

**Submission
No 75**

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

Organisation: King & Wood Mallesons

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To NSW Legislative Council Standing Committee on
Social Issues

Dear Sir/Madam

Inquiry into the Modern Slavery Act 2018 (NSW) and associated matters

We refer to the terms of reference (**TOR**) into the inquiry into the *Modern Slavery Act 2018 (NSW)* and associated matters.

We welcome the opportunity to provide a submission to this inquiry. This submission particularly addresses paragraphs 1(b), (g) and (h) of the TOR.

We support the overarching intent of the *Modern Slavery Act 2018 (NSW)* (**NSW Act**) and the draft *Modern Slavery Regulation 2019 (NSW)* (**Draft Regulation**).

However, the NSW Act largely covers similar issues to those addressed by the *Modern Slavery Act 2018 (Cth)* (**Commonwealth Act**). It is debatable whether parts of the NSW Act will have their intended effect. Further, in our view, the Draft Regulation does not sufficiently address these overlaps, which may have adverse impacts on businesses (particularly large corporate groups where at least some entities are reporting under the Commonwealth Act).

This submission addresses three issues:

- (a) The proposed exemption in Draft Regulation 10(1) for voluntary reporting entities is inconsistent with the NSW Act (and is therefore unnecessary);
- (b) The proposed exemption in Draft Regulation 10(2) for subsidiaries does not necessarily capture all subsidiaries of reporting entities under the Commonwealth Act and should be amended; and
- (c) The interaction between the proposed exemptions in the Draft Regulations, the terms of the NSW Act and the Commonwealth Act may ultimately render section 24 (and part of section 26) of the NSW Act unnecessary.

1 The effect of the anti-slavery scheme on business, including the supply chain reporting obligations under section 24 of the NSW Act (TOR paragraph (1)(b))

1.1 Proposed exemption for voluntary reporting entities under the Commonwealth Act (Draft Regulation 10(1))

Section 24 of the NSW Act requires commercial organisations with an annual turnover of \$50 million or more, and with employees in NSW, to prepare and publish annual modern slavery statements. However, section 24(9) of the NSW Act provides an exemption from all of the requirements in section 24 if the organisation is subject to obligations under a law of the Commonwealth or another State or a Territory that is prescribed as a corresponding law for the purposes of this section. Draft Regulation 9 prescribes that the Commonwealth Act is a corresponding law for the purposes of section 24(9). We welcome this proposed exemption.

However, Draft Regulation 10(1) is inconsistent with section 24(9) of the NSW Act and Draft Regulation 9. An entity which volunteers to comply with the requirements of the Commonwealth Act becomes a “reporting entity” for the purposes of the Commonwealth Act (section 5(1)(d) of the Commonwealth Act). It will therefore be subject to mandatory reporting obligations under either section 13 or 14 of the Commonwealth Act (depending on the circumstances). Pursuant to section 24(9) of the NSW Act and Draft Regulation 9 section 24 of the NSW Act will not apply to voluntary reporters under the Commonwealth Act at all. This means that Draft Regulation 10(1) is unnecessary, and is inconsistent with the terms of the NSW Act.

1.2 Proposed exemption for subsidiaries of Commonwealth parent reporting entities (Draft Regulation 10(2))

The exemption does not apply where there is only a single reporting entity in a corporate group

Draft regulation 10(2) provides an exemption from the requirement to prepare modern slavery statements for subsidiaries of Commonwealth parent reporting entities. However, this exemption only applies to subsidiaries whose parent reporting entity has given a modern slavery statement to the Minister under section 14 of the Commonwealth Act, that covers the subsidiary.

Section 14 of the Commonwealth Act provides that (emphasis added):

“An entity, other than the Commonwealth, may give the Minister a modern slavery statement covering one or more reporting entities (which may include the entity giving the statement), for a reporting period for those reporting entities.”

A reporting entity for the purposes of the Commonwealth Act is “an entity which has a consolidated revenue of at least \$100 million for the reporting period.” A subsidiary of a Commonwealth parent reporting entity with an annual turnover of less than \$100 million is not a reporting entity for the purposes of the Commonwealth Act, and there is no requirement for the parent reporting entity to prepare a joint report on behalf of the entity. A subsidiary which is not itself a “reporting entity” will only be indirectly covered by the statement as part of the reporting entity’s reporting as required by section 16 of the Commonwealth Act.

