act.
- 3.2 In the Australian context, the use of aggregated turnover as defined within *ITAA97* ss.328-115, not only assists in defining a reporting entity, but also assists in defining an entity’s revenue for the reporting requirement. Aggregated turnover is broadly defined by reference to the sum of various annual turnovers. ‘Annual turnover’ is defined within *ITAA97* ss.328-120 to mean ordinary income derived in the ordinary course of carrying on a business. This definition will inherently only take into account business turnover, consistent with the definitions used in the other foreign jurisdictions.

#### *Appropriate threshold*

- 3.3 ALHR recommends that the Government consider a \$25 million threshold as a goal to phase in over a three to five year period for the reasons outlined below. Failing this, as outlined below, ALHR supports a lower threshold than \$100 million that is at least in line with the UK threshold (that is AUD \$60 million).
- 3.4 It is our view that the threshold for the reporting requirement should be determined having close regard to the underlying policy intent of the proposed legislation and other relevant factors including:

<sup>11</sup> *Californian Transparency in Supply Chains* (2010), s.1714.43

<sup>12</sup> *Californian Transparency in Supply Chains* (2010), s.1714.43(2)(B)

<sup>13</sup> Consultation Paper, 15

- the intent of the proposed legislation being to bring about greater awareness of modern slavery and cultural change at the corporate board level;
- Australia's unique and important role to play in combatting the heinous crimes of modern slavery, given that more than 50% of the 45.8 million people subjected to some form of modern slavery are exploited in the Asia-Pacific region;<sup>14</sup>
- the threshold above which an entity is large enough to have an impact in combatting modern slavery;
- the effectiveness of the proposed modern slavery legislation in combatting modern slavery;
- the resources that would likely be made available by the Government for monitoring compliance with the legislation; and
- the compliance burden for Australian businesses caused by the threshold limit.

#### *\$100 million turnover threshold*

- 3.5 The \$100 million total annual revenue threshold currently proposed by the Australian Government appears to be inspired by the \$100 million threshold used in the ATO's corporate tax transparency report.<sup>15</sup> We are not aware of any other major laws or requirements applicable to businesses that apply a similar \$100 million threshold level.
- 3.6 We note that the ATO's corporate tax transparency measures were introduced in the context of a growing and shared concern by the former federal government and internationally by member countries of the G20 and most of the OECD, that some large corporate entities were engaged in profit shifting, with the consequential effect of eroding a country's tax base.<sup>16</sup> The income tax transparency measures took place against a background of international developments in relation to tax transparency: the G8's commitments to take actions to improve tax transparency standards in the extractive sector and to develop common reporting standards; and, the OECD's Base Erosion and Profit Shifting Plan to address tax avoidance by multinational companies.<sup>17</sup>
- 3.7 Effectively, the \$100 million threshold was introduced for the purposes of the tax transparency measures as it was entities of this size or larger that posed the greatest risk to eroding Australia's tax base. It is our view that replicating a threshold adopted in 2015<sup>18</sup> aimed at combatting tax avoidance by multinational companies is not an appropriate test for the purposes of addressing modern slavery.

#### *Alternative threshold amount*

- 3.8 A \$25 million threshold would be more closely aligned with the intent of the proposed legislation. The \$25 million threshold is used in Australia to determine whether a proprietary company is a large or small company under the *Corporations Act 2001* (Cth) s.45A. The threshold is also used to define a base rate entity in the 2018 financial year under s.23AA of the *Income Tax Rates Act 1986*, for the purposes of determining which companies are eligible to pay tax at the 27.5% reduced corporate tax rate.
- 3.9 A review of this threshold amount was undertaken in 2006, with the review committee finding that the \$25 million threshold was an appropriate threshold to identify an economically significant company. The committee stated in its review that:

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<sup>14</sup> Consultation Paper, 6

<sup>15</sup> Ibid, 15

<sup>16</sup> Explanatory Memorandum, Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Law) Bill 2015 (Cth), [1.17]

<sup>17</sup> Ibid, [1.18]

<sup>18</sup> The \$100 million threshold was introduced in 2015 by the Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Law) Bill 2015 (Cth)

*Economically significant entities are publicly accountable because of their size and potential to affect the community and the economy. Adjusting the thresholds to an appropriate level will reduce the compliance cost burden for proprietary companies that are not economically significant as they would no longer be required to prepare annual reports.*<sup>19</sup>

- 3.10 The potential impact that an entity of this size would have on the community was a key underlying policy consideration in electing the \$25 million threshold for the purposes of corporation's law. ALHR submits that the underlying rationale considered by the threshold review committee has a much closer nexus to the rationale that should be applied in determining whether an entity is large enough to have an impact in combatting modern slavery.

#### *Comparison to Foreign Jurisdictions*

- 3.11 The UK has adopted a revenue threshold of £36 million for the purposes of the UK Act, which roughly equates to \$61.1 million Australian dollars. California adopted a revenue threshold of \$100 million US dollars for the purposes of the Californian Act, which roughly equates to \$125.6 million Australian dollars.
- 3.12 The £36 million revenue threshold adopted by the UK also aligns with the definition of a large business under the UK's Companies Act 2006. This is consistent with the above rationale for adopting the \$25 million threshold in the Australian modern slavery context. The £36 million UK threshold was further considered sufficient to ensure businesses which have the resources to undertake effective due diligence are required to produce a statement.<sup>20</sup>
- 3.13 The Gross Domestic Product (**GDP**) in the UK was worth \$3,288 billion Australian dollars in 2016<sup>21</sup> and in California was worth \$3,121 billion Australian dollars in 2015.<sup>22</sup> In comparison, Australia's GDP was only \$1,538 billion Australian dollars in 2015.<sup>23</sup>
- 3.14 Given Australia's GDP is much smaller than that of the UK and California, in order for the Australian modern slavery legislation to be as effective, it would seem reasonable that the threshold adopted for Australian purposes should range (as a proportional approximation of GDP) between around \$28 million to \$62 million. While we understand that this is only a very rough measure, this analysis clearly indicates that a threshold limit of \$100 million is grossly inappropriate given the size of Australia's economy and is likely to render the proposed legislation largely ineffective.
- 3.15 If the threshold is reduced and more Australian entities are required to publish Modern Slavery Statements, the reporting required to determine whether an Australian supplier is compliant is likely to become easier for all Australian businesses as there should be a greater likelihood that more Australian suppliers in each supply chain would themselves have also published a Modern Slavery Statement. As time passes, and a greater number of statements are published, the system should thus become more efficient. In general, lowering the threshold should result in greater transparency, which in turn should reduce the reporting costs borne by the various entities.

