

22 November 2022

Modern Slavery Act Review Secretariat
Attorney-General's Department
3-5 National Circuit, Barton ACT 2600

Dear Professor McMillan AO,

Review of Australia's Modern Slavery Act 2018

Thank you for the opportunity to provide a submission to the statutory review (**Review**) of the *Modern Slavery Act 2018* (Cth) (**Act**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 50,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits, large and small businesses and the Government sector.

The AICD strongly supports the objectives of the modern slavery reporting regime in Australia; that is, to increase transparency in business operations and supply chains, and to require organisations to undertake due diligence on their modern slavery risks and address issues identified. The 2021 Global Estimates report indicates there are 49.6 million people living in situations of modern slavery on any given day, with the Asia and Pacific region host to more than half of the global total.¹

We participated in the Government's earlier consultations in support of the Act's introduction and draft guidance for reporting entities, and consider that this Review presents an important and timely opportunity to assess the Act's effectiveness over its first three years of operation. We also commend the extensive consultation undertaken by Professor McMillan AO and the Attorney-General's Department over recent months.

Enclosed with this cover letter are our detailed responses to the Review's Issues Paper at **Attachment A**.

Executive Summary

This submission is informed by our engagement with members of the AICD's Corporate Governance Committee, Reporting Committee, Law Committee and Not-for-Profit (**NFP**) Chairs Forum, as well as legal practitioners, academics, civil society groups and other industry bodies on critical aspects of the Review's Terms of Reference.

We provide comments in the following key areas:

Impact of the Act

- The introduction of Australia's modern slavery reporting regime has had a positive normative impact across organisations, Government and civil society. This has been felt acutely at the board level, with Australian directors citing the significant time and resources spent on modern

¹ Global Estimates of Modern Slavery, *Force Labour and Forced Marriage*, September 2022 (available [here](#)).

slavery due diligence and reporting. That said, our members have cited particular challenges with gaining access to, and visibility of, their suppliers in certain countries and the complexities involved with attempting to identify risks in extended supply chains.

- For the Act to be effective in strengthening due diligence and reporting practices, it must be in partnership with Government, civil society, and industry. The AICD strongly encourages the development of further resources and guidance for reporting entities, with a particular focus on NFPs, Aboriginal and Torres Strait Islander organisations and small and medium enterprises (**SMEs**) who have limited time and resources, as well as organisations operating in industries with a high risk of modern slavery in their operations and/or supply chains.

Reporting threshold

- The AICD supports the retention of the existing AU\$100m annual consolidated revenue reporting threshold. With reporting practices not yet at the desired level, albeit improving, we strongly encourage the focus following this Review to be on lifting compliance and the quality of reporting by Australia's largest entities, rather than increasing the number of entities required to report. We note that entities with a revenue below AU\$100m will often be indirectly caught by the regime as they are part of the supply chains of larger organisations.

Additional measures to improve compliance with reporting obligations

- In recognition of concerns with the quality of reporting over the last two reporting cycles the AICD supports, in principle, consideration of a range of additional enforcement measures.
- If the Review concludes that the introduction of civil penalties for non-compliance is a necessary next step to address inadequate reporting, we strongly urge that:
 - any penalties are confined to the entity level and for conduct such as a failure to submit a statement, submission of a materially false or misleading statement or clear failure to satisfactorily address all mandatory reporting criteria;
 - a 'reasonable steps' style defence attach to ensure that organisations that take appropriate measures to fulfil their due diligence obligations under the Act are not subject to liability;
 - a graduated approach to enforcement be taken, ranging from 'soft corrective' measures initially to more 'punitive sanctions' that could be reserved for recalcitrant conduct; and
 - the imposition of penalties should be subject to judicial exclusivity (not applied by an Anti Slavery Commissioner or Ministerial direction).

The role of an Anti-Slavery Commissioner

- The AICD supports the establishment of an independent Anti-Slavery Commissioner to oversee the administration of the Act, with a clearly defined focus on education, awareness raising, monitoring and compliance activities. If established, the Anti-Slavery Commissioner could play a pivotal supporting role in providing practical guidance and sector insights for reporting entities as well as coordinating work across industry, Government and civil society to eliminate modern slavery in Australia and global supply chains.

Next Steps

We hope our submission will be of assistance with this important consultation. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy (cgergis@aicd.com.au), Laura Bacon, Senior Policy Adviser (lbacon@aicd.com.au) or Christie Rourke, Senior Policy Adviser (crouke@aicd.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Louise', with a long horizontal flourish extending to the right.

Louise Petschler GAICD

General Manager, Governance & Policy Leadership

Attachment A

1. Impact of the Act

Australian directors are increasingly focused on modern slavery governance. Since its introduction, the Act has had a positive normative impact in raising awareness and elevating a conversation around modern slavery risks across organisations, government and civil society.

