

Submission
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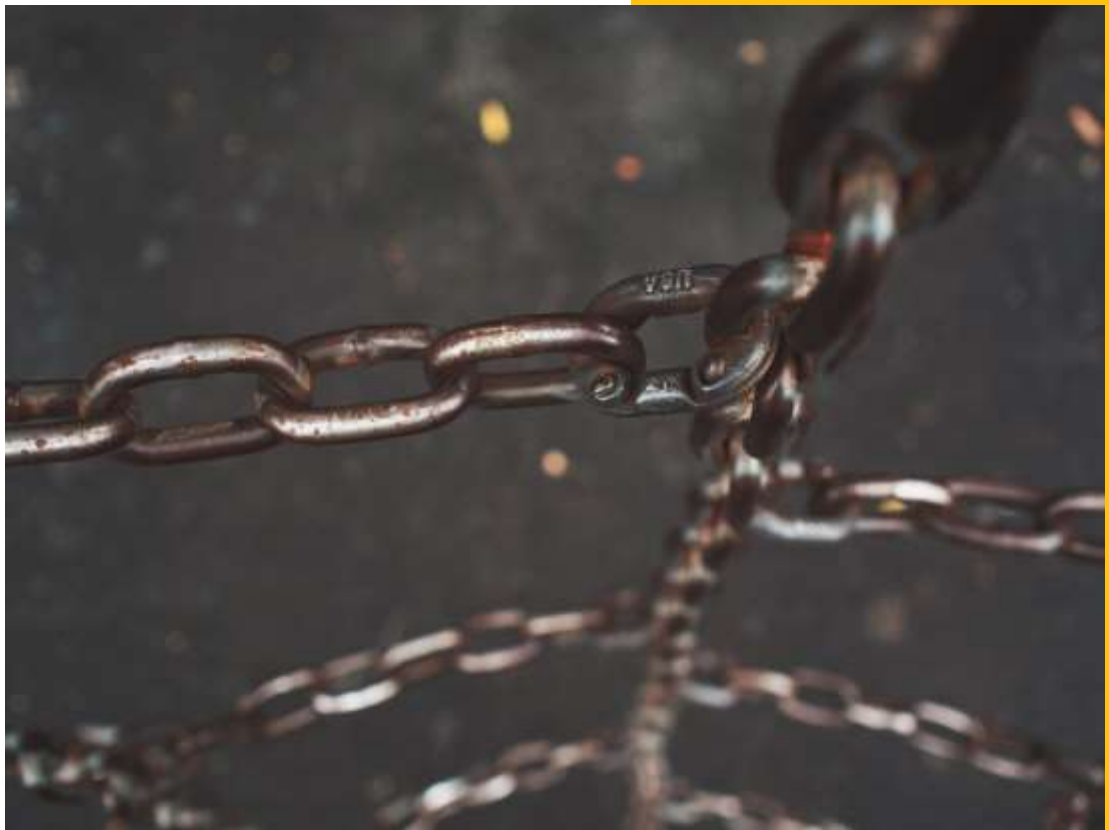
INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

Organisation: NSW Business Chamber and Australian Business Industrial (ABI)

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INQUIRY INTO THE MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS



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OVERVIEW

Australian Business Industrial (ABI) and the NSW Business Chamber (the Chamber) welcomes the opportunity to provide a submission to the Standing Committee on Social Issues' *Inquiry into the Modern Slavery Act 2018 and associated matters*.

ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*.

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce, established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

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INTRODUCTION

ABI and the Chamber strongly support actions necessary to eradicate modern slavery in all its forms and notes the NSW government's primary concerns about modern slavery practices relates to slavery and servitude, particularly sexual servitude; child abuse; forced labour; deceptive recruiting for labour and services; debt bondage; and trafficking of organs, people and children.

Apart from placing an additional and onerous regulatory burden on businesses, especially those in NSW; we have real concerns about the effectiveness of the proposed regulatory approach being adopted in relation to the control and/or eradication of these practices.

Our submission, which outlines our concerns, will follow the order of the Terms of Reference.