<sup>19</sup> Treasury, Corporate and Financial Services Regulation Review Proposals Paper 2006, Draft Regulation Impact Statement, Chapter 2 – Company Reporting Regulations, (Australian Government, 2006), 4

<sup>20</sup> Explanatory Memorandum to The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 (UK), [7.5]

<sup>21</sup> Trading Economics, *United Kingdom GDP 1960-2017*, (2017) <<https://tradingeconomics.com/united-kingdom/gdp>>. Per this source, the UK had a GDP of USD\$2,618.89 billion in 2016. This was converted to Australian dollars using the average conversion rate on 23 September 2017

<sup>22</sup> US Bureau of Productivity Analytics, *Gross domestic product (GDP) by state (millions of current dollars)*, (CFM) (Press release), (10 December 2015), 7. Per source, California had a GDP of USD\$2,485 billion in 2015. This was converted to Australian dollars using the average conversion rate on 23 September 2017

<sup>23</sup> International Monetary Fund. *World Economic Outlook: Report for Selected Country Groups and Subjects* (April 2016). Per source, Australia had a GDP of USD\$1,223 billion in 2015. This was converted to Australian dollars using the average conversion rate on 23 September 2017

#### 4. Consultation Question 4 - How should the Australian Government define an entity's 'operations' and 'supply chains' for the purposes of the reporting requirement?

- 4.1 ALHR welcomes the Government's proposal to provide detailed guidance for businesses about the definitions of 'operations' and 'supply chains' that are developed in conjunction with business and civil society stakeholders.<sup>24</sup>
- 4.2 An entity's 'operations' should also be construed broadly and by its ordinary meaning. In that regard, 'operations' should not be limited to activities undertaken in order to generate revenue or increase the value of assets, but should extend to the day-to-day activities undertaken by an entity, whether defined in an entity's constitution or captured in its policies or statements of purpose.
- 4.3 The UK Act does not define the term 'supply chain', however the Guidance issued by the UK Government<sup>25</sup> states that for the purpose of the reporting requirement in section 54, the term has its "everyday meaning".
- 4.4 ALHR supports the Government's proposal<sup>26</sup> to extend the definition of 'supply chain' beyond first tier suppliers. Further, ALHR is of the view that the definition of 'supply chain' should:
- not be limited to core suppliers, but rather should extend to ancillary suppliers, such as those that provide cleaning or catering functions; and
  - specify that 'supply chain' includes overseas suppliers.
- 4.5 The Government should encourage entities to report on the entirety of each supply chain. Tools for end-to-end supply chain mapping are available and numerous companies, particularly in the apparel industry, have made public the details of their entire supply chain.<sup>27</sup> However, it cannot be assumed that an industry will have immediate and full visibility of its entire supply chain.<sup>28</sup>
- 4.6 The formulation of the definitions of 'supply chain' and 'operations' should also take into account the definitions of 'business activities', 'business relationships' and 'value chain' in the *United Nations Guiding Principles on Business and Human Rights (UNGPs)*.

#### 5. Consultation Question 5 - How will affected entities likely respond to the reporting requirement? As this is how the regulatory impact is calculated, do Government's preliminary cost estimates require adjustment?

- 5.1 A range of systemic measures to both alleviate this regulatory burden and initial learning period are recommended below in Section 9.
- 5.2 The cost of compliance with the reporting requirement should be weighed against the human cost of modern slavery and the serious human rights violations it gives rise to. Modern slavery is a significant issue for Australian companies. It is estimated that Australian companies whose supply chains were using forced or child labour imported

<sup>24</sup> Consultation Paper, 15

<sup>25</sup> United Kingdom Home Office, *Transparency in Supply Chains etc. A practical guide* (October 2015), 5

<sup>26</sup> Consultation Paper, 15

<sup>27</sup> See for example, Adidas, H&M, Cotton On, and Esprit which publically disclose details of their whole supply chain. For further detail see Human Rights Watch, *Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry*, 20 April 2017

<sup>28</sup> See, company responses captured in a report prepared by the Ethical Trading Initiative, *Corporate approaches to addressing modern slavery in supply chains: A snapshot of current practice*, 1 August 2016



\$600 million worth of products in the 2009-2010 financial year.<sup>29</sup> Further, it is estimated that over half of the victims of forced labour are in the Asia-Pacific region, amounting to approximately 30 million people.<sup>30</sup>

### *Benefits to reporting*

- 5.3 The regulatory burden on entities should also be weighed against the benefits to entities in complying with the reporting requirements. The mandatory reporting requirement creates a consistent set of standards for businesses to follow.<sup>31</sup> Companies that are leaders in addressing modern slavery risks will be appropriately recognised and rewarded for their efforts and it will be harder for laggards to ‘free-ride’ or avoid scrutiny.<sup>32</sup> Our recommendations for financial and non-financial penalties and incentives for compliance are discussed at Item 9 below.
- 5.4 In addition, reporting enables businesses to manage the governance and reputational risks arising from modern slavery in their global supply chains.<sup>33</sup> This is a significant investment in the long-term value of the business. Tackling modern slavery is the first step towards positioning businesses to capitalise on industry trends towards more sustainable business models that account for business impacts on the communities, societies and the environment, in line with the global sustainable development goals (SDGs).<sup>34</sup> Tackling modern slavery can release new opportunities, spark innovation, strengthen reputation, attract the best talent, tap into the increasing consumer and investor demand for sustainable practices, and secure a social licence to operate into the future.<sup>35</sup>
- 5.5 The Business and Sustainable Development Commission,<sup>36</sup> a UK based NGO, estimates that achieving the SDGs, which includes the eradication of modern slavery in Goal 8, could by 2030 open up at least US\$12 trillion in market opportunities.<sup>37</sup> ALHR therefore submits that the business case for addressing modern slavery is clear and this should be emphasised to Australian entities which are required to comply with the reporting requirement.

