

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

**Organisation:** Housing Industry Association (HIA)

**Date Received:** 4 October 2019

---



HOUSING INDUSTRY ASSOCIATION



Submission to the  
Standing Committee on Social Issues

## **Inquiry into the Modern Slavery Act and associated matters**

4 October 2019

# contents



|   |            |
|---|------------|
| <b>ABOUT THE HOUSING INDUSTRY ASSOCIATION .....</b>                               | <b>III</b> |
| <b>1. INTRODUCTION .....</b>  | <b>4</b>   |
| 1.1 GENERAL COMMENTS .....  | 5          |
| <b>2. THE RESIDENTIAL BUILDING INDUSTRY .....</b>                                 | <b>6</b>   |
| 2.1 THE SUBCONTRACT SYSTEM AND SUPPLY CHAIN .....                                 | 6          |
| <b>3. THE NSW INQUIRY .....</b>   | <b>7</b>   |
| 3.1 SUPPLY CHAIN REPORTING .....  | 7          |
| 3.2 MONETARY THRESHOLD .....  | 8          |
| 3.3 EFFECT ON BUSINESS .....  | 8          |
| 3.4 MODERN SLAVERY STATEMENT .....  | 9          |
| 3.5 PUBLICATION OF MODERN SLAVERY STATEMENTS .....                                | 10         |
| 3.6 SCHEDULES IN THE NSW ACT .....  | 10         |
| 3.7 THE ROLE OF THE COMMISSIONER IN RAISING AWARENESS AND VICTIM ASSISTANCE ..... | 11         |
| <b>4. COMMENTARY ON THE DRAFT REGULATION .....</b>                                | <b>11</b>  |
| 4.1 SUPPORT FOR BUSINESS COMPLIANCE .....   | 11         |
| 4.2 SMALL BUSINESS EXCLUSION .....  | 11         |
| 4.3 VOLUNTARY REPORTING .....   | 12         |
| 4.4 PUBLIC REGISTER .....   | 12         |
| 4.5 EXEMPTIONS, CONSULTATION, MONITORING AND EVALUATION .....                     | 12         |
| <b>5. CONCLUSION .....</b>  | <b>12</b>  |

Housing Industry Association contacts:

David Bare  
Executive Director  
Housing Industry Association

Guy Noble  
Manager Workplace Services  
Housing Industry Association

Phone:  
Email:

Phone:  
Email:

## ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 60,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

*"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationery, industry awards for excellence, and member only discounts on goods and services.

## 1. INTRODUCTION

On 21 June 2018, NSW Parliament passed the *Modern Slavery Act 2018* ('the NSW Act') and on 21 December 2018 appointed Professor Jennifer Burn as the Interim Anti-Slavery Commissioner ('the Commissioner'). The Commissioner has been tasked with leading the implementation of the NSW Act which has not yet commenced.

On 19 June 2019, the Minister responsible, the Hon. Don Harwin (Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, and Vice-President of the Executive Council) was asked about the commencement of the legislation, in response, the Minister stated:

*'Members will know that in June 2018 the Parliament passed the Modern Slavery Bill 2018 with a view that the scheme would commence operation this year. Since becoming Minister, I have received advice from the Department of Premier and Cabinet that the legislation in its current form contains a number of defects requiring urgent attention. The consequence of these defects are such that if left unattended they would render some provisions of the Act inoperable.'*

*'Meanwhile, other provisions are open to the risk of a constitutional challenge. As such, the Act cannot commence operation as drafted. To address these matters, a number of options are available to the Parliament. This includes passage of an amendment bill that the department has prepared. It was an option for me to try to rush the bill, but I have chosen not to do that because I believe proper consultation is required. As such, this week I will refer the Modern Slavery Act, the amendment bill that has been drafted and the draft regulation that has been prepared by the Department of Premier and Cabinet under that Act to the Standing Committee on Social Issues for its inquiry and report.'*

On 6 August 2019, the NSW Act was referred to the Standing Committee on Social Issues for inquiry and report (Inquiry).