THE TERMS OF REFERENCE

- 1. That the standing committee on social issues inquire into and report on the Modern Slavery Act 2018 (NSW), the consultation draft of the Modern Slavery Bill 2019 (NSW), and the consultation draft of the Modern Slavery Regulation 2019 (NSW), with particular reference to:**

- (a) *the operability of the proposed anti-slavery scheme***

The proposed anti-slavery scheme has been described as a 'complementary' state-based system.

A more effective mechanism to detect and rule out modern slavery within NSW we believe involves a coordinated approach with the Australian Government and relevant federal agencies. Under such an arrangement, the primary role of NSW authorities and associated agencies would be to co-operate with the Australian Government, and Commonwealth bodies such as Austrade, the Australian Federal Police and the Attorney General's Department, who are best placed to deal with the majority of these matters.

Recommendation 1: Repeal the legislation and instead develop a protocol (if there isn't one already in place) for the NSW Police to work together with federal agencies to identify risk areas for modern-slavery practices and adopt the best course of action for the practice being conducted.

The federal scheme requires Australian entities carrying on business in Australia and having a consolidated revenue of at least \$100 million to report on risks of modern slavery practices in their operations and supplies chains and describe the actions taken to assess and address those risks, including due diligence.

In comparison, the NSW scheme contains similar but slightly different obligations which apply to businesses with a turnover of \$50 million or more (with an exemption for those businesses who voluntarily report under the federal scheme).

Best practice in a regulatory sense should seek to align regulatory obligations and to the extent this scheme purports to address the same subject matter as the federal scheme, the legislation should mirror the provisions and obligations as set out in the *Commonwealth Modern Slavery Act 2018*.

The NSW legislation adds an additional and unnecessary regulatory burden and is expected to create confusion in the business community, especially those businesses at the cusp of the \$100 million mark.

Recommendation 2: Where there is an overlap in subject matter, the NSW legislation should mirror the provisions of the federal legislation, including the financial threshold.

To the extent to which it 'complements' the federal scheme, the NSW scheme contains some significant differences and has far-reaching consequences.

Of most concern are the provisions which replace the current section 16. Subsection (2) does not contain a requirement to act in good faith and excludes a person providing 'information, a document or thing' to the Commissioner from 'any criminal or civil liability'.

In addition, when read together with the:

- proposed section 26(1)(d) - which is a new paragraph allowing the Commissioner to 'include any other information that the Commissioner thinks appropriate' to the public register (without a requirement to notify the entity in relation to whom the 'information, document or other thing' relates);
- proposed amendments to the *Defamation Act 2005* - granting absolute privilege to 'matters arising under the *Modern Slavery Act 2018*'; and
- definition of 'coercion' including 'psychological oppression', 'abuse of power' or 'taking advantage of a person's vulnerability',

the proposed amendments may result in a systemic abuse of the scheme (for example, by a disgruntled employee) and allow it to continue unchecked. They will also leave businesses affected by the lodging and publication of false information; these businesses will be powerless to take legal action or protect their reputation (assuming they are aware of the allegation).

As a minimum measure, before any information is published by the Commissioner on the register, the Commissioner should be required to notify the entity to whom the information relates and allow the entity to submit a confidential and un-redacted version to the Commissioner (not for release) together with redacted version for publication coupled with a right of reply (also to be published).

In addition, the information being provided may contain confidential or business sensitive information that an individual would otherwise be obliged (at common law or equity) to keep confidential. Allowing a blanket exclusion from civil liability will, in some instances, create an unacceptable level of uncertainty to commercial contractual relationships.

Recommendation 3: Section 16 of the *Modern Slavery Act 2018 (NSW)* and the *Defamation Act 2005* are not to be amended as proposed by the current version of the *Modern Slavery Amendment Bill 2019*.

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

We are concerned with the over-reliance on the 'top-down' approach this system relies upon as it assumes that the businesses bound by the legislation are able to:

- obtain the information required for reporting purposes;
- control the risk; and
- eliminate or reduce the risk.

For businesses operating towards the top of a complex supply chain, this is an overly onerous obligation. Should the *Modern Slavery Amendment Bill 2019* be passed unamended, the only way a business could be confident of protecting their reputation would be to require every entity in its supply chain to provide an assurance that they are not engaging in modern slavery practices. For elements of the supply chain that involve international or specialist components or services, the administrative burden of providing such an assurance in the form required may restrict or prevent these components or services from being included and potentially limit or end the capacity of businesses operating in NSW.

