

## AUSTRALIAN MODERN SLAVERY LEGISLATION: PREPARING FOR CORPORATE REPORTING ON SUPPLY CHAIN TRANSPARENCY

Internationally, there has been increasing recognition of modern slavery as one of the greatest human rights abuses of the modern world. The term 'modern slavery' encompasses a range of heinous practices including human trafficking, slavery, servitude, debt bondage, forced labour and forced marriage. Modern slavery is particularly prevalent in the Asia-Pacific region, with the International Labour Organisation (ILO) estimating that over half of the victims of forced labour, approximately 11.7 million people, are in the Asia Pacific region.

The nature of modern slavery is that it is largely clandestine, meaning it can be 'hidden in plain sight'.<sup>1</sup>

### BACKGROUND

In 2012, California first introduced legislation focusing on the role that businesses can play in stamping out these practices, by introducing a reporting requirement on business aimed at increasing transparency in supply chains. The United Kingdom followed that lead introducing the *Modern Slavery Act (UK Act)* in 2015 which contains a similar reporting requirement on businesses.

In Australia, a Parliamentary Committee was established in 2016 to consider whether Australia should adopt a modern slavery act with similar or improved measures to that of the UK. In its final report, issued in December 2017, the Parliamentary Committee recommended the establishment of a modern slavery act in Australia (**Inquiry Report**). The Commonwealth Modern Slavery Bill 2018 (**Commonwealth Bill**) is the culmination of extensive consultation with the business community and civil society.

As with the other recent legislation in this area, the primary purpose of the NSW Act and the Commonwealth Bill will be to require transparency in the supply chain arrangements of large Australian businesses, thus shining a light into the dark world of modern slavery.

### Key issues

- On 28 June 2018, the Australian Federal Government introduced legislation to enact a Commonwealth Modern Slavery Act which will require entities, including foreign entities carrying on business in Australia with an annual consolidated revenue of \$100 million to publicly report on their modern slavery policies and practices
- The government has committed to enact the Bill by year's end
- The New South Wales Parliament has also just passed the first Modern Slavery Act in Australia, requiring certain businesses to publicly report on their due diligence processes in relation to modern slavery in their business and supply chains
- Organisations affected by the NSW legislation and large businesses which will be covered by the proposed Commonwealth legislation will need to conduct due diligence of their business and supply chains and enhancing their modern slavery policies and prepare the publication of modern slavery statements

## **NEW COMMONWEALTH BILL AIMS TO CREATE A 'RACE TO THE TOP'**

The much-anticipated Commonwealth Bill confirmed that the expected reporting requirement will apply to entities based or operating in Australia which have an annual consolidated revenue of more than AUD\$100 million. It is estimated that this will cover approximately 3,000 entities.

However, whilst the Bill prescribes details regarding the form and content of the reporting requirement, there are no provisions for enforcement or penalties for failure to report within the relevant reporting period. This has already drawn criticism from commentators, who have labelled it "toothless".<sup>2</sup> It is apparent from the Explanatory Memorandum accompanying the Bill that the primary objective is to "assist the business community in Australia to take proactive and effective actions to address modern slavery".<sup>3</sup> Therefore, an approach which is intended to "facilitate a collaborative 'race to the top'" was favoured over punitive penalties which "may lead to a tick box compliance approach from reporting entities".<sup>4</sup>

In a "world-first",<sup>5</sup> the Bill also applies to the Commonwealth Government, which will be required to prepare a modern slavery statement covering all non-corporate Commonwealth entities, thereby leading the business community "by example".

## **NEW SOUTH WALES MAKING HEADWAY**

New South Wales has been proactive in combating modern slavery by passing the *Modern Slavery Act 2018* (NSW) on 21 June 2018 (the **NSW Act**). It may be that some of the features of the NSW Act will feature in the federal legislation.

Unlike the UK Modern Slavery Act, the NSW Act makes it mandatory for certain commercial to publish a slavery and human trafficking statement for each financial year. These organisations are, namely, any corporation (including foreign registered corporations) incorporated partnerships, association or other body of persons who:

- have employees in NSW;
- supply goods and services for profit or gain, and
- have total turnover of not less than AUD\$50 million per financial year (a significantly lower threshold than under the Commonwealth Bill).

## **WHAT DOES THE MANDATORY SLAVERY STATEMENT NEED TO COVER?**

The Commonwealth Bill specifies the content which must be reported in the form of a "modern slavery statement". Under the proposed legislation, there are six mandatory reporting criteria:

- identification of the reporting entity;
- the reporting entity's structure, operations and supply chains;
- the risks of modern slavery practices in the operations and supply chains of the reporting entity;
- the actions taken by the reporting entity to assess and address those risk, including due diligence and remediation processes;

- how the reporting entity assesses the effectiveness of the actions taken to address those risks; and
- the process of consultation with any entities that the reporting entity owns or control.

The proposed criteria broadly reflect areas that organisations are encouraged (but not required) to report on under the UK Act.

The approach of prescribing mandatory criteria in the Commonwealth Bill was favoured given it will more likely result in consistent reporting, a problem which has arisen in the context of the UK Act. The Australian Government proposes to release "clear and detailed guidance" for reporting entities to assist them in their preparations to meet the reporting requirements. It is expected that the proposed criteria will be incorporated into the NSW Act which will be set by regulations to be issued in due course.