## **6. Consultation Question 6 - What regulatory impact will this reporting requirement have on entities? Can this regulatory impact be further reduced without limiting the effectiveness of the reporting requirement?**

As described elsewhere in this submission, in our view – and perhaps counter-intuitively - the more broadly the reporting entity requirements are framed, the easier they will be to comply with generally, because reporting entities will be able to reference reports from others further down the supply chain. A broad definition of a reporting entity, and effective enforcement of the regulatory requirements, will therefore in practice decrease the regulatory impact across the board.

<sup>29</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Trading Lives: Modern Day Human Trafficking* (Parliament of the Commonwealth of Australia, 2013), 88

<sup>30</sup> Foreign Affairs and Aid Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *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*, (Parliament of the Commonwealth of Australia, August 2017), 2

<sup>31</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Trading Lives: Modern Day Human Trafficking*, above n 30, 7

<sup>32</sup> *Ibid*, 7

<sup>33</sup> *Ibid*, 24

<sup>34</sup> Business and Sustainable Development Commission, *Better Business, Better World* (January 2017), 12. NB this report is supported by, among other governments and NGOs, the Australia Department of Foreign Affairs and Trade

<sup>35</sup> *Ibid*, 12

<sup>36</sup> <http://businesscommission.org>

<sup>37</sup> Business and Sustainable Development Commission, above n 35, 13

## 7. Consultation Question 7 - Are the proposed four mandatory criteria for entities to report against appropriate? Should other criteria be included, including a requirement to report on the number and nature of any incidences of modern slavery detected during the reporting period?

7.1 The Consultation Paper notes that the four proposed mandatory reporting criteria will be:

1. The entity's structure, its operations and its supply chains;
2. The modern slavery risks present in the entity's operations and supply chains;
3. The entity's policies and process to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff); and
4. The entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness.

7.2 ALHR welcomes the proposal that these criteria be mandatory and that they be aligned, at least in part, with some of the UK Act's non-mandatory reporting criteria.

### *Changes to the criteria*

7.3 ALHR further recommends that:

- entities should report on the number and nature of the incidences of modern slavery detected during the reporting period, in detail, along with steps taken to respond and remediate such issues and ensure they do not occur in future;<sup>38</sup>
- Criteria 2 should, in line with the wording in the UK Act, include 'and the steps taken to assess and manage the specific risks identified';<sup>39</sup>
- Criteria 3 should have further guidance and requirements about the performance indicators of 'effectiveness' of an entity's policies and processes. Additionally, in line with the UK Act, the requirement to report on training available to staff should be a separate, mandatory criteria, not an optional element of Criteria 3; and
- an additional criterion should be added describing how employees or others can report modern slavery risks or incidences, the entity's grievance mechanisms and its policies for remedying harm including compensatory schemes.<sup>40</sup>

7.4 This final additional criterion would align business with the requirement in UNGP 15(c) that in order to meet their responsibility to respect human rights, businesses must have in place policies and processes 'to enable the remediation of any adverse human rights impacts they cause or to which they contribute.'

7.5 The Consultation Paper proposes that 'entities will have the flexibility to determine what, if any, information they provide against each of the four criteria and whether to include any additional information.'<sup>41</sup> ALHR instead recommends that for the legislation to be effective, the Government mandate minimum content for Modern Slavery Statements. For example, mandating that the Modern Slavery Statements must address at least the first tier of their supply chains in the first reporting period, with

<sup>38</sup> See also Anti-Slavery Australia, *Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade*, (2017), 4

<sup>39</sup> *Ibid*, 10

<sup>40</sup> See similar views in Amnesty International Australia, *Submission to the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into Modern Slavery Act in Australia* (19 May 2017), 3-14

<sup>41</sup> Consultation Paper, 16.

requirements increasing as time passes. This would provide guidance to business to avoid risks of ‘green washing’ or entities purporting to comply with the reporting requirements by simply stating that no steps have been taken to address modern slavery, as allowed under the UK Act.<sup>42</sup>

- 7.6 ALHR welcomes the proposed requirement for the Modern Slavery Statements to be approved by the entity’s board (or equivalent) and published on an entity’s webpage with a visible link on the entity’s homepage.<sup>43</sup> ALHR also recommends that the new Act provide that Modern Slavery Statements should:
- include a link to the Central Repository site to allow for stakeholders (including those from other jurisdictions) to understand the context to the statement and allow comparison with other statements; and
  - be included in the entity’s Annual Report.<sup>44</sup>
- 7.7 As submitted to the Inquiry in April, ALHR recommends the new Act provide that:
- Modern Slavery Statements should include a specific reference to their board’s approval;<sup>45</sup> and
  - to protect consumers and avoid ‘green washing’, the content of Modern Slavery Statements must not be misleading or deceptive, as those terms are currently understood within Australian law.<sup>46</sup>

## 8. Consultation Question 8 - How should a central repository for Modern Slavery Statements be established and what functions should it include? Should the repository be run by the Government or a third party?