NSWBC and ABI support the option to voluntarily opt in to the federal scheme as businesses may wish to be pro-active in preventing modern slavery practices in their supply chain to provide them with a competitive or reputational advantage.

However, we would strongly advocate that any businesses that voluntarily reports and attempts to comply with the legislative requirements should not be subject to any of the penalties applicable to those who are subject to the mandatory reporting requirements.

Recommendation 4: Repeal the NSW legislation and investigate ways to incentivise NSW businesses to opt-in to the federal scheme.

(c) *the intended application of the anti-slavery scheme with respect to charities and not-for-profit organisations, State Owned Corporations and local councils*

We note the *Modern Slavery Amendment Bill 2019* includes an amendment which, if enacted, will include charities and not-for-profit organisations within the definition of 'commercial organisation' and clarifies that the \$50 million turnover threshold is confined to turnover derived from the supply of goods and services for profit or gain.

Recommendation 5: Even with the clarification regarding turnover, we do not support the inclusion of this amendment because:

- There is no evidence provided by the NSW Government showing the connection between organisations of this type and modern slavery.
- Given the important role volunteers play to the continuing operations of charities and not-for-profit organisations, we believe the compliance burden will be unacceptably high.

(d) *the appropriateness and enforceability of Modern Slavery Risk Orders under section 29 of the NSW Act*

The current legislation provides that, where a person is convicted with a Schedule 2 offence, which includes offences under the *Commonwealth Criminal Code* as well as the *Crimes Act 1900* (NSW), a court may make an order prohibiting the person from engaging in 'conduct constituting modern slavery' for a period of up to 2 years (a Modern Slavery Risk Order).

It is difficult to see how this would work in practice.

The *Modern Slavery Amendment Bill 2019* contains a provision to repeal this part of the Act.

Recommendation 6: We support the repeal of the provisions that permit the making of Modern Slavery Risk Orders under section 29.

(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*

We maintain the existence of the *Commonwealth Modern Slavery Act 2018* negates the need for NSW-specific legislation to the extent that they overlap in subject matter and believe the balance of the NSW-specific scheme is unnecessarily onerous and unworkable.

(h) *the preferred course of action to address the matters identified*

We refer to Recommendation 1 (above). However, should the legislation remain in place, then the Commissioner should ensure its website has a feedback portal allowing outside comment to come through on a regular basis and we encourage the Commissioner to regularly consult and engage with employer organisations and professional bodies, such as ABI and NSWBC.

Such organisations are in daily contact with their members and are best placed to comment on the impact of the legislation and relay member feedback to the Department and the relevant Minister(s).

2. The Committee shall have regard to the Government submission enclosed with the terms of reference

NSWBC notes that the NSW Government's submission to the Inquiry stated that:

"the Commonwealth estimated an annual regulatory impact on the business community of the modern slavery reporting requirement of \$21,950 per reporting entity".

The NSW Government submission expects the equivalent impact to obtaining compliance with the Commonwealth. The Chamber has real concerns with imposing a further cost on law-abiding businesses who have no background of or any association with modern slavery.

Given the NSW Act can impose criminal penalties, up to 10,000 penalty units for organisations that do not comply with reporting requirements of section 24, a possible \$110,000 penalty per breach, businesses obliged to comply with the NSW Act are likely to spend more time and money ensuring they meet these obligations to ensure they are not subject to any criminal penalties.

This not only includes the time and money spent from employees of a particular organisation conducting due diligence for reporting purposes but also fees paid to external providers such as lawyers and accountants who will prepare these statements on an organisations behalf.

We believe the likelihood of this state-specific scheme achieving its statutory objectives are, at best, minimal. It is for that reason, we suggest those NSW businesses should be permitted to offset the cost of compliance with this scheme against their pay-roll tax burden.

Recommendation 7: That the NSW government permit those NSW businesses bound by the NSW modern slavery legislation to offset the cost of compliance against their pay-roll tax burden.