AICD members agree that the Act's transparency model approach, coupled with the requirement for a statement to be approved by the 'principal governing body' and the 'responsible member' of that governing body, has raised board level focus on due diligence of operations and supply chains. Directors are also acutely aware of the potential reputational risk and investor scrutiny attached to poor or unethical supply chain practices. As noted in the Issues Paper, we consider this is reflected in the noticeable compliance improvement across both reporting cycles, as reported by the Modern Slavery Business Engagement Unit (**MSBEU**).²

That said, in feedback to the AICD, directors have highlighted the following concerns about the effectiveness and operation of the Act:

- **Access** - in many cases, there are significant barriers for organisations to undertake the requisite due diligence on their organisations' operations and supply chains. Gaining access to, and engagement with, suppliers beyond tier 1 and 2 suppliers in certain countries and regions is a common challenge in practice. In addition to the COVID-19 pandemic disrupting these processes over the last two reporting cycles, there are also geopolitical factors and other risk factors that hinder robust supply chain analysis on an ongoing basis. Industry requires greater support from the Government to remediate these issues at an international trade and political level;
- **Internal capabilities** – organisations, even those significantly resourced, report that they are still grappling with the challenge of ensuring they have sufficient internal capabilities and expertise to undertake the necessary due diligence on their operations and supply chains, let alone effective action to address modern slavery risks when identified; and
- **Objects of the Act** – as mentioned above, Australian directors and their organisations are, in the majority, spending significant time and resources on modern slavery governance. There is widespread acceptance that the intent of the Act is to incentivise the business community to take proactive and effective actions to identify and address modern slavery risks in their operations and supply chain. However, we have had feedback from external stakeholders that the commentary surrounding compliance with the regime to date has lost sight of this purpose. Ensuring transparency around work practices in operations and supply chains through reporting on identified risks and/or prevalence of modern slavery and taking steps to address those risks or occurrences are levers within organisations' control to meet the Act's objective. However, given the endemic nature of modern slavery in many parts of the world, significant global economic coordination and collaboration is essential.

² An assessment of modern slavery statements submitted since the regime commenced indicates compliance with Act has improved between the first and second reporting cycles, from 59% to 72% respectively.

Enhanced guidance and support from Government

Since the Act was introduced, the AICD has lifted its focus on the governance of modern slavery and remains committed to building the capability of directors and boards to tackle modern slavery risks and drivers. Discourse on modern slavery governance features in the AICD's core educational offering, the *Company Director Course*, as well as regular member content, webinars and resources - including director tools on modern slavery risk oversight and signing off on modern slavery statements.³

The AICD considers that for the Act to be effective in strengthening due diligence and reporting practices, it must be in partnership with Government, civil society, academia and international partners. As set out in Section Four of this submission, the AICD believes that the establishment of an Anti-Slavery Commissioner will play a critical role in achieving collaboration across all stakeholders and shifting consumer behaviour.

Our consultation with directors suggests there is significant demand for further guidance, training, Government advice and support on identifying and addressing modern slavery risks both here in Australia and abroad. We strongly encourage the development of tailored guidance, in particular, for:

- **NFPs, Aboriginal and Torres Strait Islander organisations and SMEs** that are reporting entities under the Act which often have limited time, resources and internal expertise to conduct extensive supply chain analysis. It is critical that the Government support these entities to ensure that the compliance burden is a manageable rather than a daunting task that then promotes a 'tick a box' compliance approach. Guidance could outline low cost, simple steps that organisations can take to investigate their operations and supply chains and corrective actions to remediate any risks identified. We also encourage the Review to consult with Aboriginal and Torres Strait Islander organisations about the impact of the Act and meeting certain reporting criteria, given the unique challenges they face in certain supply chains; and
- **Reporting entities in industries with a high risk of modern slavery** in their operation and/or supply chains. Feedback from our members indicates that entities in certain industries would benefit from additional guidance which includes a list of countries, regions, suppliers and/or products with a high degree of modern slavery risk, as well common modern slavery indicators to monitor.

In addition, in feedback to the AICD, directors have identified that the verification and assurance process is an area where resources and capabilities could be bolstered. At present, there are limitations to the verifications that internal audit within organisations can carry out due to the specialised nature of the risk and limited personnel capabilities – as mentioned above, there are often barriers in access and visibility of suppliers in certain countries and regions. In the case of NFPs or SMEs, time and resources act is a similar barrier.