- 8.1 ALHR welcomes the Government’s proposal for a central repository for Modern Slavery Statements (**Central Repository**) that is free, searchable and publically accessible and will include all published Modern Slavery Statements.<sup>47</sup>
- 8.2 The UK Parliamentary Joint Committee on Human Rights report on *Human Rights and Business 2017: Promoting responsibility and ensuring accountability* notes the lack of a mandated central register as a shortcoming in the UK framework.<sup>48</sup> Providing a legislative basis for the Central Repository in the Australian legislation will enhance its standing and avoid the issues encountered in the UK where there is no central repository and multiple registries have emerged run by civil society, which has the potential to cause duplication and confusion, and is viewed as contributing to the lax response to reporting.
- 8.3 ALHR recommends that the Central Repository should be run by a government body such as the Attorney General’s Department or ASIC, or failing that, by a civil society organisation<sup>49</sup> but with government funding and in partnership with both the Government and an Independent Anti-Slavery Commissioner (**IASC**) (see item 15).

<sup>42</sup> *Modern Slavery Act 2015 (UK)*, s.54(4)(b)

<sup>43</sup> Consultation Paper, 17

<sup>44</sup> See discussion in, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim report*, above n 31, 50, [4.18]

<sup>45</sup> ALHR Submission, 32

<sup>46</sup> *Ibid*, 28 -29

<sup>47</sup> Consultation Paper, 17

<sup>48</sup> Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability* (Parliament of the United Kingdom, 5 April 2017), 39 [98]

<sup>49</sup> Such as the Business & Human Rights Resource Centre, a civil society which runs the Modern Slavery Registry statements published pursuant to the UK *Modern Slavery Act 2015*



- 8.4 The Central Repository should be continuously updated. Its main purpose should be to allow for scrutiny and comparison of entities' responses to the reporting requirements. The Central Repository should list the entities:
- that are required to report for the relevant financial year; and
  - have or haven't complied with the requirement to report, or have opted-in to the reporting requirement.
- 8.5 The Central Repository should be easily searchable by:
- size of the entity;
  - industry;
  - where the entity is headquartered;
  - whether entities have reported;
  - whether risks of modern slavery were found; and
  - whether incidences of modern slavery were found.
- 8.6 Oversight of compliance with reporting requirements is discussed below at Item 13. However, the outcomes of compliance monitoring should be published and the Central Repository should list the entities (and allow searches for) entities that:
- have not complied with the aspects of the reporting requirements such as minimum required content;
  - have been subject to financial penalties (see Item 9); and
  - are/are not able to tender for government contracts (see Item 9).
- 8.7 The Central Repository should contain both Government and civil society guidance on responding to the reporting requirement. Additionally, commentary and analysis from civil society or experts about the Central Repository, and the modern slavery reporting requirement (including entities' compliance) should also be collected and made available on the same site as the Central Repository. An example of this approach is the 'Reporting Guidance and Resources' page<sup>50</sup> on the Modern Slavery Registry for the UK site run by the Business & Human Rights Resource Centre (**BHRRC**).<sup>51</sup> Providing a single access point for commentary and guidance would:
- benefit business and consumers by enabling them to understand what is expected from the reporting requirement;
  - assist civil society to coordinate its external commentary and monitoring of the Central Repository and compliance with the reporting requirement; and
  - provide a useful reference point for analysis by academics and other countries considering similar legislation.

## **9. Consultation Question 9 - Noting the Government does not propose to provide for penalties for non-compliance, how can Government and civil society most effectively support entities to comply with the reporting requirement?**

### *Penalties*

- 9.1 ALHR strongly supports financial penalties as well as public reporting on:

<sup>50</sup> [http://www.modernslaveryregistry.org/pages/reporting\\_guidance](http://www.modernslaveryregistry.org/pages/reporting_guidance)

<sup>51</sup> <http://www.modernslaveryregistry.org>

- non-compliance by relevant entities with the requirement to issue a Modern Slavery Statement;
  - Modern Slavery Statements that are not signed by a director, approved by the entity's board or not linked on the entity's website in a prominent position; and
  - failure to meet mandated minimum content requirements for Modern Slavery Statements (as set by Government guidance or regulation, see Item 7).<sup>52</sup>
- 9.2 The penalties should at least be commensurate with the expected cost of compliance, and therefore should be set at a minimum of \$11,000, which as noted in the Consultation Paper, is the current expected cost of compliance per company. A grace period where penalties will not be applied in the first two to three years of operation of the Act can grant businesses time to satisfactorily meet the requirements of the Act.
- 9.3 Further, looking to the United Kingdom experience, the lack of penalties beyond the possibility of an injunction associated with the UK Act has been widely criticised as an ineffective feature of the legislation. In the UK, the initial compliance with the reporting requirement has been underwhelming. A Chartered Institute of Procurement and Supply survey found that over a third of UK businesses required to report under the UK Act did not do so,<sup>53</sup> and 37% of supply chain managers admitted they did not even read the government guidance on modern slavery.<sup>54</sup> Over half of supply chain managers surveyed called for the introduction of fines for non-compliance with the statutory requirements, noting that their organisations are unlikely to take action unless there are stricter policies and penalties.<sup>55</sup>
- 9.4 The BHRRC's Modern Slavery Registry for the UK contains 3,061 statements as at 1 October 2017. However, this is well short of the estimated 12,000-17,000 companies that are estimated to be affected by the requirements of the UK Act. This is likely due to a combination of BHRRC not being able to effectively collate all the relevant statements, as well as many companies who are required to report not doing so.<sup>56</sup>
- 9.5 The threat of penalties or sanctions for non-compliance with Modern Slavery Statement reporting requirements would enhance the business case for complying with any reporting requirements, thereby driving standards and improving supply chain scrutiny.

