

**Submission
No 49**

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

Organisation: ClubsNSW
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ClubsNSW Submission Modern Slavery Act 2018

ClubsNSW thanks the Standing Committee on Social Issues for the opportunity to comment on the Inquiry into the *Modern Slavery Act 2018*.

ClubsNSW submits that not-for-profit (NFP) registered clubs should be exempt from the requirement to prepare a *modern slavery statement*.

Clubs are structured so their operating and financial activities are transparent and subject to scrutiny by their members and governing bodies, and clubs commonly source suppliers and staff from their local communities. These features strongly mitigate the risk that a club's structure, operations or supply chains will be connected to modern slavery and ClubsNSW is unaware of any evidence to suggest it is an issue in the industry.

The draft Modern Slavery Amendment Bill 2019 (the draft Bill) and Modern Slavery Regulation 2019 (the draft Regulation) proposes to exempt NFPs from the need to prepare a modern slavery statement. This is sensible as the NSW Government has recognised that NFPs face proportionately greater administrative and compliance costs in preparing a modern slavery statement.

ClubsNSW is concerned that the exemption, as currently drafted, would not apply to registered clubs. ClubsNSW believes there is no logical basis as to why NFP clubs should not also be exempted and accordingly recommends that they be.

Registered clubs

All clubs are NFP and member-owned, with a focus on their communities. Clubs' NFP status is effected by the *Registered Clubs Act 1976*, which decisively prohibits a club from distributing profit or assets to members.¹ The Act confers this NFP status by way of a 'deemed rule' which operates to void and override any contrary clause in a club's constitution.

The affairs of clubs are transparent and receive significant scrutiny. For instance, a club's affairs – including operating and financial activities – are overseen and scrutinised by an elected governing body. For the high majority of NSW clubs which are public companies, legislation and common law imposes comprehensive duties on members of a club's governing body.²

The affairs of clubs are also subject to member oversight and scrutiny. Club members are aided in their scrutiny function through legislative requirements for clubs to disclose various information. For example, legislation requires clubs to circulate to members a profit-and-loss statement, balance sheet and trading accounts on a quarterly basis.³

¹ *Registered Clubs Act 1976* (NSW) ss 10(1)(i) & 30(1)(i).

² In addition to fiduciary duties, members of a club's governing body are also subjected to director duties in the *Corporations Act 2001* (Cth) Part 2D.1, Division 1.

³ *Registered Clubs Regulation 2015* (NSW) Sch 2, cl 10.

Modern slavery statement

The draft Bill amends the Act to set out the scope of an organisation's requirement to prepare a modern slavery statement; being those organisations **supplying goods and services for profit or gain**⁴ [emphasis added], where the trading revenue exceeds \$50 million.

Further, the draft Regulation exempts organisations from this requirement if:

- a. Its constitution prohibits the distribution profits or assets to members; **and**
- b. It doesn't conduct its affairs so as to provide pecuniary gain for its members; **and**
- c. It is exempt from paying federal income tax.

Supplying goods and services for profit or gain

ClubsNSW questions whether an organisation can supply goods and services for profit or gain while also being prohibited from distributing profit or assets to members. If such a prohibition is effective, goods or services cannot be supplied *for profit or gain* regardless of whether they generate a surplus or exceed cost of goods sold.

ClubsNSW understands that the inclusion of '*supplying goods and services for profit or gain*' is primarily designed to capture NFPs and charitable organisations that have trading arms. It is unclear how this relates to clubs, which must supply goods and services at a profit to avoid operating at a loss but which do not have trading arms and are restricted from distributing profits or assets to members.

ClubsNSW would appreciate clarification in this regard.

Constitutional non-distribution clauses

Further, the requirement that the organisation's NFP status be confirmed in its constitution is problematic for clubs. As aforementioned, all registered clubs in NSW are deemed NFP via the Registered Clubs Act, which negates the need for clubs to specify their NFP status in their constitution.

In *Commissioner of Taxation v Co-operative Bulk Handling* [2010] FCAFC 155,⁵ the Federal Court found that an entity's non-distribution clause can be contained in either its constitution or governing statute. It follows that a statutory requirement would take effect where there is no constitutional non-distribution clause. The draft Regulation is inconsistent with this ruling.

ClubsNSW recommends that the proposed exemption in the draft Regulation be expanded to cover entities whose NFP status is conferred via governing statute.

Federal income tax-exempt

All registered clubs in NSW are NFP, however many clubs are not federal income tax-exempt, particularly RSL clubs which do not have an accessible exemption category. These clubs would be required to prepare the modern slavery statement, despite being NFP.

⁴ Proposed at paragraph 24(1)(a) of the draft Bill.

⁵ [95].

ClubsNSW submits that the federal income tax-exempt criterion:

- is arbitrary; and
- would impose a greater administrative burden on NFP clubs, whose affairs are already subject to considerable scrutiny and oversight.

Determining whether an entity is tax-exempt is a complex exercise based on a variety of factors; none of which would be an appropriate proxy for exemption to prepare a modern slavery statement. For example, a golf club's tax-exempt status could be based on whether its board members play golf.⁶

Given the variability of the factors underpinning tax-exempt qualification, it is not uncommon for a club's tax-exempt status to change on a year-to-year basis. These clubs will typically only know if they are tax-exempt after completion of the financial year.

Therefore, if the requirement to prepare a modern slavery statement is pegged to tax-exempt status, clubs and other organisations would have significant uncertainty as to whether they must comply on any given year.

The fact that an organisation's tax-exempt status can change from year-to-year would pose practical difficulties to the modern slavery framework. If a club does not need to pay income tax in a given financial year – for example, if it made a loss – it would not be relevant, and the club will therefore not explore, whether it qualifies for tax-exempt status.

Recommendation

The Explanatory Paper for the proposed Regulation outlines the rationale for the NFP exemption:

“The Government recognises that charities, not-for-profit organisations and small businesses which are captured by the Act would face proportionality greater administrative burden and increased compliance costs in meeting their reporting requirements compared to larger commercial organisations. On that basis, the draft Regulation exempts these organisations from the requirement to prepare a modern slavery statement.”

ClubsNSW supports this rationale, and notes that NFP clubs are already subject to significant regulation and compliance measures. Moreover, for the reasons outlined in this submission, NFP clubs possess features which would mitigate the risks of modern slavery in the club's structure, operations and supply chains.

Accordingly, ClubsNSW recommends that NFP clubs be exempted from the requirement to prepare a modern slavery statement.

Should you wish to discuss further, please contact Josh Landis, Executive Manager of Public Affairs on _____, or by email at _____

⁶ Australian Taxation Office, Taxation Ruling TR 97/22, paragraph 58.