

**Submission  
No 11**

**INQUIRY INTO MODERN SLAVERY ACT 2018 AND  
ASSOCIATED MATTERS**

**Name:** Mr Gregory Ross  
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**Parliament of New South Wales  
Call for Submissions**

**Modern Slavery Act 1918 and Draft Regulation**

I am a lawyer much involved in Government and Procurement who has been attentive to the Modern Slavery Developments in recent years (in Australia and overseas). I send this personally, rather than as a partner of the law firm with which I work.

I recently attended a NSW Government briefing session 5 September 2019 to do with its Modern Slavery Act and (Draft) Regulation. I have also attended seminars on the Commonwealth equivalent.

Having read the NSW Government's **Draft Modern Slavery Regulation 2019 Explanatory Paper** in detail, I now make the following comments:-

1. As you know, the Australian Federal/Commonwealth Government passed its Modern Slavery Act last year. The New South Wales Government did so too. It need not and should not have done so. The nature and depth of the Commonwealth legislation (assuming it to be valid) is such that there is not really any meaningful room left for the NSW legislation to work, despite the carve out for it to apply over \$50,000,000 and under the Commonwealth threshold of \$100,000,000. The carve out seems like a misconceived face saving exercise. The NSW legislation is constitutionally flawed and should be withdrawn or redrawn very differently;
2. The State of NSW and Commonwealth versions have many inconsistencies. There was, for some months, some speculation as to whether the NSW legislation would have any role at all in light of our Commonwealth Constitution provision to the effect that where the Commonwealth makes a valid law, any inconsistent State laws fail. I won't go into that in detail as I am sure others have already done so or will do so;
3. The State and Commonwealth legislation have different monetary thresholds as to application. The State legislation contain offences, the Federal/Commonwealth did not;
4. I have to say I was very disappointed by the review of NSW legislation, outlined in the presentation, which has taken place in respect of the NSW legislation;
5. Rather than speaking in terms of avoiding inconsistency with Federal/Commonwealth legislation, the seminar spoke in terms of "**harmonisation**" (pursuant to which, in short, compliance with the Federal/Commonwealth legislation will be considered as compliance with the state version);
6. That is, in my view, 'political correctness'-speak. The result is, in my view, something of a nonsensical mishmash;

## Industry Consultation & Calls for Submissions

7. It was stated that much of the Modern Slavery Legislation for the State of New South Wales is, to say the least, in a state of flux. Hence, the State Government has resorted to industry consultation.
8. Most business people to whom I have mentioned the legislation express shock and alarm that they are not aware of it. That there has been seen a need to do that as this late date and with tight timeframes very much reflects how, in my view, the NSW legislation is misconceived;
9. The briefing I attended was an example of that.
10. Needless to say, one of the submissions I personally make is that the "public awareness", consultation period and publicising of the legislation and its implications are so profoundly inadequate that the whole thing should be extended;
11. In my many years as a lawyer, and as a government legal practitioner with Accredited Specialist status at that, I am unable to remember any NSW legislative reform as naïve and in its grasp of the legal and policy issues and impractical in operation as are the NSW provisions;
12. The scheme outlined in the draft Modern Slavery Regulation Explanatory Paper (NSW) leaves much to be desired and implemented, if it is to be effective as a tool to do with the ongoing scourge of modern Slavery;
13. A particular oddity is that, if one is dealing with a company {whether here or overseas}, the obligation only extends to the "*chain of supply*" related to one's business. It would not have any useful impact in a situation where, whilst the overseas company with which one is dealing might be "okay" process wise, one happens to know that the owner/directors of the supplier company have household kept staff in circumstances amounting to forced labour / slavery. To that, one can apparently turn a closed eye.

## Identified Deficiencies & Submissions

14. Concerns that I have identified in respect of the proposed arrangements may not, of themselves, be relevant to every company's operations in Australia but they include: –
  - A. That the consultation with society has been so inadequate, that time should be further extended and a much better public consultation period be allowed (see points 8 and 10 above);
  - B. That the purpose of the legislation is an abdication of responsibility in respect of Slavery by Government as, in many ways, the legislation just shifts responsibility to the private sector, with no apparent consideration of the cost of compliance and or likely cost increase of compliance;
  - C. That the proposals are silent on the extent to which Small to Medium Enterprises (SMEs) under the reporting threshold (\$AU50 million for the NSW legislation and

\$AU100 million for the Federal/Commonwealth was legislation) can be required by entities covered by the legislation to check the details in their own chain of supply – the Federal/Commonwealth Guidance document implies so but there is really still nothing by way of meaningful detail to allow SMEs even to guess at compliance cost;

- D. There is no guidance as to what protection from culling in expression of interest, replying to request for tender or contract procurement processes (whether by Government or the private sector which will be complying with the legislation) will be available for SMEs not in a position to provide detail in respect of slavery activity in its own supply chain;
- E. For some companies in Australia still operating with old Memorandum and Articles of Association with powers circumscribed to specific listed aims, compliance with the legislation may be in breach of their internal rules;
- F. There remains nothing meaningful for SMEs to consider as to what will, practically, be required of them, so leaving them unable to quantify cost of compliance;
- G. There is some doubt as to whether the Australian Tax office will see compliance costs as a “cost of doing business” which would be deductible or a capital cost;
- H. There is nothing on to what extent complying with the reporting [and corresponding publication obligations] on slavery (especially in a name and shame context as is envisaged by the legislation) will be the subject of exemption from liability for defamation and the like [complicated more by the fact that, for many chains of supply, the actual 'slavery' may well be outside Australia and so beyond protection from any relevant statutory Australian privative provisions to be inserted in the legislation];
- I. With State Government entities (and a corresponding obligation applies for Commonwealth government entities) having something in the nature of obligations to report on slavery activity in their chain of supply, I am concerned as to the extent to which the relevant provisions may be misused to exclude entities which have the capacity and expertise to deliver relevant goods and services at a good price but which, for one reason or another, do not deal with the Modern Slavery reporting mechanisms as well as some ideologues might want;
- J. That the position of Local Government has not been clearly addressed is as inadequate as it is disingenuous;
- K. There is little or nothing to suggest proper consideration has been given to the possible impact of disclosure on the lives and livelihoods of the victims of slavery who are involved in the relevant chain of supply. Having been somewhat familiar with freeing people from “*bonded labour*” in India, great subtlety is often needed to ensure that well-meaning but ham-fisted implementation of anti-slavery policies do not actually worsen the circumstances of victims of slavery.
- L. Similarly, great care needs to be taken to avoid frustrating the aspirational anti-slavery aim of the legislation. The many current implementation deficiencies may be argued to suggest that the policies envisaged by the legislation are likely, in overseas countries, to be taken as a 21<sup>st</sup> Century back door reintroduction of “western” 17<sup>th</sup> Century style imperialism, involving imposition of our cultural aspirations in ignorance of and perhaps to override cultural norms acceptable elsewhere. That may well be counterproductive, rather than beneficial to, the victims of slavery.

15. The situation remains something of an impractical movable feast with commencement date for the New South Wales legislation and many practical issues still uncertain.

Should you wish to confer, I can be available.



**Greg Ross**