The terms of reference for the Inquiry into the NSW Act and associated matters is quite broad and are directed towards:

- a) *the operability of the proposed anti-slavery scheme*
- b) *the effect of the anti-slavery scheme on business, including the supply chain reporting obligations under section 24 of the NSW Act*
- c) *the intended application of the anti-slavery scheme with respect to charities and not-for-profit organisations, State Owned Corporations and local councils*
- d) *the appropriateness and enforceability of Modern Slavery Risk Orders under section 29 of the NSW Act*
- e) *the unintended consequences of drafting issues with the NSW Act, including with respect to the Human Tissue Act 1983 (NSW) and the sale and supply of human tissue*
- f) *the risk of a possible constitutional challenge to current provisions in the NSW Act due to inconsistencies with the Criminal Code Act 1995 (Cth)*
- g) *whether the passage of the Modern Slavery Act 2018 (Cth) renders parts or all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps*
- h) *the preferred course of action to address the matters identified*
- i) *any other related matter.*

HIA provides this submission in response to the Inquiry.

As highlighted by the Minister, the NSW Act contains a number of provisions which require amending to be given their proper effect. HIA understands that the *Modern Slavery Amendment Bill 2019* ('the Bill') is aimed at ensuring the NSW Act *'better aligns with the policy intent behind it, and will enhance the legal clarity, constitutionality and operation of the NSW Act.'*

At the same time the draft *Modern Slavery Regulation 2019* ('the draft Regulation') was released for consultation. The Regulation is intended to provide the required detailed provisions as to how commercial organisations report on their supply chain and prepare and publish their statements as per section 24 of the NSW Act. This will then allow commencement of the NSW Act.



The deficiencies in the NSW Act and the content of the draft Regulation highlight the problematic nature through which this legislation was brought and passed through Parliament. As is clear from the Minister's statement extracted above, the introduction of the amending Bill, the draft Regulation and the referral of these together with the NSW Act to the Standing Committee on Social Issues for its inquiry and report also highlight the inadequacies in the Government's response to the Bill whilst it was being considered by Parliament. It is unfortunate that efforts were not made earlier to rectify the readily apparent shortcomings of the Bill.

The NSW Act, Bill and draft Regulation also fail to adhere to the Better Regulation principles which state:

*'The principles are designed to improve the quality of regulation, by ensuring the decision maker is fully informed when considering regulatory proposals. Better Regulation is the result of sound policy development and regulatory design processes. The principles are the cornerstone of the government's commitment to good regulation and must be followed in the development of every regulatory proposal. In doing so, it is demonstrated the proposal is required, reasonable and responsive'.<sup>1</sup>*

These principles have clearly not been applied in relation to the NSW Act, Bill and draft Regulation.

## 1.1 GENERAL COMMENTS

HIA's principal position is that the NSW Act in its entirety is unnecessary and should be repealed. If this does not occur the provisions relating to Modern Slavery Statements in Part 3 of the NSW Act should be repealed.

While HIA supports appropriate actions being taken by the business community to address the risks of modern slavery in their supply chain, HIA fails to see the merit in having a scheme in NSW operating alongside the Commonwealth scheme which passed its own *Modern Slavery Act 2018* ('Commonwealth Act') which commenced on 1 January 2019.

HIA also questions the need for separate regulations in NSW. The matters dealt with in the draft Regulations are arguably better suited to form part of the principle legislation. This approach ensures that the appropriate level of scrutiny is applied to matters that are critical to the operation of the regulatory regime. By way of example, the Commonwealth Act stands alone and contains all the requirements relating to the regime. This approach also reduces regulatory burden. In light of the need for the Bill, HIA sees that there is an opportunity to reconsider the proposed regulatory approach.

The Commonwealth Act requires entities based, or operating, in Australia, which have an annual consolidated revenue of more than \$100 million, to report annually on the risks of modern slavery in their operations and supply chains, and actions taken to address those risks.

