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ERADICATING MODERN SLAVERY: HOW THE NEW MODERN SLAVERY ACT AFFECTS YOUR ORGANISATION

2018



The *Modern Slavery Act 2018 (Act)* was passed by the Australian Federal Parliament on 29 November 2018. It will take effect on a date to be proclaimed. The Act establishes a mandatory reporting regime, under which large businesses and certain Commonwealth entities are required to report on the risks of modern slavery in their operations and supply chains, and the acts that they have taken to address those risks.

“The UN estimates that up to 25 million modern slavery victims are exploited in global supply chains. This includes over 4,000 people in Australia estimated to be enduring slavery or slave-like conditions.”

Second Reading Speech, Alex Hawke, Assistant Minister for Home Affairs

DOES IT APPLY TO MY ORGANISATION?

The Act applies to Australian entities and entities carrying on business in Australia that have an annual consolidated revenue of \$100 million or more. It also applies to the Commonwealth and corporate and non-corporate Commonwealth entities that meet the \$100 million revenue threshold.

“The bill sets a \$100 million consolidated revenue threshold for reporting. This ensures that it focuses on entities that have the capacity to meaningfully comply and the market influence to clean up and address their global supply chains.”

Second Reading Speech, Alex Hawke, Assistant Minister for Home Affairs

An entity “carries on business in Australia” within the meaning of the Act if it:

- (a) establishes or uses a share transfer office or share registration office in Australia; or
- (b) administers, manages, or otherwise deals with, property situated in Australia as an agent, legal personal representative or trustee, whether by employees or agents or otherwise, in the case of a body corporate, or if it would be taken to do so if it was a body corporate.

In addition, entities that do not fall within the threshold revenue requirement may volunteer to comply with the Act by giving notice to the Minister if they operate in Australia.



WHAT IS MODERN SLAVERY?

Under the Act, “modern slavery” is expansively defined to mean conduct that:

- + is an offence under Division 270 or 271 of the *Criminal Code Act 1995* (Cth), which includes slavery, slavery-like offences (such as servitude, forced labour, deceptive recruiting for labour or services, forced marriage and debt bondage offences), trafficking in persons, organ trafficking and harbouring a victim;
- + occurs outside of Australia, but which would be an offence under Division 270 or 271 of the *Criminal Code Act 1995* (Cth) if that conduct had taken place in Australia;
- + is trafficking in persons, as defined in Article 3 of the protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ([2005] ATS 2007); and
- + is “the worst forms of child labour”, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour ([2007] ATS 38).

“Trafficking of persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”

Article 3 of the protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ([2005] ATS 2007)

“the worst forms of child labour” comprises (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour ([2007] ATS 38)

It would be expected that the government will give formal administrative guidance to accompany the Act to provide explanatory information regarding the conduct captured by “modern slavery”.

WHAT DOES MY ORGANISATION HAVE TO DO TO COMPLY?

Entities that are subject to the Act (**reporting entities**) are required to produce a Modern Slavery Statement in the approved form. Modern Slavery Statements must be produced annually to the Minister within 6 months after the end of the entity's financial year. It would be expected that the scope of this requirement, including the form approved by the Minister, will be outlined in regulations.

Modern Slavery Statements must be approved by the entity's principal governing body (for example, the board of directors or board of trustees) and signed by a responsible member of the entity (such as a company director).

“The bill makes senior management accountable for the entity's modern slavery risks by requiring statements to be approved by the entity's principal governing body.”

– Second Reading Speech, Alex Hawke, Assistant Minister for Home Affairs

The Act allows for a joint Modern Slavery Statement to be submitted on behalf of multiple related reporting entities, which is intended to reduce the administrative obligations on corporate groups and other collections of entities.

The Minister must prepare a Modern Slavery Statement for the Commonwealth, covering all non-corporate Commonwealth entities.

We note that compliance with the Act is limited to producing a Modern Slavery Statement. Modern slavery practices continue to be separately criminalised under the Criminal Code.

“The development of this bill has been guided by one central objective: to combat modern slavery in the supply chains of our goods and services.”

– Second Reading Speech, Alex Hawke, Assistant Minister for Home Affairs

WHAT HAS TO BE INCLUDED IN A MODERN SLAVERY STATEMENT?

According to the mandatory reporting criteria specified in the Act, Modern Slavery Statements must:

- (a) identify the reporting entity;
- (b) describe the structure, operations and supply chains of the reporting entity;
- (c) describe the risks of modern slavery practices in the operations and supply chains of the reporting entity and any entity controlled by the reporting entity;
- (d) describe any actions taken by the reporting entity (and any entity that the reporting entity owns or controls) to assess and address modern slavery risks (this may include due diligence, remediation processes, policies and processes, and staff training) and the effectiveness of such actions;
- (e) describe the process of consultation with any entities owned or controlled by the reporting entity;
- (f) outline the details of approval by the principal governing body of the reporting entity; and
- (g) provide any additional information that the entity considers relevant.

The Modern Slavery Statement is intended to be an overview of an entity's general process for assessing, preventing and addressing modern slavery, rather than a report detailing specific incidents that have occurred.

