

## INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

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Australian  
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# Draft NSW Modern Slavery Regulation 2019

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Submission to the NSW Department of Premier and Cabinet

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<b>1</b>	<b>Introduction .....</b>	<b>3</b>
<b>2</b>	<b>Summary .....</b>	<b>3</b>
<b>3</b>	<b>Content.....</b>	<b>4</b>
<b>3.1</b>	<b><i>What are stakeholder views on the public register? .....</i></b>	<b>4</b>
<b>3.2</b>	<b><i>What functions should the public register include? .....</i></b>	<b>5</b>
<b>3.3</b>	<b><i>How long should statements be available on the register? .....</i></b>	<b>6</b>

## 1 Introduction

1. The Australian Human Rights Commission (Commission) is Australia's legislatively-mandated national human rights institution.<sup>1</sup> The Commission provides independent and impartial services to promote and protect human rights and fundamental freedoms, and address discrimination.<sup>2</sup>
2. The Commission's statutory responsibilities include contributing to policy and legislative development on fundamental human rights issues.<sup>3</sup> The Commission does this through engagement with stakeholders and by encouraging government, industry and community groups alike to see fundamental rights and freedoms realised.
3. The Commission thanks the New South Wales Department of Premier and Cabinet for the opportunity to comment on the draft *Modern Slavery Regulation 2019* (draft Regulations). The Commission welcomes the draft Regulations which will give effect to the modern slavery reporting requirement in s 24 of the *Modern Slavery Act 2018* (NSW).

## 2 Summary

4. Modern slavery practices are serious human rights abuses. The 2011 *United Nations Guiding Principles on Business and Human Rights* (UNGPs) provide a global standard and framework for businesses, as well as for State and civil society organisations, in addressing adverse human rights impacts related to business activity.<sup>4</sup> The UNGPs explain that businesses have a 'responsibility to respect human rights', which is implemented by conducting human rights due diligence to identify and address their adverse human rights impacts. The reporting requirement outlined in the *Modern Slavery Act 2018* (NSW) and the draft Regulations, is expected to prompt businesses to take steps to fulfil their responsibility to respect human rights, in relation to modern slavery.
5. The Commission welcomes the proposed harmonisation of the reporting criteria outlined in draft regulation 7 with the mandatory reporting criteria in s16 the *Modern Slavery Act 2018* (Cth). This consistency will assist both the business community in reporting efforts and civil society efforts to review and

highlight best practice amongst published modern slavery statements.

6. The Commission looks forward to the enactment of the *Modern Slavery Act 2018* (NSW) following its review by the Legislative Council Standing Committee on Social Issues Committee, and commends the NSW Government on the introduction of this legislation, including the establishment of a NSW Independent Anti-Slavery Commissioner and NSW Government procurement obligations.

## 3 Content

### 3.1 What are stakeholder views on the public register?

7. For the *Modern Slavery Act 2018* (NSW) to operate effectively, all statements should be made publicly available for scrutiny. Therefore, the Commission welcomes draft regulation 8, providing that the NSW Anti-Slavery Commissioner must publish all modern slavery statements on a 'statement register', available online for free to the public (the public register). Importantly, this regulation provides consistency with s 18 of the *Modern Slavery Act 2018* (Cth), which also provides for a Government-run, online public register of modern slavery statements submitted under the Commonwealth reporting regime.
8. Draft regulation 8 is an important qualification to s 26(1)(a) of the *Modern Slavery Act 2018* (NSW), which provides that the Commissioner must keep a publicly available, online register that would  

[identify] any commercial organisation that has disclosed in a modern slavery statement under section 24 that its goods and services are, or may be, a product of supply chains in which modern slavery may be taking place and whether the commercial organisation has taken steps to address the concern.
9. Like other stakeholders,<sup>5</sup> the Commission is concerned that the practice provided for in s 26(1)(a) of the *Modern Slavery Act 2018* (NSW), is likely to discourage companies from taking proactive steps to identify their modern slavery risks or from revealing their modern slavery risks in their modern slavery statement, for fear of being 'named and shamed' on the s 26(1)(a)

register. This potential consequence of s 26(1)(a) is out of step with the purpose of modern slavery reporting legislation, including in similar legislation in other jurisdictions,<sup>6</sup> which is to encourage greater transparency, support business to take effective action and drive a 'race to the top' amongst businesses in their responses to modern slavery.<sup>7</sup>

10. The Commission acknowledges the intention expressed in the NSW Department of Premier and Cabinet's (DPC) *Explanatory Paper: Supply Chain Reporting Requirement*<sup>8</sup> that the NSW Anti-Slavery Commissioner's policy will be to

support businesses that have taken positive steps to address their risks, and will positively highlight and showcase best practice in identifying, disclosing and responding to risks of modern slavery. The Commissioner will honour the effectiveness of an organisation's due diligence if they succeed in exposing modern slavery in their operations and supply chains, and initiate work on a plan (that may need to be quite long-term) to address that problem.<sup>9</sup>

11. In the Commission's view, this is the correct approach to understanding the disclosure of modern slavery risks. That is, the identification of modern slavery risks or incidences in a modern slavery statement likely indicates that the business is undertaking proactive due diligence to identify its modern slavery risks, particularly where appropriate mitigation and remediation measures follow. Further, given the prevalence of modern slavery globally, and particularly in the Asia-Pacific region,<sup>10</sup> it is the efforts of businesses that *do not* disclose modern slavery risks that should be subject to particular scrutiny.