*No penalties for identification and remediation of incidences of modern slavery*

- 9.6 The identification of incidences of modern slavery should be recognised by both Government and civil society as an indication that appropriate steps are likely being undertaken by the entity to scrutinise its supply chains. Therefore, ALHR supports legislation that gives entities an incentive to report and critically analyse the risk of modern slavery in their supply chains, and also to identify incidences of modern slavery (and provide remediation activities), rather than covering up the entity's involvement.
- 9.7 ALHR does not support financial penalties or preclusion from tendering for government contracts for entities that report on incidences of modern slavery identified in their supply chains in their annual Modern Slavery Statement, so long as the entities have taken substantive remedial steps. Additionally, Government and civil society should work together to produce case studies of best practices demonstrated by entities that

<sup>52</sup> See similar recommendations in Advisory Committee of the Modern Slavery Registry, *Australian Government Modern Slavery in Supply Chains Reporting Requirement Response to Public Consultation Questions*, (October 2017), 7

<sup>53</sup> Chartered Institute of Procurement and Supply, *'News: One in three businesses are flouting Modern Slavery legislation – and getting away with it'* (6 September 2017), <<https://www.cips.org/en-AU/news/news/one-in-three-businesses-are-flouting-modern-slavery-legislation--and-getting-away-with-it/>>

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Oliver Elgie and Natasha Walton, *'The UK Modern Slavery Act: One Year On'* (3 April 2017) Herbert Smith Freehills, <<https://www.herbertsmithfreehills.com/latest-thinking/the-uk-modern-slavery-act-one-year-on>>

have identified incidences of modern slavery in their supply chains and taken appropriate steps to remedy such issues.

#### *Non-financial penalties*

9.8 As noted above, lists of entities that:

- have or haven't complied with the reporting requirement;
- have been subject to financial penalties (if applicable); and/or
- are not able to tender for government contracts,

should be available on the Central Repository, easily accessible to the public and searchable by industry, entity size and type of non-compliance.

9.9 Civil society should also apply public pressure where Modern Slavery Statements are superficial, fail to address the mandatory reporting requirements, or are devoid of real engagement with procedures for identifying and preventing slavery in corporate supply chains.

#### *Incentives – procurement*

9.10 As discussed above, given the significant value of public procurement of goods and services, the Australian *Modern Slavery Act* should include a requirement that the Government can only contract with entities which fall within the definition of 'reporting entity' and which are compliant with the modern slavery reporting requirements (except to the extent that they are currently in the process of taking action against slavery where it has been found in their supply chains, as described in paragraph 9.7 above). This would include barring relevant entities that have not published a Modern Slavery Statement in a given year, or that have published a statement which does not meet minimum content standards, from government procurement.

9.11 The Government should work with State and Territory Governments to ensure there is a harmonised legislative position in this regard for all public procurement by government bodies, which is linked to compliance with the reporting requirement. The US Federal Government already excludes procurement from organisations found or reasonably suspected to have child labour or trafficked labour in their supply chains.<sup>57</sup>

9.12 There is increasing support for this approach in the UK. For example, the UK Parliamentary Joint Committee on Human Rights 2017 report on *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, stressed the need for Government to set an example that business would follow in terms of its supply chains and procurement.<sup>58</sup> It recommended excluding companies that have not undertaken effective human rights due diligence from being able to tender for public sector contracts, export credit and other governmental support,<sup>59</sup> and notes that this is a way governments are able to meet their commitments under UNGPs 5 and 6.<sup>60</sup>

9.13 UNGP 5 provides that:

<sup>57</sup> Federal Register: The Daily Journal of the United States Government, *Federal Acquisition Regulation; Ending Trafficking in Persons*, (A Rule by the Defense Department, the General Services Administration, and the National Aeronautics and Space Administration, 29 January 2015), <<https://www.federalregister.gov/documents/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons>>; United States Department of Labor, *List of Products Produced by Forced or Indentured Child Labor*, <<https://www.dol.gov/ilab/reports/child-labor/list-of-products/>>

<sup>58</sup> Joint Committee on Human Rights, Parliament of the United Kingdom, above n 49, 31 [79-80]

<sup>59</sup> Ibid, 34, [87]

<sup>60</sup> Ibid, 35, [83]

*'States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.'*<sup>61</sup>

9.14 UNGP 6 provides that:

*'States should promote respect for human rights by business enterprises with which they conduct commercial transactions.'*<sup>62</sup>

The Commentary to UNGP 6 specifically highlights the opportunity that states have to promote respect for human rights through procurement.<sup>63</sup>

9.15 ALHR also supports the UK Committee's recommendation that:

*'(c)ompanies that have been found to have been responsible for abuses, either by the courts or by the National Contact Point, or where a settlement indicates that there have been human rights abuses, should also be excluded from public sector contracts for a defined and meaningful period.'*<sup>64</sup>

### *Guidance and training*

9.16 ALHR welcomes the Government's proposal to provide detailed guidance about the nature and extent of the information that should be included in Modern Slavery Statements.<sup>65</sup> While the UK Government issued high level Guidance<sup>66</sup> in 2015 about complying with the UK reporting, the lack of prescription around the content of the reporting in the UK has also been criticised by the UK Joint Committee on Human Rights. The Committee notes in its report, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, that the lack of prescription has meant that 'many statements do not reveal much, if anything, about the practical steps being taken to tackle modern slavery.'<sup>67</sup>

9.17 As at March 2017, the Business and Human Rights Resource Centre (BHRRC) reported that of all the statements submitted on its registry in compliance with the UK Act to date, only 15% met all the basic minimum requirements.<sup>68</sup> A report by Ergon Associates in April 2017, further found that while the length and detail of statements was improving slightly, little progress was made in reporting of due diligence, risk assessments, key performance indicators and outcomes.<sup>69</sup>

9.18 The levels of non-compliance with the UK Act can be explained by a lack of business understanding about the requirements of the Act and how to conduct appropriate modern slavery due diligence in their supply chains. This is likely to also occur in Australia.

