

Ai GROUP SUBMISSION

Standing Committee on Social Issues
Legislative Council
New South Wales Parliament

Inquiry into the Modern Slavery Act 2018 (NSW)

4 October 2019

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GROUP

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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Summary

Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a submission to the *Inquiry into the Modern Slavery Act 2018 (NSW) and associated matters* conducted by the Legislative Council's Standing Committee on Social Issues. The Inquiry includes also consideration of the proposed *Modern Slavery Amendment Bill 2019 (the Amendment Bill)* and the draft *Modern Slavery Regulation 2019 (Draft Regulation)*.

Crimes of modern slavery have no place in society and should be eradicated. Ai Group supports businesses playing a role, along with others in the community, to combat modern slavery. Ai Group supports effective measures to achieve such an objective.

The enactment of two pieces of modern slavery legislation on business– the *Modern Slavery Act 2018 (NSW) (the NSW Act)* by the NSW Parliament and the *Modern Slavery Act (Cth) (the Cth Act)* by the Australian Parliament – each provide for separate modern slavery reporting frameworks. Businesses covered by each of the reporting frameworks must prepare modern slavery statements against mandatory criteria largely directed at the actions and processes businesses use to identify modern slavery risks in their operations and supply chains.

Ai Group supports a NSW modern slavery reporting framework that adopts a consistent and harmonised approach with the Cth Act. Different reporting frameworks ultimately undermine and confuss efforts of business to systematically identify and manage modern slavery risks in their operations and supply chains.

The NSW Act, together with the Amendment Bill and Draft Regulation, seek to harmonise the NSW reporting requirement to the reporting requirement in the Cth Act. These changes are welcome and minimise duplicate reporting on business and the associated cost and regulatory burden.

However, some stark inconsistencies with the Cth Act remain, in respect of enforcing the obligation on businesses to prepare modern slavery statements.

It is inequitable for smaller NSW businesses covered by the NSW Act to be subject to significant financial penalties of \$1.1 million, while the Cth Act applying to larger NSW businesses adopts an alternative enforcement approach without financial penalty. The result is a two-tiered reporting system for NSW businesses with different consequences based on business size.

The inequitable and inconsistent enforcement approach with the Cth Act sends an inappropriate message to the community that combatting modern slavery is more pressing for smaller businesses than larger organisations.

This inconsistency should be removed by:

- Deleting the penalty provisions in s.24 of the NSW Act, while maintaining the more serious offences relating to modern slavery under s.33 and Schedule 2; and,

- Inserting a provision in the NSW Act of the kind described in s.24 of the Cth Act in respect of a three-year review.

The three-year review mechanism would enable the NSW Government to evaluate the effectiveness of the NSW Act and consider whether additional measures are required to improve compliance with modern slavery reporting requirements.

Two modern slavery reporting frameworks

Both the NSW Act and the Cth Act provide for separate, stand-alone modern slavery reporting frameworks on certain classes of businesses. The Cth Act commenced 1 January 2019 and requires businesses with a consolidated revenue of \$100 million or more to prepare and provide an annual modern slavery statement.

The NSW Act has not yet commenced. The NSW Act covers businesses with an annual turnover of not less than \$50 million and similarly requires such businesses to prepare and provide an annual modern slavery statement.

Ai Group has actively engaged with both the NSW Government and the Australian Government in an endeavour to ensure that businesses are subject to harmonious modern slavery reporting frameworks that minimise the administrative burden and are consistent in approach.

Duplicate reporting requirements on businesses must be avoided

The NSW Act, together with the Amendment Bill and Draft Regulation, seek to harmonise the NSW reporting requirement to the Cth Act's reporting requirement. A critical aspect of this is ensuring that businesses are not required to report twice into different reporting frameworks on essentially the same issue.

Ai Group is supportive of the Draft Regulation narrowing the coverage of the NSW Act to remove duplicate reporting requirements on businesses captured by both the Cth and NSW Acts.

Specifically, the Draft Regulation at clauses 9 and 10 identify appropriate and necessary exemptions from the requirement to prepare a modern slavery statement under s.24 of the NSW Act. These exemptions include an organisation that is subject to reporting obligations under the Cth Act, and also organisations which report under the Cth Act, either as a voluntary reporter or a subsidiary of a parent organisation covered by the Cth Act, where the subsidiary is covered by a joint statement prepared pursuant to the Cth Act's reporting requirements.

The Draft Regulation necessarily limits the scope of the NSW Act to businesses with an annual turnover of at least \$50 million but less than \$100 million. Businesses with annual turnovers of \$100 million or more are subject to the Cth Act's reporting requirements. These are essential provisions to enable the two reporting schemes to operate harmoniously on businesses, without duplication.

Inconsistent enforcement approach with the Cth Act

The NSW Act's inconsistency with the Cth Act in respect of the enforcement approach to modern slavery reporting is inequitable for smaller NSW businesses.