The NSW Act goes further than the Commonwealth Act in that it contains a number of penalty provisions. HIA submits that these penalty provisions be repealed. Not only is it inappropriate for a state act to contain penalty provisions where there is a concurrent Commonwealth scheme in operation, there is also no justification or evidentiary basis for the introduction of such penalties.

The NSW Act also requires the appointment of an Anti-Slavery Commissioner. HIA questions the rationale and justification of such an office given that the Commonwealth did not deem this necessary.

There are builders, suppliers and manufacturers operating in the residential building industry that will be required to report under the NSW Act. HIA is concerned that given the nature of the supply chains in the residential building industry the industry is at risk of being disproportionately burdened by the obligations in the NSW Act.

Supply chains in the industry are longer and more complex than many other industries.

The heavy reliance on the use of independent contractors in conjunction with the inordinate number of participants involved in the production of a building product from the raw material to its ultimate inclusion in a house necessitates a robust but not overly complex or burdensome response to the risk of modern slavery being part of the supply chain.

---

<sup>1</sup> TPP19-01 Guide to Better Regulation pg 5

As such, any regulatory intervention must give due weight to the burden that will be imposed on businesses, including small businesses, in that supply chain.

It is unfortunate that whilst the DPC recognises the need to address the deficiencies in the NSW Act, it has not undertaken a Regulatory Impact Statement (RIS). One was conducted for the Commonwealth Act, although that contained a number of deficiencies and was only concerned with the impact of those large organisations with a consolidated revenue of \$100 million and over, whereas the NSW Act is aimed at those organisations with a turnover of between \$50 - \$100 million. HIA strongly recommends that a separate RIS be undertaken for NSW.

While it is arguable that businesses that meet the proposed monetary threshold could develop and deploy the necessary resources to comply with the NSW Act, the non-reporting entities in the supply chains of reporting entities will be asked to investigate their supply chains will be far less capable of doing so. HIA has been told by a number of its members that this is already occurring in response to the commencement of the Federal legislation.

Given that no previous consultation has occurred HIA provides this submission in response to the NSW Act and the Bill and draft Regulation.

## **2. THE RESIDENTIAL BUILDING INDUSTRY**

Internationally, the construction industry has been identified as a high-risk industry for modern slavery.

The construction industry is broad and encompasses companies working in the detached residential, multi-residential, renovation, commercial, public infrastructure and civil works sector.

The construction process and supply chain operation and management that is adopted on a single dwelling residential construction site generally differs significantly from those on a multi storey commercial development and those in the public infrastructure and civil works sectors.

In all sectors, the supply of building materials and products adds an additional layer of complexity. Some companies may be directly captured by the NSW and Commonwealth legislation, but many suppliers will fall outside its scope.

A 'one-size-fits-all' approach is inappropriate for the residential building industry. It will be essential that industry specific guidance is developed well in advance of the legislation commencing that includes materials specifically for the housing sector, to assist in responding to modern slavery risks in supply chains. This has not yet occurred at the Federal level, despite the commencement of the Commonwealth Act.

The residential building industry builds, on average, 113,000 detached houses per year and in the last few years has constructed a record number of both high rise and low-rise dwellings, reaching a peak of 233,000 dwellings in 2016. The industry employs nearly 1 million people and contributes approximately \$100 billion towards the nation's total GDP. It is not unreasonable to concede that a sector that contributes so much to the economy and society should be dealt with distinctly from the broader construction industry.

### **2.1 THE SUBCONTRACT SYSTEM AND SUPPLY CHAIN**

It is well known that the residential building industry, in particular the detached housing and renovation markets, rely on the use of subcontractors.

In commercial construction, whilst there is a large number of subcontracting firms, the overwhelming majority of those working are actually employed by these subcontracting firms. Further subcontracting occurs only in specialist areas. Most commercial construction employees are union members and for industrial reasons casual labour is rarely used.

By contrast, in the housing industry, subcontracting predominates down to the lowest levels, so that there are relatively few employees on a low or medium density housing site.