9.19 As discussed in section 15 below, ALHR recommends the establishment of an Independent Anti-Slavery Commissioner. The Foreign Affairs and Aid Sub-Committee of the Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade's Interim Report for the Inquiry gave in-principle support for the position of an IASC.<sup>70</sup> Among other things ALHR suggests that IASC can play a valuable role in raising

<sup>61</sup> United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011), 8

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Joint Committee on Human Rights, Parliament of the United Kingdom, above no 59, 34 [88]

<sup>65</sup> Consultation Paper, 16

<sup>66</sup> United Kingdom Home Office, *Transparency in Supply Chains etc. A practical guide* (October 2015), 5

<sup>67</sup> Joint Committee on Human Rights, Parliament of the United Kingdom, above no 59, 38 [95]

<sup>68</sup> Business and Human Rights Resource Centre, *UK: 1 year of company reports under the Modern Slavery Act - compliance & future steps*, (2017) <<https://business-humanrights.org/en/uk-1-year-of-company-reports-under-the-modern-slavery-act-compliance-future-steps>>

<sup>69</sup> Lis Cunha and Stuart Bell, 'Modern slavery statements: One year on' (Ergon Associates, April 2017) 1, <[https://business-humanrights.org/sites/default/files/documents/msa\\_one\\_year\\_on\\_april\\_2017.pdf](https://business-humanrights.org/sites/default/files/documents/msa_one_year_on_april_2017.pdf)>

<sup>70</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim report*, above n 31, [4.55].

awareness, increasing business capacity, and promoting best practices, which will be important in ensuring businesses can and do adequately comply with reporting requirement. The IASC can provide a platform for linking businesses with appropriate resources and partners who can assist them in complying with the Act, including NGOs, multi-stakeholder initiatives, consulting firms, and industry peak bodies where resources can be pooled to achieve the best outcomes.<sup>71</sup>

9.20 ALHR submits that the proposed legislation provides for the IASC to be provided adequate funding to, in conjunction with civil society and experts:

- develop guidance on how to comply with the proposed reporting requirements. Such guidance should be published online on the same site as the Central Repository and should assist companies to understand whether they are required to report, and how to comply with the reporting requirements;
- develop and deliver training for business as to how to effectively address modern slavery in supply chains; and
- undertake general awareness raising for the public about the reporting requirement.

9.21 Additionally, ALHR recommends that an Anti-Slavery Business Advisory Service be established, and adequately funded (potentially under the auspices of the Independent Anti-Slavery Commissioner), to provide advice to businesses on the requirements for complying with the new Australian *Modern Slavery Act* and in implementing policy and supply chain transparency management processes.

9.22 As discussed in Section 8 above, additional guidance and commentary from civil society and/or experts should also be collected and made available on the same site as the Central Repository.

## 10. Consultation Question 10 - Is the five month deadline for entities to publish Modern Slavery Statements appropriate? Should this deadline be linked to the end of the Australian financial year or to the end of entities' financial years?

10.1 The ALHR welcomes the proposal for a uniform reporting deadline being aligned to five months after the end of Australian financial year (30 June) as opposed to the end of an entity's financial year. We note that a company may apply to ASIC to vary their financial year to synchronise with an overseas parent or group.<sup>72</sup>

10.2 ALHR agrees with the Consultation Paper's suggestion that linking the reporting deadline to a consistent date will:

- facilitate the race to the top by providing 'certainty for the business community by ensuring that entities cannot seek any competitive advantage by delaying publication of Modern Slavery Statements';<sup>73</sup> and
- 'ensure that Government, the business community and civil society can more accurately assess compliance with the reporting requirement'.<sup>74</sup>

10.3 In particular, a uniform reporting date will make it easier to identify year-on-year improvements at industry level, and across the whole cohort of reporting entities.

<sup>71</sup> See for example, Kevin Hyland, Independent Anti-Slavery Commissioner of the UK (Open letter to UK CEOs, 4 April 2017), <<http://www.antislaverycommissioner.co.uk/media/1134/letter-to-ceos-on-section-54-of-modern-slavery-act-1-year-on.pdf>>

<sup>72</sup> *Corporations Act 2001* (Cth) ('Corps Act') Section 340; ASIC Corporations (Synchronisation of Financial Years) Instrument 2016/189

<sup>73</sup> Consultation Paper, 15

<sup>74</sup> Consultation Paper, 15



## **11. Consultation Question 11 - Should the reporting requirement be 'phased-in' by allowing entities an initial grace period before they are required to publish Modern Slavery Statements?**

- 11.1 ALHR is of the view that the reporting requirements under the proposed Act should not be 'phased-in' for large entities with an initial grace period before they are required to publish Modern Slavery Statements, in particular for those entities with revenue of \$60 million or over. However, a phase-in period may be appropriate for smaller entities.
- 11.2 The large entities required to publish Modern Slavery Statements are those who have the resources to seek professional advice to be able to comply with the reporting requirements without a grace period. This is consistent with submissions from business to the Committee that some companies have already undertaken significant work to address modern slavery risks and the robust frameworks they have introduced to monitor and audit their supply chains.<sup>75</sup> At least twenty one (21) large Australian companies that were captured by the UK Act annual reporting requirement have already published Modern Slavery Statements.<sup>76</sup>
- 11.3 Further, large entities have been put on notice by the Inquiry and Consultation Paper of the likelihood of having to comply with reporting requirements under the proposed Act. Professional advisory firms have already begun preparing companies for this inevitability.
- 11.4 ALHR also notes that while there were transitional provisions for reporting under the UK Act, this 'phase in' option applied only to companies whose financial year ended within five months of the UK Act receiving royal assent.<sup>77</sup> In the Australian context, if the reporting requirement is at the end of the Australian financial year for all entities (as discussed above at Item 10) all relevant entities would have five months to comply with the reporting requirements in the first Australian financial year after the Act is passed.

## **12. Consultation Question 12 - How can the Australian Government best monitor and evaluate the effectiveness of the reporting requirement? How should Government allow for the business community and civil society to provide feedback on the effectiveness of the reporting requirement?**

- 12.1 ALHR welcomes the proposal in the Consultation Paper to review the effectiveness of the reporting requirement three years after its introduction.<sup>78</sup>
- 12.2 The UK conducted a number of reviews of the UK Act (not just the reporting requirement) during the first years of its implementation. In April 2017, the United Kingdom Parliament's Joint Committee on Human Rights published its review of the UK Act.<sup>79</sup> The Joint Committee conducted interviews, reviewed the existing literature in order to identify shortcomings with the UK Act, and made suggestions for improvements. The UK Government also commissioned an ad hoc independent review of the UK Act commissioned by Teresa May (in her previous role as Home Secretary).