The proposed exemption does not address a situation where:

- (a) There is only one single reporting entity (which has multiple subsidiaries) within a corporate group; or
- (b) There are multiple reporting entities within a corporate group (which each have subsidiaries), but each reporting entity elects to prepare its own report (and therefore there is no joint report for multiple reporting entities in the group).

In either (a) or (b) above, the modern slavery statement would be prepared under section 13 of the Commonwealth Act. This means that any entity owned or controlled by the single reporting entity which otherwise met the reporting threshold in section 24(2) of the NSW Act would not be able to rely on the proposed exemption in Draft Regulation 10(2) because the modern slavery statement was not prepared under section 14 of the Commonwealth Act. This will significantly increase compliance burdens for these commercial organisations and appears inconsistent with the NSW Government's proposed approach to the Draft Regulation which was directed at preventing duplication of reporting obligations on businesses. A proposed amendment to Draft Regulation 10(2) to address this issue is set out in Section 3 below.

The exemption imposes stronger penalties on the subsidiaries seeking to rely on it than the reporting entity which is ultimately responsible for its preparation

Draft Regulation 10(2) only exempts commercial organisations from the requirements of sections 24(2)-(6) of the NSW Act. Section 24(7) of the NSW Act, which makes it an offence to provide information in connection with a matter under that section that the person knows, or ought reasonably to know, is false or misleading in a material particular, will still apply.

It is unclear whether section 24(7) would apply if there is false or misleading information in the modern slavery statement that is provided to the Commissioner as part of relying on the exemption in Draft Regulation 10(2). The provision is broad and potentially covers various disclosures that may be made to the Commissioner. This potentially exposes the subsidiary seeking to rely on the exemption to significant penalties even if it was not responsible for the preparation of the modern slavery statement. It also imposes potentially more serious penalties on subsidiaries than those which are imposed on the ultimate reporting entity under the Commonwealth Act.

The preferable course, which will also aid in reducing the compliance burden for corporate groups, is to exempt all entities which are covered by a modern slavery statement prepared under the Commonwealth Act from section 24 of the NSW Act. In this respect, we consider it unnecessary to refer to "covered" (which is ambiguous) and instead simply rely on the requirements of the Commonwealth Act (where reporting entities are expected to address risks that relate to entities they own or control as part of their modern slavery statement).

Inconsistency with the terms used in the Commonwealth Act

Draft Regulation 10(2) refers to "subsidiaries" of Commonwealth reporting entities. Section 16 of the Commonwealth Act refers to entities that are owned or controlled by the reporting entity. We suggest that similar terminology be adopted in the Draft Regulations so as to avoid any potential confusion as to whether particular exemptions apply.

2 Whether the passage of the *Modern Slavery Act 2018* (Cth) renders parts or all of the NSW Act unnecessary, or requiring amendment to address inconsistencies or gaps (TOR paragraph (1)(g))

There are significant penalties for non-compliance with section 24 of the NSW Act. The Commonwealth Act does not impose any penalties for non-compliance.

Voluntary reporting under the Commonwealth Act is discussed above. The practical effect of the interaction between the Commonwealth and NSW Acts (and the proposed exemptions in the Draft Regulations) is to incentivise commercial organisations who would be required to comply with section 24 to voluntarily report

under the Commonwealth Act so as to limit their potential exposure to penalties. This may ultimately mean that section 24 (and at least part of section 26) of the NSW Act are unnecessary (or at least of little utility).

3 The preferred course of action to address the matters identified (TOR paragraph (1)(h))

Due to the matters outlined in Section 2 above, it may ultimately be that section 24 (and at least part of section 26) are unnecessary and should be repealed.

If section 24 is to be retained, we suggest that:

- Draft Regulation 10(1) should be omitted from the final regulations; and
- Draft Regulation 10(2) be amended to read:

A commercial organisation is exempt from the requirements of section 24 of the Act in relation to a financial year of the organisation if the organisation:

- (a) *Is owned or controlled by a reporting entity (within the meaning of the Commonwealth Act); and*
- (b) *The reporting entity has given a modern slavery statement to the Minister under section 13 or section 14 of the Commonwealth Act.*

Please contact us if you have any queries.

Yours faithfully

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