The flexibility of the subcontract system and the highly competitive nature of the residential building industry have interacted to secure a high degree of efficiency and productivity.

There are around 25 different trades involved on-site in the building of a house.

The familiar ones are of course concreters, bricklayers, framing carpenters, plumbers, electricians, roof tilers and painters. Others include the contractor who pegs out the site, backhoe operators, drainers, termite system installers, plasterboard fixers, plasterers, floor tilers, glaziers, kitchen installers, the fitting out carpenter, the floor sander, the brick cleaner and finally the garage door fixer.

The contractor may be the last in a long line of supply chain participants from those processing the raw materials, to the component manufacturers who make the raw materials into building materials, to the material suppliers, then in some cases retailers. There is also the handling and transport processes to and from each stage.

Each supply chain, for each product and for each contractor will differ.

Central to the notion of subcontracting arrangements and the use of independent contractors is that contractors supply their own material. This means that the supply chain for materials is equally diverse.

It is likely that a reporting entity carrying on residential building work, will need to, or will need to require that each one of these 25 or more trades carry out an investigation of their own supply chains. There are always risks in managing the subcontractor relationship and the supply chain and how the obligations under the NSW Act and draft Regulation will impact these contractual arrangements is presently unclear.

The allocation of risk through a contractual chain is acceptable business practice. How the residential building industry is going to respond to the NSW Act through the allocation of that risk is unclear, principally because the extent of the investigation requirements are unclear, but also because if a risk is passed down the contractual chain through contract clauses asking for guarantees as to the sources of products and material, it is unclear whether a reporting entity will be permitted to rely on such guarantees to satisfy their obligations under the NSW Act and the draft Regulation.

Entities carrying out residential building work will need time to build capacity to address and respond to these complex issues.

### **3. THE NSW INQUIRY**

#### **3.1 SUPPLY CHAIN REPORTING**

It is HIA's view that the passage of the Modern Slavery Act 2018 (Cth) renders all of the NSW Act unnecessary.

Although there are some considerable differences between the Commonwealth Act and the NSW Act there are a number of provisions which contain significant overlap.

For instance, both Acts require large organisations to publish annual modern slavery statements about the steps they have undertaken to eliminate modern slavery from their supply chains. Section 24 of the NSW Act together with the draft Regulation require commercial organisations with an annual turnover between \$50 million and \$100 million to lodge annual Modern Slavery Statements with the Commissioner.

In its submission the DPC canvases an alternative approach noting the requirement for large commercial and corporate organisations to report on their supply chain under the Commonwealth Act. As the DPC rightly observes, if s 24 of the NSW Act were repealed commercial organisations with an annual turnover of between \$50 million and \$100 million would no longer be required to provide an annual modern slavery statement.

Those larger organisations with a consolidated revenue of \$100 million or higher that have a presence in NSW would continue to be required to report under the Commonwealth Act.

HIA supports the repeal of s 24 of the NSW Act. It is appropriate for there to be only a single supply chain reporting regime in NSW and throughout the other states and Territories. If it is repealed an amendment to s 3 Objects of Act would be required; object (h) would require deletion.



If s 24 is not repealed HIA notes and supports the existence of clause 10 in the draft Regulation to exempt commercial organisations in NSW with an annual turnover between \$50 million and \$100 million from the s 24 requirements of the NSW Act if they volunteer to comply with the requirements of the Commonwealth Act.

### 3.2 MONETARY THRESHOLD

The Commonwealth Act requires entities with an annual consolidated revenue of \$100 million or more to provide an annual Modern Slavery Statement reporting on the risks of modern slavery in their supply chain.

Although often used interchangeably, revenue and turnover are not the same thing. Revenue is the total value of goods or services sold by the business. Turnover is the income that a firm generates through trading goods and services. This difference should be reconciled.