<sup>75</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim report*, above n 31, 23 [3.15]

<sup>76</sup> Modern Slavery Registry, <<http://www.modernslaveryregistry.org/companies/8685/statements/10501>> Those companies include ANZ Group, Ashurst LPP, BHP Billiton plc, Brambles Limited, Commonwealth Bank Group, CSL Behring UK Limited, Macquarie Group Limited, Multiplex Global Ltd, Qantas Group, QBE Insurance Group Limited, Rio Tinto plc, SG Fleet Group Limited, South32 Ltd, Telstra Corporation Limited, Toll Holdings Limited, Treasury Wine Estates Limited, Wesfarmers Limited, Westfield Corporation Limited and Westpac Banking Corporation

<sup>77</sup> UK Home Office, above n 67, 12-13

<sup>78</sup> Consultation Paper, 17

<sup>79</sup> Joint Committee on Human Rights, Parliament of the United Kingdom, above n 49, 37 – 48

This review was conducted by barrister Caroline Haughey, and examined the UK Act as it stood a year since its passing.<sup>80</sup>

- 12.3 The Government should consider, with input from civil society and business, whether similar early reviews may be appropriate in the Australian context.
- 12.4 Evaluations of the effectiveness of the reporting requirement could be conducted by Parliamentary committees, with input from business and civil society. For example, the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade, which led the initial Inquiry or the Parliamentary Joint Committee on Law Enforcement which led the inquiry into Human Trafficking, Slavery and Slavery-like Practices,<sup>81</sup> would be well placed for this function. Alternatively, it would also be appropriate for Government to commission an independent expert or a civil society body to undertake such a review.
- 12.5 Both qualitative and quantitative indicators should be taken into account when evaluating the effectiveness of the reporting requirement, especially in the first few years of the reporting requirement. For example, the *UK Chartered Institute of Procurement and Supply Survey* in 2017 found that the number of UK supply chain managers who said they would not know how to respond if modern slavery was found in their supply chain dropped from 52% to 17% after the introduction of the UK Act.<sup>82</sup> Moreover, an *Ergon Associates and Historic Futures Report* found that the UK Act catalysed internal dialogue and awareness within companies about the issue of modern slavery, as well as increased focus on risk assessment and monitoring.<sup>83</sup>
- 12.6 An evaluation of the effectiveness of the reporting requirement should take into account:
- an assessment of compliance with the reporting requirement;<sup>84</sup>
  - the reporting threshold;
  - the amount of the penalties for failing to comply with legislation;
  - the functioning of the Central Repository;
  - the adequacy of guidance and advice available for business;
  - levels of compliance with the reporting requirement;
  - the quality of the content of Modern Slavery Statements;
  - whether sufficient resources are available for monitoring compliance with the reporting requirement; and
  - areas for improvement by Government or business in supporting or responding to the reporting requirement.

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<sup>80</sup> Caroline Haughey, *The Modern Slavery Act Review*, (31 July 2016)

<sup>81</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Trading Lives: Modern Day Human Trafficking*, above n 30

<sup>82</sup> Chartered Institute of Procurement and Supply, above n 54

<sup>83</sup> Ergon Associates and Historic Futures, *Has the Modern Slavery Act had an impact on your business?*, (Report, October 2016), <<https://business-humanrights.org/sites/default/files/documents/msa-report-ergon-oct2016.pdf>>

<sup>84</sup> See Consultation Paper, 17

### 13. Consultation Question 13 - Is an independent oversight mechanism required, or could this oversight be provided by Government and civil society? If so, what functions should the oversight mechanism perform?

- 13.1 Oversight of compliance with the reporting requirement should be provided for in the proposed Modern Slavery Act along with a provision for adequate funding for the body or bodies chosen for this role, taking into account the volume of potential reporting entities involved.
- 13.2 The UK's Anti-Slavery Commissioner holds the view that the Central Repository of Modern Slavery Statements should not be overseen by the IASC because it could challenge his independence as she/he may be seen to be determining whether the statement is good or bad.<sup>85</sup>
- 13.3 ALHR welcomes the proposals in the Consultation Paper that the Government will:
- monitor 'general compliance' with the reporting requirement;<sup>86</sup>
  - that entities that do not comply with the reporting requirement may be subject to public criticism; and
  - support business groups and civil society to undertake analysis and benchmarking of Modern Slavery Statements and that there will be an assessment of compliance with reporting requirements after three years.
- 13.4 However, ALHR recommends that for the reporting requirement to be effective, the Government should fund at least annual reviews of compliance by relevant entities, with the reporting requirement and public benchmarking of Modern Slavery Statements. Such reporting could be undertaken by the Government body running the Central Repository or by a civil society body with Government funding (or in partnership). The results of such monitoring and benchmarking should be published on the Central Repository website.
- 13.5 Areas for monitoring and benchmarking include:
- the number of entities complying with the reporting requirement, and the number of entities that have opted-in to comply with the reporting requirement;
  - which entities did not submit a Modern Slavery Statement for that year and whether they were penalised;
  - qualitative assessments of reporting, for example:
    - whether Modern Slavery Statements respond to or expand beyond mandatory criteria and contain the minimum mandated content;
    - whether the quality of responses to the mandatory criteria and level of detail is improving annually and areas for further guidance or training;
    - comparisons to examples of best practice standards or guidance provided by government or civil society;
  - snapshots of reporting quality by industry and entity size;
  - statistics on incidences of modern slavery identified and remediated by reporting entities; and

<sup>85</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Committee Hansard regarding Adopting a modern slavery act in Australia*, 30 May 2017, 9

<sup>86</sup> Consultation Paper, p.17



- feedback submitted by civil society and the business community on the reporting process.

13.6 Additionally, a government department such as the Attorney General's Department or ASIC could be responsible for dealing with complaints related to the reporting requirement or Central Repository and the implementation of penalties. Penalties for non-compliance can be set by regulation.