Under the Bill, modern slavery statements will need to obtain board approval (or approval from the entity's principal governing body) and be signed by a "responsible member" of the entity (such as an authorised director or equivalent).

The manner in which the statement should be approved under the NSW Act will be set by regulation in due course.

## **WHEN WILL MANDATORY REPORTING ON SUPPLY CHAINS BE REQUIRED?**

Under the Commonwealth Bill, the proposed timeframe for corporate reporting is within 6 months after the end of the reporting entity's financial year. There are no transitional provisions. Therefore, it is crucial that affected organisations start to plan and put processes in place to ensure they will be able to meet their obligations. Indeed, the Interim Report noted that "many larger Australian businesses already have established processes in place to address supply chain risks".

Under the NSW Act the proposed timeframe within which modern slavery statements must be prepared will be provided for in the regulations.

## **ENFORCEMENT**

The NSW Act includes penalty provisions for failing to prepare a modern slavery statement; failing to make it public in line with the regulations; and providing information that is false or misleading. Each of these obligations is subject to a maximum penalty of 10,000 penalty units (AUD\$1.1 million) for failure to comply.

By stark contrast, there are no enforcement mechanisms in the Commonwealth Bill.

Whilst the Commonwealth Bill fails to prescribe offences or civil penalties for a failure to report, it is anticipated that the Bill, once enacted, will be supported by formal guidance issued by the government to explain the scope of the reporting requirement and the various types of conduct that falls within "modern slavery". This mirrors the approach taken in the UK where the statutory guidance to the UK Act serves as a useful tool for clarifying the expectations of the government and promotes better compliance with the Act. Further, the Bill anticipates the creation of a "Modern Slavery Statements Register", which is to be made available to the public on the internet, free of

charge which will facilitate scrutiny of the adequacy of statements by the public. The government has also committed to establishing a new Modern Slavery Business Engagement Unit within the Department of Home Affairs to support the implementation of the Bill and assist with compliance.

The Bill contains a provision for review within 3 years of its commencement, which may see future penalties being introduced in due course.

## **NEXT STEPS FOR THE BILL**

The Bill will be subject to further debate on 13 August 2018. Hon Alex Hawke MP, Assistant Minister for Home Affairs has expressed his commitment to passing the Bill by the end of 2018.

## **WHAT SHOULD YOU DO NOW TO PREPARE?**

Organisations should start thinking about the implications of the Federal Bill and the NSW legislation now, and in particular consider the following:

- is your organisation likely to be subject to the supply chain reporting requirement?
- if so, can your organisation answer the criteria outlined above for reporting on its supply chain?
- what due diligence might your organisation need to carry out to prepare a supply chain reporting statement?
- does your organisation currently have policies relating to modern slavery? If not, how will the organisation prepare for establishing such a policy?
- does your organisation educate and train staff about modern slavery?
- what existing risk management procedures could be revised to address modern slavery?

Clifford Chance has advised many UK based businesses on the implications and requirements of the UK Act, and therefore has a depth of experience in advising clients how best to prepare for the introduction of an Australian modern slavery act.

## **CLIFFORD CHANCE SUBMISSIONS**

Clifford Chance's submission to the Parliamentary Committee focused on the need to provide certainty on which entities would be subject to the reporting requirement and guidance on reporting requirements:

[https://www.apf.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ModernSlavery/Submissions?main\\_0\\_content\\_1\\_ReadGrid1ChangePage=8\\_20](https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Submissions?main_0_content_1_ReadGrid1ChangePage=8_20)

---

<sup>1</sup> *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia*, Parliament of the Commonwealth of Australia, Canberra, December 2017, page ix.

<sup>2</sup> F. Tomazin, "Slaves in the supply chain: New laws branded 'Toothless'", The Sydney Morning Herald, 27 June 2018.

<sup>3</sup> The Parliament of the Commonwealth of Australia, Modern Slavery Bill 2018, Explanatory Memorandum, 29 June 2018, page 2.

<sup>4</sup> The Parliament of the Commonwealth of Australia, Modern Slavery Bill 2018, Explanatory Memorandum, 29 June 2018, page 57.

<sup>5</sup> The Hon. Alex Hawke MP, 'New Legislation to Combat Modern Slavery', Media Release, 28 June 2018.

## CONTACTS

**Tim Grave**  
Partner

**T** +61 2 8922 8028  
**E** tim.grave  
@cliffordchance.com

**Jenni Hill**  
Partner

**T** +61 8 9262 5582  
**E** jenni.hill  
@cliffordchance.com

**Rae Lindsay**  
Partner

**T** +44 20 7006 8622  
**E** rae.lindsay  
@cliffordchance.com

**Anna Kirkpatrick**  
Senior PSL

**T** +44 20 7006 2069  
**E** anna.kirkpatrick  
@cliffordchance.com

**Amanda Murphy**  
Senior Associate

**T** +61 8 9262 5567  
**E** amanda.murphy  
@cliffordchance.com

**Georgia Eldridge**  
Graduate Lawyer

**T** +61 2 8922 8515  
**E** georgia.eldridge  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, Level 16, No. 1 O'Connell Street, Sydney, NSW 2000, Australia

© Clifford Chance 2018

Liability limited by a scheme approved under professional standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.