Both the Cth Act and the NSW Act will apply to businesses operating in NSW, with each of these two modern slavery reporting regimes imposing very different consequences on businesses that do not prepare a modern slavery statement in compliance with the relevant Act.

The NSW Act imposes financial penalties of up to \$1.1 million for businesses that:

- Do not prepare a modern slavery statement as required by the Act for each financial year (s.24(2));
- Do not make their modern slavery statement public in accordance with the Regulation; (s.24(6)); or
- Provide information in connection with a matter under s.24 (transparency in supply chains) that the person knows, or ought reasonably to know, is false or misleading in a material particular (s.24(7)).

Subsection 24(7) also includes a legislative note that the *Crimes Act 1900* covers other offences for providing false and misleading information/documentation.

In contrast, and with application to larger organisations, the Cth Act does not impose financial penalties on the same conduct or omission but provides for reporting entities to subsequently comply or be 'named and shamed' on a public online register.

Specifically, s.16A of the Cth Act empowers the Minister to seek an explanation from a reporting entity as to why it has not complied with its reporting obligations under the Cth Act and to request that the entity take remedial action (such as the provision of a modern slavery statement) in relation to the Cth Act's reporting requirement.

A reporting entity that fails to provide the required explanation, or take the required remedial action, may be publicly recorded by the Minister in an online register as a reporting entity that has failed to comply with the reporting requirements of the Cth Act.

The 'naming and shaming' of a business on the public register could impose considerable commercial damage or loss of business opportunity for a business that has not prepared a modern slavery statement. It is likely that many organisations covered by the Cth Act, including the Commonwealth Government, will utilise the public register as part of their procurement procedures to determine whether an entity that may become a supply chain participant has complied with the Cth Act in preparing the required modern slavery statement.

Further, given that many businesses operating in NSW will be subject to modern slavery reporting for the first time, Ai Group considers the Cth Act's approach to enforcement to be appropriate.

The Cth Act, at s.24 mandates a three-year review of the operation of the Cth Act to determine, amongst other things, whether additional measures to improve compliance with the Cth Act are required, such as the introduction of civil penalties. The three-year review provision was a later amendment to the *Modern Slavery Bill 2018* (Cth) with the Bill ultimately passed by the Australian Parliament.

The inconsistency between the NSW Act and the Cth Act in respect of the enforcement approach, disadvantages smaller businesses and provides for an inequitable reporting scheme for NSW businesses more broadly.

The following examples highlight the inequitable outcomes that would result from the current interaction between the NSW Act and Cth Act:

- A NSW business with an annual turnover of \$99 million faces a \$1.1 million penalty for not preparing a modern slavery statement in accordance with the NSW Act;
- A NSW business with an annual turnover of \$101 million that does not prepare a modern slavery statement is not subject to financial penalty but may be subject to an investigation and 'naming and shaming' on the public register;
- A global business operating in NSW with an annual turnover of \$250 million is not subject to a financial penalty for not preparing a modern slavery statement.

This inconsistency should be removed by:

- Deleting the penalty provisions in s.24 of the NSW Act, while maintaining the more serious offences relating to modern slavery under s.33 and Schedule 2; and,
- Inserting a provision in the NSW Act of the kind described in s.24 of the Cth Act in respect of a three-year review.

The three-year review mechanism would enable the NSW Government to evaluate the effectiveness of the NSW Act and consider whether additional measures are required to improve compliance with modern slavery reporting requirements.

Publishing statements on a public register

Ai Group is supportive of provisions in the Amendment Bill and Draft Regulation to enable the Anti-Slavery Commissioner to publish *all* modern slavery statements via an online register, rather than only displaying those statements disclosing risks of modern slavery.

An integral feature of the NSW modern slavery reporting framework is transparency in reporting by commercial organisations. The effect of ‘naming and shaming’ only those businesses that disclose risks of modern slavery, is likely to serve as a disincentive for commercial organisations to engage in transparent reporting. Furthermore, Ai Group considers that commercial organisations that disclose risks of modern slavery are demonstrating that they have implemented due diligence systems effective in uncovering such risks. The sharing of this information should be encouraged rather than businesses being ‘named and shamed’ on a particular list.

Ai Group has provided similar feedback¹ to the Commonwealth Government in respect of the Cth Act and we refer to recommendations we have made relating to the development of resources for civil society and the media for reading and interpreting modern slavery statements.

Preparing modern slavery statements

Ai Group is supportive of the Draft Regulation adopting a mandatory criteria against which modern slavery statements must report, identical to that contained in the Cth Act.

We are also supportive of the Draft Regulation enabling the provision by commercial organisations of joint statements to satisfy the NSW reporting requirements. Businesses frequently comprise of different entities and it is appropriate that measures like this are introduced to minimise the regulatory burden on commercial organisations required to report.



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¹ [Ai Group Submission, Modern Slavery Act 2018 \(Cth\), Draft Guidance Materials. 17 May 2019](#)