#### **14. Consultation Question 14 - Should Government reconsider the other options set out in this consultation paper (Options 1 and 2)? Would Option 2 impose any regulatory costs on the business community?**

14.1 ALHR does not consider Option One to be an appropriate response. ALHR echoes the concerns noted in the Consultation Paper in relation to Option Two. In particular, that there is a significant amount of international guidance already available around the prevalence of modern slavery in supply chains and this alone has not led to the voluntary uptake by the business sector (with some ad hoc exceptions) of adequate measures to respond to the scourge of modern slavery.

14.2 Experience to date suggests that unless the response to modern slavery is rooted in a regulatory framework, which levels the playing field through mandatory reporting, it is difficult to incentivise a 'race to the top' in responding to modern slavery.

#### **15. Independent Anti-Slavery Commissioner (IASC)**

15.1 ALHR recommends that the Australian Modern Slavery Act should establish the role of an IASC and Australia should follow the IASC model provided by the UK Act.

15.2 The Commonwealth's response to modern slavery must be multi-faceted, spanning from prevention to prosecution of offenders and support for victims. An IASC would play a key role in this response, filling the gaps around the efforts of law enforcement, government agencies and relevant civil society groups.

##### *UK IASC*

15.3 We can look to the United Kingdom for an IASC model. The role of the IASC is established by the UK Act.<sup>87</sup> The role of the UK's IASC is to:<sup>88</sup>

- encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences; and
- assist in the identification of the victims of those offences.

15.4 The UK IASC is to achieve this by, *inter alia*:

- reporting to government and publishing such reports;
- making recommendations to any public authority;
- undertaking research;
- providing training; and
- providing support to victims of human trafficking and slavery like offences.

15.5 The UK IASC has a statutory duty to submit an annual report on the exercise of their functions.<sup>89</sup> This report must include an assessment of the extent to which the

<sup>87</sup> *Modern Slavery Act 2015 (UK)*, s.40

<sup>88</sup> *Modern Slavery Act 2015 (UK)*, s.41

<sup>89</sup> *Modern Slavery Act 2015 (UK)*, s.42(8)

Commissioner's priorities have been met during the period. This encompasses private sector engagement.<sup>90</sup>

#### *Parliamentary support for an Australian IASC*

- 15.6 Two Parliamentary committees have provided support for the introduction of an IASC. The Foreign Affairs and Aid Sub-Committee of the Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade's interim report for the Inquiry gave in-principle support for the position of an IASC.<sup>91</sup> The Interim Report described the IASC's remit as including consulting, advising, reporting on and making recommendations with respect to modern slavery supply chain reporting.<sup>92</sup>
- 15.7 The Parliamentary Joint Committee on Law Enforcement's (**PJCLE**) "*An inquiry into human trafficking, slavery and slavery like practices*" recommended that the Government consider appointing a person to a role it described as an Anti-Slavery and Trafficking Commissioner (in effect, an IASC).
- 15.8 The PJCLE recommended that this role be independent and have the following responsibilities, which are currently unfulfilled by any government body:
- providing training and written guidance to business about best practice in responding to modern slavery reporting requirements;
  - collecting and requesting data on the prevalence of human trafficking, slavery and slavery-like practices in Australia;
  - monitoring implementation of the *National Action Plan to Combat Human Trafficking and Slavery 2015–19*;
  - provide recommendations and advice to government on improving its response to human trafficking, slavery and slavery-like practices; and
  - oversight of the effectiveness of Commonwealth legislation and policies intended to reduce the prevalence of human trafficking, slavery and slavery-like practices.<sup>93</sup>

#### *Desirability of independence*

- 15.9 The Foreign Affairs and Aid Sub-Committee of the Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade considers the IASC should be independent of Government.<sup>94</sup> ALHR endorses this view. An Australian IASC should be independent from Government because this would entrench the responsibility of the IASC to oversee and critically analyse the Government's response to modern slavery and provide recommendations and advice where necessary. The UK IASC has stated that his independent status allows him "make [Government agencies] adopt best practice to protect victims, to identify victims and to also call them to account when they are not doing that".<sup>95</sup>
- 15.10 ALHR recommends that the IASC should be empowered and adequately funded to:
- provide training and written guidance to business about best practice in responding to modern slavery reporting requirements and understanding and complying with the UNGPs;

<sup>90</sup> UK Independent Anti-Slavery Commissioner, *Priority 4: Private sector engagement*, (2017) <<http://www.antislaverycommissioner.co.uk/priorities/priority-4-private-sector-engagement/>>

<sup>91</sup> Foreign Affairs and Aid Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report*, above n 31, [4.55]

<sup>92</sup> *Ibid*, [4.47]

<sup>93</sup> Foreign Affairs and Aid Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report*, above n 31, [2.151]

<sup>94</sup> *Ibid*, [4.47]

<sup>95</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Committee Hansard* regarding *Adopting a modern slavery act in Australia*, 30 May 2017, 2

- critically analyse the Government's response to modern slavery, making recommendations on how it could be improved, including recommendations regarding co-ordination across Government departments;
- undertake legislative reviews at periodic intervals of domestic legislation relating to modern slavery, including a periodic review of the Australian Modern Slavery Act;
- monitoring implementation of the monitoring implementation of the National Action Plan to Combat Human Trafficking and Slavery 2015–19;
- raising public awareness of modern slavery;
- providing support to victims of modern slavery and assisting with ensuring they have access to appropriate redress;
- monitor and report on the Government's implementation of the 20 recommendations in the Joint Committee on Law Enforcement 2017 report, *An inquiry into human trafficking, slavery and slavery like practice*; and
- monitor Australia's compliance with relevant international treaties, such as the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.

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If you would like to discuss any aspect of this submission, please contact Australian Lawyers for Human Rights' Business & Human Rights Subcommittee by email at [bhr@alhr.org.au](mailto:bhr@alhr.org.au).

Yours faithfully,

Benedict Coyne

**President, Australian Lawyers for Human Rights**

*Contributors: Business and Human Rights Subcommittee*