A similar observation is made in respect of the different terminology used in respect of organisations who are required to make modern slavery statements. The Commonwealth Act uses the term entity, which has the meanings as defined in section 4 of that Act under *Australian entity* and the meaning under section 5 *Reporting entity*.

Schedule 1, [12] and [13] of the Bill propose changes to the definition of 'commercial organisation' contained in s 24(1) of the NSW Act.

HIA submits (predicated on Part 3 and s 24 not having been repealed) that the opportunity to align the definition of commercial organisation with the Commonwealth Act should be taken instead.

HIA is concerned that despite the proposed monetary threshold and the heralded 'targeted approach' the impacts on small and medium sized business throughout the supply chain will be extensive and most likely apply an inappropriate additional regulatory burden on an unspecified number of businesses.

HIA understands that the monetary threshold of \$100 million was arrived at to ensure those *'larger businesses and other entities in Australia including those with extensive, complex and/or global operations and supply chains'*<sup>2</sup> were captured by the reporting requirements. Further, it was determined that those entities with a turnover of \$100 million would have the *'capacity to meaningfully comply with the reporting requirements and have the market influence to effect change to their supply chain'*.

Given this, the NSW Government should not be pressing ahead with the requirement for commercial organisations with an annual turnover between \$50 million and \$100 million to lodge annual Modern Slavery Statements. This is especially the case when one considers, and is bound to accept, that the NSW Act contains criminal offences and penalties for non-compliance while the equivalent Commonwealth legislation, with its higher threshold aimed at those larger businesses with the capacity to meaningfully comply, does not.

As outlined above, the supply chain in the residential building industry is complex and involves many industry participants. Reporting entities and non-reporting entities can, and will, operate within the same supply chain. For example, it is likely that a reporting entity builder will have small and medium sized subcontractors providing products and materials to their housing projects. While not required to provide a Modern Slavery Statement, obligations will be placed on those smaller contractors so that the reporting entity can ensure compliance with their reporting obligations.

### 3.3 EFFECT ON BUSINESS

The DPC recognises that there is going to be an effect on business and notes the 'Commonwealth estimated an annual regulatory impact on the business community of the modern slavery reporting requirement of \$21,950 per reporting entity.' This amount was up from \$11,500, the original estimate.

From the time of the original 2017 Federal Consultation Paper, the number of estimated affected entities increased from 2,000 to 3,000, with the accompanying total annual regulatory burden increasing from \$23 million to approximately \$65.85 million.

---

<sup>2</sup> Commonwealth Explanatory Memorandum at pg.11

HIA notes that the DPC currently estimates the number of businesses in NSW to be captured by the NSW Act to be approximately 1650 and these businesses will probably have to spend the same amounts as larger organisations to comply.

The DPC suggests that this figure may be lower due to the proposed exemptions to small organisations and charities. This suggestion provides all the more reason for a RIS to be carried out before the implementation of the legislation.

Applying the same rationale as the DPC has done in respect of the small business exclusion would mean that those businesses captured by the NSW Act would actually have higher compliance costs than those organisations which fall under the Commonwealth Act.

HIA submits that the impact of the development of, and ongoing maintenance of, internal processes to ensure compliance must be considered as a part of the regulatory impact of the NSW Act and draft Regulation. For example, outlined below is just a short list of some of the matters (beyond the mandatory criteria) that reporting entities will need to consider in order to comply with the reporting requirements:

- The development of internal policies and procedures in relation to modern slavery.
- The review of existing policies, such as a code of conduct, ethical and corporate social responsibility policies, as well as operational procedures, such as procurement and sourcing.
- Establishing systems to ensure that a reporting entity complies with these policies and procedures.
- Carrying out ongoing risk assessments to identify all potential risk areas and then to consider and determine higher risk within a supply chain.
- Developing and/or expanding existing due diligence process to apply to new and existing suppliers and subcontractors.
- Considering ways of monitoring the changing nature of supply chains.
- Reviewing formal contracts with suppliers and subcontractors to consider the inclusion of obligations to comply with modern slavery rules or other related policies.
- Considering how to establish accountability through the supply chain.
- Establishing a process in order to address particular concerns and/or identified incidence of modern slavery.
- Considering whether audits of direct and indirect suppliers will need to be carried out. For example, will on-site assessments be required? Will reporting entities be required to commit resources to conducting investigations at construction sites or supplier premises? If so, what would the scope and purpose of these audits/visits be?