“Statements will need to address mandatory criteria set out in the bill, including identifying the entity's key modern slavery risks and describing their actions to address these risks. These criteria will provide certainty for business about how to report and ensure statements can be easily compared.”

ARE MODERN SLAVERY STATEMENTS MADE PUBLIC?

Yes. The Act requires the Minister to establish an online register of Modern Slavery Statements that is to be made available to the public free of charge. The Minister is to register all Modern Slavery Statements provided by reporting entities, and may do so even if they are non-compliant with the prescribed reporting criteria.

The intention behind establishing a public register is to promote transparency in supply chain operations and to assist the market make informed consumption and investment choices regarding an entity's goods and services.

WHAT IF I DON'T COMPLY WITH THE ACT?

No penalties apply for failing to comply with the Act, or for producing misleading Modern Slavery Statements.

However, the government may require entities that fail to properly report to provide an explanation for such failure and/or undertake specified remedial action. The Minister may publish a list of entities that fail to comply with such requests and the details of the explanation or remedial action requested.

“For the first time, large businesses will be required to identify how their operations and supply chains may contribute to modern slavery and explain what they are doing to address these risks. This increased transparency will create a level playing field for large businesses to disclose their modern slavery risks.”

– Alex Hawke, Assistant Minister for Home Affairs

NSW ACT

Earlier this year, NSW also passed a Modern Slavery Act (**NSW Act**) with a similar reporting requirement. The table below compares the key points between the Commonwealth and NSW Acts.

Of particular note is the lower revenue threshold in NSW (\$50 million), different definition of “modern slavery”, establishment of an Anti-slavery Commissioner in NSW, and penalties under the NSW Act for failing to report or producing misleading reports (up to \$1.1 million).

The NSW Act exempts commercial organisations from having to report under the NSW regime if that organisation is subject to a corresponding Commonwealth or State law, as prescribed by regulations. As at the date of publication, no Commonwealth or State law has been prescribed as “corresponding” law for these purposes.

The NSW Act has not yet commenced.

Issue	Commonwealth Act	NSW Act
Who is captured?	Entities that carry on business in Australia with over \$100 million annual consolidated revenue. Also, corporate and non-corporate Commonwealth entities that meet the \$100 million revenue threshold.	Commercial, private sector organisations that have employees in NSW and which have an annual turnover of \$50 million or more. Public sector agencies are exempt from the reporting obligations.
What is modern slavery?	Conduct that is criminalised under Division 270 or 271 of the <i>Criminal Code Act 1995</i> (Cth), which includes slavery, forced labour and debt bondage offences, as well as people trafficking and “the worst forms of child labour”.	Criminal offences under sections 80D, 80E, 91G(1)-(3), 91H, 91HAA and 93AA-93AC of the <i>Crimes Act 1900</i> (NSW) and Divisions 32, 270 and 271 <i>Criminal Code Act 1995</i> (Cth), including forced labour, human trafficking and debt bondage.
Where must the conduct occur?	Applies to acts committed both within and outside of Australia	Applies to acts committed both within and outside of NSW.
What do you have to do to comply?	Reporting entities must produce a public Modern Slavery Statement in the approved form. Reports must be produced annually, within 6 months of the end of the entity’s financial year.	Reporting entities must produce a public Modern Slavery Statement for each financial year of the organisation in accordance with the regulations.
What must be disclosed in a Modern Slavery Statement?	The mandatory reporting criteria includes: <ul style="list-style-type: none"> + the entity’s identity, structure, operations and supply chains; + potential modern slavery risks in their operations; + actions taken to address modern slavery risks (including due diligence and remediation processes); and + the effectiveness of such actions. 	Organisations must publicly disclose: <ul style="list-style-type: none"> + their structure, business and supply chains; + due diligence processes regarding modern slavery in their business and supply chains; + steps taken to address any identified risks of modern slavery; and + training about modern slavery available to their employees.
Penalties for non-compliance?	No penalties apply for failing to comply with the reporting requirement, or for producing misleading reports.	Penalties of up to 10,000 penalty units (\$1.1 million) apply to organisations that do not comply with the reporting obligations.



5 STEPS TO PREPARE YOUR ORGANISATION FOR COMPLIANCE WITH THE NEW LAWS

Organisations that are subject to either or both of the Commonwealth Act and NSW Act should start preparing themselves to comply with these new laws:



Map your supply chains

Work out how your supply chains operate in the context of your structure and businesses.



Perform a risk assessment

Identify areas of your operations and supply chains where there may be a higher risk of modern slavery activity (including, for example, based on industry or geography).



Manage identified risks

Identify how you can minimise modern slavery practices in high risk areas of your supply chains, and consider what additional measures you could take to minimise these risks. This could include reviewing terms of supply contracts, as well as your processes for monitoring compliance (including, for example, surveys and audits).



Fix identified issues

Develop an approach to remediate issues when they arise. This may include addressing how matters should be escalated internally and what remediation steps may be appropriate.



Train staff

Introduce training for staff about modern slavery risks and how to take appropriate action. This would include training on how to implement relevant modern slavery policies and contractual provisions.

As part of your organisation's ongoing compliance with the Act, we note that these activities will need to be conducted on a continuous basis.

KEY CONTACTS



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