12. The Commission also notes that draft sub-regulation 8(6) provides that the public register of all statements, may be combined with the s 26(1)(a) risk register, but it is unclear how this will operate in practice.<sup>11</sup> In light of this, the Commission remains concerned that the s 26(1)(a) register mechanism will be confusing for reporting companies and has the potential to undermine the transparency-based objectives of this legislation.

### **3.2 What functions should the public register include?**

13. In order for the *Modern Slavery Act 2018* (NSW) to be effective, all published statements should be easily accessible online, and in a format that is most

useful for consumers, investors, civil society organisations, unions and businesses to review and compare statements, track trends and highlight best practice.

14. For example, the non-government organisation, the Business and Human Rights Resource Centre, which collects the modern slavery statements published by companies pursuant to the *Modern Slavery Act 2015* (UK) in an online register, allows users to search statements across a range of categories including company, sector or industry, and the country in which the business is domiciled or headquartered.
15. The inclusion of a public list of businesses required to report and the status of their compliance with the reporting requirement, would also promote greater transparency and accountability in reporting and provide a strong incentive for businesses to ensure a high standard of compliance. Without such a list, interested parties are unable to effectively monitor if companies are complying with the reporting requirement. The lack of a publicly available list of reporting entities is regarded as a significant shortfall of the *California Transparency in Supply Chains Act 2010* and the *Modern Slavery Act 2015* (UK) in motivating business to comply.<sup>12</sup>

### **3.3 How long should statements be available on the register?**

16. The Commission recommends that, once a statement is made publicly available, it should remain on the register. A key aspect of good modern slavery reporting is being able to demonstrate ongoing improvements being made in the business' response to identifying and addressing their modern slavery risks. Furthermore, in order for civil society, unions, business, investors and other stakeholders to understand and disseminate practices that reflect leading practice in modern slavery responses, and demonstrate improvement over time, statements should not be removed from the public register.
17. In addition, given that one of the mandatory reporting criteria for modern slavery statements outlined in draft regulation 7(1)(e) asks reporting businesses to describe how the organisation assesses the effectiveness of the

actions they have taken to respond to modern slavery risks, it is important to be able to track developments and achievements from year to year.

18. This issue could be revisited by the Anti-Slavery Commissioner in consultation with stakeholders in future if necessary.



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- <sup>1</sup> *Australian Human Rights Commission Act 1986* (Cth) s 10A
- <sup>2</sup> Australian Human Rights Commission, *About the Commission*, Australian Human Rights Commission. At <https://www.humanrights.gov.au/about-commission-0>
- <sup>3</sup> *Australian Human Rights Commission Act 1986* (Cth), s 11
- <sup>4</sup> Office of the High Commissioner for Human Rights, *UN Guiding Principles on Business and Human Rights* (2011)  
[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- <sup>5</sup> NSW Department of Premier and Cabinet, *Explanatory Paper; Supply Chain Reporting Requirement* (June 2019), 15  
<https://www.parliament.nsw.gov.au/lcdocs/other/12301/Consultation%20paper%20-%20Modern%20Slavery%20Regulation%202019.pdf>
- <sup>6</sup> E.g. *Modern Slavery Act 2015* (UK)
- <sup>7</sup> NSW Department of Premier and Cabinet's (DPC) *Explanatory Paper; Supply Chain Reporting Requirement* (June 2019), 18; Commonwealth Department of Home Affairs, *Modern Slavery Act 2018: Draft Guidance for Reporting Entities*, (April 2018), 11; Commonwealth Parliament, *Explanatory Memorandum: Modern Slavery Bill 2018* (2018), 2
- <sup>8</sup> NSW Department of Premier and Cabinet, *Explanatory Paper; Supply Chain Reporting Requirement* (June 2019)
- <sup>9</sup> NSW Department of Premier and Cabinet, *Explanatory Paper; Supply Chain Reporting Requirement* (June 2019), 16
- <sup>10</sup> The International Labour Organisation estimates that there are approximately 40 million people in conditions of modern slavery globally more than half of which are in the Asia-Pacific. See Department of Premier and Cabinet's (DPC) *Explanatory Paper; Supply Chain Reporting Requirement* (June 2019), 4 and Commonwealth Attorney General's Department, *Modern Slavery In Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement* (2017), 6
- <sup>11</sup> NSW Department of Premier and Cabinet's (DPC) *Explanatory Paper; Supply Chain Reporting Requirement* (June 2019), 16
- <sup>12</sup> Know the Chain, *Insights Brief: Five Years of the California Transparency Act* (30 September 2015). At [https://knowthechain.org/wp-content/uploads/2015/10/KnowTheChain\\_InsightsBrief\\_093015.pdf](https://knowthechain.org/wp-content/uploads/2015/10/KnowTheChain_InsightsBrief_093015.pdf) (viewed 18 July 2018). Business & Human Rights Resource Centre, 'FTSE 100 at the starting line: An analysis of company statements under the UK Modern Slavery Act' (10 October 2016). At <https://www.business-humanrights.org/sites/default/files/documents/FTSE%20100%20Modern%20Slavery%20Act.pdf> (viewed 18 July 2018)