### **3.4 MODERN SLAVERY STATEMENT**

Both the Commonwealth and the NSW Act require Slavery Statements to describe what steps an organisation has taken to assess and address modern slavery risks in their operations and supply chains, both in Australia and overseas where applicable. Both the Commonwealth and the NSW Act require the Statements six months after the end of their financial year.

The Commonwealth Act requires that the Statements must be in an 'approved form,' and meet the mandatory criteria contained in s 16, whereas under section 24(3) of the NSW Act they are required 'to be prepared in accordance with the regulations.' Section 24(5) of the NSW Act provides a number of examples of the criteria that may be included in the Regulation. Clause 7 of the draft Regulation contains the mandatory criteria for the preparation of the Modern Slavery Statements.

HIA submits that a better approach would be to amend s 24 of the NSW Act and insert into that section the mandatory criteria rather than having it in the Regulation. Having the criteria in the head legislation would better align with the Commonwealth legislation and is simply a better regulatory approach. Section 24(5) of the NSW Act should also be deleted. Such matters are now dealt with by the draft Regulations. There is a real risk that having two provisions dealing with the same matters may cause confusion and have unintended consequences.

There are considerable similarities between the two systems, which is deliberate as the explanatory paper explains, however there is one stark difference; the NSW Act contains penalties of up to \$1.1 million for organisations that fail to comply with reporting requirements. This penalty is draconian, inappropriate, and it is constitutionally questionable, for a state act to include penalty provisions where an act of the Commonwealth deals with the same matter.

While HIA does not oppose the use of an approved form, businesses should be given the flexibility to provide and present information in a way that suits their business. According to the DPC, provided the minimum mandatory criteria in clause 7 is addressed, businesses are to be given this flexibility as explained in the *Explanatory Paper: Supply Chain Reporting Requirement for Business* under the Rationale heading accompanying clauses 5 and 6. As drafted though, (see cl 5(b)) the Commissioner has the discretion to introduce an approved form in the future. The form would presumably align with any that is approved by the Minister under s 13 of the Commonwealth Act, but that is not guaranteed.

Similarly, while aligning reporting requirements with an entity's financial year is supported, HIA would suggest that annual reporting on these matters is cumbersome. A statement every two years, for example, would reduce cost and regulatory burden, would still meet the primary goal of the proposed measures, but would also provide reporting and other entities time to come to terms with, and respond to, modern slavery risks in their supply chains.

The matters that must be addressed are extensive and no doubt intimidating for all businesses but particularly small businesses.

The UK experience indicates that it is taking businesses some time to become accustomed to the reporting requirements. In materials published in June 2017 it was reported that while 2018 modern slavery statements had been uploaded only around 14 per cent of them complied with the legal requirements and most provided little information on the areas the UK legislation suggests companies may wish to report on.<sup>3</sup>

The UK experience also indicates that companies may encounter difficulties in producing their first modern slavery statement. HIA would suggest that those difficulties, *which include risk mapping beyond the first tier of the supply chain and supplier capacity building*<sup>4</sup> are potentially ongoing and may take years to resolve.

In light of the complexities, level of detail required, the UK experience and that *'it is not expected that a reporting entity would ordinarily identify no modern slavery risks in their operations or supply chains'*<sup>5</sup> HIA asks that entities be provided sufficient time to comply with the reporting requirements if the Bill is passed and that sufficient guidance material is published well in advance of the first reporting period.

### 3.5 PUBLICATION OF MODERN SLAVERY STATEMENTS

At the Federal level, Modern Slavery Statements are to be posted onto a dedicated, publicly accessible website maintained by the Minister. The Federal Minister has the discretion to publish non-complying Modern Slavery Statements or to exclude them.