With this in mind, we encourage the Review to consider whether there is an opportunity for the development of principles, a code of practice or accreditation measures for large suppliers that could reduce the burden currently placed on individual companies to assess supply chain risks across what can, in some industries, be a common pool of suppliers. This might include for example a centralised register of accredited suppliers, both domestically and internationally, to provide certainty and assurance around organisations' procurement arrangements. In our view, there is an opportunity for this mechanism to be co-developed between business, Government and civil society and foster collaboration with international partners. As discussed in Section Four, this could be administered by an

³ AICD Director Tool: [Modern slavery risk oversight](#) and AICD Director Tool: [Signing off on modern slavery statements](#).

established Anti-Slavery Commissioner function with input from industry and cross-Government agency coordination.

2. Reporting requirements

Reporting threshold

The AICD strongly supports the retention of the existing AU\$100m annual consolidated revenue reporting threshold. Three years into the regime, it is clear that the focus should be on lifting the quality of reporting by Australia's largest entities, rather than increasing the number of entities required to report. Members consistently comment that the work required to produce a modern slavery statement is considerable, often requiring significant external support. We have also received anecdotal evidence that the cost of complying has far exceeded expectations, which mirrors comments highlighted in the Issues Paper. With this in mind, we are particularly concerned that lowering the threshold would capture NFP and SME entities that are not sufficiently resourced to undertake the level of due diligence required to meet the Act's requirements adequately. In our view, lowering the threshold would unfairly increase compliance costs for many NFPs and SMEs with little reduction in the incidence of modern slavery in supply chains, at least for now. It would also likely promote a 'tick a box' approach to compliance.

The current threshold appropriately captures larger organisations with more resources and capacity to comply effectively with the requirements, while still enabling a 'trickle-down' effect through supply chains to impact suppliers' behaviour and drive meaningful change in business practice. Market practice is more likely to be thorough and consistent if current thresholds are maintained, rather than if a broader range of entities are caught (thereby setting a stronger benchmark).

Reporting criteria

The AICD is supportive of the existing mandatory reporting criteria in the Act. After three years of the reporting requirement being in place, entities have become familiar with these criteria and we do not consider these need to be amended in the Act. However, our members would welcome additional clarification and guidance on definitions like 'operations and supply chains' and 'due diligence' in administrative guidelines, in recognition that no one size fits all and entities need flexibility to determine what is appropriate within their own resources and capabilities.

More fundamentally, however, we consider greater clarification and guidance on how entities are required to report the occurrence of modern slavery, when detected in their operations or supply chains, is critical. In our view, existing guidance material on recommended pathways to report to Government is unclear. If established, we see a role for the Anti-Slavery Commissioner to be an appropriate independent body for entities to notify, as well as work cooperatively with, to ensure steps are taken swiftly to address and eliminate any identified modern slavery practices.

Reporting timelines

Our members support the current reporting requirements which allow entities to align their reporting obligations with other internal accounting and reporting processes throughout their applicable financial year.

Statement approval

As noted in Section One, AICD members support the requirement for a modern slavery statement to be approved by the 'principal governing body' and the 'responsible member' of that governing body. This

has had a positive impact in raising awareness and scrutiny of operational and supply chain modern slavery due diligence at the board level. In our view, this is a process that should be retained.

3. Additional measures to improve compliance with reporting obligations

The AICD supports the range of regulatory measures that are currently available to cultivate effective compliance with the Act, including powers for the Minister for Home Affairs (**Minister**) to:

- elect not to register a deficient modern slavery statement;
- request an entity to explain why it has not complied adequately or at all with the reporting requirement, or request an entity to take specified remedial action to ensure compliance; and
- publish the identity of an entity that does not comply with the request.

The AICD considers that it may be appropriate for these powers to sit with the Anti-Slavery Commissioner, if established.

The transparency that is afforded to modern slavery statements via the Register and ability for the Minister to 'name and shame' non-compliant entities can support business compliance. For ASX listed public companies in particular, reputational risk as well as investor and consumer pressures weigh heavily on corporate decision-making and the governance frameworks that support it.

In earlier consultations on the Act's introduction, the AICD considered it inappropriate to introduce penalties at the outset and that Government should focus on establishing the reporting regime and working with business to improve practices. International experience indicated that it takes time to develop an understanding of modern slavery risks in a supply chain, assess and investigate risks, and train staff effectively to undertake this work.

However, the AICD acknowledges that assessments of modern slavery statements by the MSBEU over the first two reporting cycles have identified concerns with the quality of reporting. Accordingly, the challenge that lies ahead for the regime is striking a balance between creating the right incentives to drive better management of modern slavery risks and appropriately targeted liability settings.

To this end, the AICD supports in principle consideration of a range of additional enforcement measures. As noted in the Issues Paper, this could include: court powers to grant an injunction requiring entities to comply with their reporting obligations; published standards or guidelines that entities are expected to observe in preparing a modern slavery statement; a complaints procedure for non-compliant statements to be investigated; or a penalty regime for non-compliance with the reporting requirements.