Clause 8 of the draft Regulation requires the Commissioner to keep and publish a statement register of all Modern Slavery Statements. Section 26 of the NSW Act requires the Commissioner to keep an electronic register that has been characterised as 'naming and shaming' those organisations that have identified whether an organisation's goods and services are or may be the product of supply chains in which modern slavery is occurring.

If all statements are going to be published as required by clause 8, there is no need for a separate register under s 26. If a member of the public wants to discover whether a particular organisation has identified that it has a risk or actually identifies that its goods and services are, or may be, the product of supply chains in which modern slavery is occurring the member of the public need only read the Modern Slavery Statement from that organisation. There is no need for separate register; section 26 should be deleted.

If s 26 is deleted there is no need for the proposed new s 26(3). HIA is not opposed to this new subsection, but notes that there is nothing in the draft Regulation giving effect to s 26(3). It seems an opportunity was missed here to provide information about the manner and form of voluntary disclosures referred to in 26(1)(b).

### 3.6 SCHEDULES IN THE NSW ACT

HIA fails to see the utility of the provisions provided for in the Schedules of the NSW Act. Schedule 1 deals with the Modern Slavery Committee, whose constitution and functions are dealt with under Part 2 Division 4 of the NSW Act.

---

<sup>3</sup> CORE (June 2017) *Modern slavery reporting: Weak and notable practice*

<sup>4</sup> CORE (June 2017) *Recommended Content for a Modern Slavery Statement*

<sup>5</sup> Commonwealth Explanatory Memorandum at pg.19

There appears to be little value and practical reason for the establishment of this Committee. As contained in s 22, it has the power to 'inquire into and report on matters relating to modern slavery, and to report to both Houses of Parliament.'

HIA questions the need for a Modern Slavery Committee with the functions as outlined.

Sections 21 – 23 should be deleted along with Schedule 1.

### **3.7 THE ROLE OF THE COMMISSIONER IN RAISING AWARENESS AND VICTIM ASSISTANCE**

HIA supports the functions of the Commissioner as provided for in Part 2 of the NSW Act. In particular the raising of awareness and the provision of education and training, the monitoring of the effectiveness of legislation and government policies in combating modern slavery, and the provision of guidance on preventing, detecting, investigating and prosecuting modern slavery.

The provision of assistance and support for the victims of modern slavery is commendable. The establishment of a hotline for the provision of advice and assistance to children and other persons who are, or may be, victims of modern slavery is a very practical action, as is the action of ensuring access to forms of financial support and counselling for victims of modern slavery.

## **4. COMMENTARY ON THE DRAFT REGULATION**

### **4.1 SUPPORT FOR BUSINESS COMPLIANCE**

In the *Explanatory Paper: Supply Chain Reporting Requirement for Business*, it is asked how the Anti-Slavery Commissioner can best support businesses to comply with the reporting requirements under the NSW Act and also what guidance businesses would find helpful in preparing their statements. Obviously, such support and guidance will only be required where s 24 is not repealed.

In March 2019 the Federal Department of Home Affairs released Draft Guidance for Reporting Entities for public consultation to which HIA provided feedback. The Department of Home Affairs has committed to publishing 'Clear and comprehensive guidance for business about the Reporting Requirement and their obligations.' The Guidance material has now been released.

HIA submits that useful, accurate and reliable guidance material in relation to the NSW Act is essential. The Commissioner will be able to utilise the material published by the Department of Home Affairs and supplement that material where appropriate because the mandatory criteria in clause 7 of the draft Regulation is so closely connected to the mandatory criteria as the Commonwealth Act.

HIA is aware that in June 2019, the Modern Slavery Business Engagement Unit of the Department of Home Affairs convened a two day modern slavery conference. An equivalent conference should be held by the NSW Government for those organisations required to report under the NSW Act.

As stated above, HIA's primary concern is that it is unclear how the legislation will apply to non-reporting entities in the supply chains of reporting entities. These non-reporting entities are likely to be small businesses who are not considered to be the target of the obligations under the NSW Act. This is equally the case for non-reporting entities under the NSW Act. Guidance for non-reporting entities needs to be developed and it needs to be industry specific.

HIA calls for the development of industry specific guidance material. HIA is particularly concerned that guidance material specific to the residential building industry is prepared. It is critical that reporting entities understand the extent of their supply chains as envisaged by the NSW Act, including that other businesses, particularly small businesses, will be involved in supporting a reporting entity comply with their reporting requirements.

### **4.2 SMALL BUSINESS EXCLUSION**

HIA supports an ongoing exemption for small organisations from the reporting requirements under the NSW Act.

HIA submits that as part of the RIS the Government should be conducting there needs to be a more detailed examination of the effects on small organisations of the reporting requirements. It is unclear why the figure of 20

employees has been decided upon. The way in which clause 10(5) has been drafted makes it appear as though the number 20 is a simple head count of employees and does not differentiate between part-time and full-time employees, casuals and labour hire.

### **4.3 VOLUNTARY REPORTING**

In the Bill, an amendment to s 26 inserts a new regulation making power, allowing the Regulation to be able to address the manner and form in which voluntary modern slavery statements can be made to the Commissioner. Given this, the Government should have taken the opportunity to include a provision allowing for voluntary risks statements in the draft Regulation.

There is some sense in enabling voluntary reporting from businesses falling below the \$50 million turnover; it would help further the objects of the NSW Act by assisting in raising community awareness and encourage collaborative action to combat modern slavery. However whether there actually needs to be a specific provision allowing for voluntary reporting is debatable.

If the Government is minded to enable voluntary reporting, the NSW Act, or the Regulation, should be clear as to whether a voluntary reporting entity has to abide by the mandatory reporting criteria at clause 7 of the draft Regulation and if a failure to comply with the mandatory criteria exposes the voluntary reporting entity to any penalties.

As stated above, if s 24 of the NSW Act is not repealed, HIA supports the exemptions in draft Regulation 10 applying to commercial organisation who voluntarily report under the Commonwealth Act.

### **4.4 PUBLIC REGISTER**

The public register should provide an overview of the NSW scheme, a discussion of, and link to, the Commonwealth provisions and copies of the modern slavery statements that have been submitted. As stated above it should not be a space for naming and shaming organisations.

The statements should be able to be submitted by email or upload (especially for larger sized files) to a website maintained by the Commissioner.

Only the most recent statement should be available on the public register. Once it is uploaded it replaces the previous year's statement.

### **4.5 EXEMPTIONS, CONSULTATION, MONITORING AND EVALUATION**

In respect of subsidiaries of parent entities reporting under the Commonwealth Act, it is logical for such subsidiaries to be exempt from reporting requirements. To require otherwise would only be to increase red tape without any discernible benefit on achieving the objects of the NSW Act.

In respect of the communications channels the Commissioner could use to raise awareness, HIA suggests the use of periodic newsletters to which members of the public can subscribe and press releases for more important timely announcements in much the same way as a wide range of Government departments currently communicate with the NSW public is appropriate and should be adopted. A dedicated website should also be established.

## **5. CONCLUSION**

HIA recommends that the NSW Act be repealed, failing that Part 3 of the NSW Act should be repealed. In the alternative, s 24 of the NSW Act the provision compelling commercial organisations with a total turnover of not less than \$50 million to prepare a modern slavery statement should be repealed.

If this is not done HIA supports the inclusion of clause 10 in the draft Regulation to exempt commercial organisations in NSW with an annual turnover between \$50 million and \$100 million from the s 24 requirements of the NSW Act if they volunteer to comply with the requirements of the Commonwealth Act.

Industry specific guidance material should be developed and should be aimed, not just at those organisations who have to prepare a modern slavery statement, but also the smaller businesses that are non-reporting entities who will inevitably be impacted by the legislation.