Penalty regime for non-compliance

In considering whether it is appropriate to introduce civil penalties for non-compliance, it is critical that doing so does not lead to unintended consequences. In particular, care must be taken to ensure that an overly punitive regime does not drive a "tick a box" approach to compliance and reporting, thereby limiting the usefulness of modern slavery statements. This risk was observed in the 2017 report of the Joint Standing Committee on Foreign Affairs, Defence and Trade *Hidden in Plain Sight - An inquiry into establishing a Modern Slavery Act in Australia*.

It is equally important to remain cognisant of the risk of driving modern slavery practices underground and disincentivising the reporting of 'bad news' up the chain within an organisation, let alone publicly in

statements, should modern slavery risks or instances be identified. The primary object of the Act must remain focused on supporting organisations and this should include a particular focus on what steps organisations can take when suspected or actual modern slavery practices are identified.

If the Review considers that the introduction of civil penalties for non-compliance are a necessary next step to address inadequate reporting, we strongly urge that:

- **Conduct and threshold** – any civil penalties are confined to the entity level and for conduct such as a failure to submit a statement, submission of a materially false or misleading statement or clear failure to satisfactorily address all mandatory reporting criteria. We note that the finding of 'fault' for these types of conduct or omissions will in many cases require a subjective assessment. Accordingly, there should be clear guidance from Government on what is its regulatory expectation and the imposition of civil penalties should be subject to judicial exclusivity (not applied by an Anti Slavery Commissioner or Ministerial direction);
- **Reasonable steps** – a 'reasonable steps' style defence, similar to that provided under Australia's work, health and safety laws, attaches to the imposition of any civil penalties to ensure that organisations that take appropriate measures to fulfil their due diligence obligations under the Act are not exposed to liability. Importantly, an assessment of whether 'all reasonable steps' has been taken by an entity should factor in the entity's size, resources, practicability and cost measures to ensure they are being held to a standard proportionate to their capabilities and circumstances. Ancillary guidance on what constitutes 'reasonable steps' will be critical; and
- **Graduated approach** – the imposition of civil penalties should be considered a 'last resort'. In our view, a graduated approach to enforcement should be taken, ranging from 'soft corrective' measures initially to more 'punitive sanctions' that could be reserved for entities engaging in recalcitrant conduct. For example, the existing powers for the Minister to request an entity to explain why it has not complied adequately, or at all, with the reporting requirement, or request an entity to take specified remedial action to ensure compliance should be retained as initial measures. This is particularly important for new entrants to the regime. While many organisations have been reporting entities under the Act since its introduction, each reporting cycle will see new cohorts of organisations that are required to report and will need to grapple with the reporting requirements for the first time.

We note that this approach is also consistent with recommendations made in the 2019 independent review of the *UK Modern Slavery Act 2015* for the introduction of enforcement actions, commencing with a warning letter, and rise to a fine (as a percentage of turnover), a court summons or disqualification of a director.⁴

Judicial function exclusivity

The AICD strongly asserts that the imposition of penalties should only be exercised by a federal court under Chapter III of the Australian Constitution, not the Anti-Slavery Commissioner or Minister. However, it

⁴ Recommendation 30, UK Government Response to the Independent Review of the Modern Slavery Act 2015, available [here](#).

may be appropriate for the Anti-Slavery Commissioner, if established, to have within its monitoring and compliance remit the Minister's current regulatory functions as noted above.⁵

4. The role of an Anti-Slavery Commissioner

The AICD supports the establishment of a new and independent Anti-Slavery Commissioner function to oversee the administration of the Act. If established, the Anti-Slavery Commissioner should focus on supporting organisations to meet the Act's objectives and collaborating with business, government and civil society to reduce modern slavery risks, rather than a narrower compliance focus. This should be enshrined in the objectives of the Anti-Slavery Commissioner function.

In addition to the nominated functions⁶ proposed by the Australian Government, the AICD believes that it would be sensible for the Anti-Slavery Commissioner to undertake the educative, monitoring and compliance functions currently discharged by the MSBEU and Minister. Its monitoring function might include, for example, an ability to conduct thematic or sectoral assessments that would provide valuable, real-world insights into current practices and highlight areas requiring improvement. In undertaking the monitoring function by reviewing reports to ensure compliance, the Anti-Slavery Commissioner will also be best placed to provide timely and practical guidance.

The development of guidance by the Anti-Slavery Commissioner to support compliance and assist companies in monitoring and remediating identified risks of modern slavery will greatly assist entities' reporting and compliance with the Act, and more broadly, help eradicate modern slavery in supply chains. As set out in Section One, our members have highlighted that practical guidance for high-risk sectors, products of concern, SMEs and NFPs would be extremely valuable, particularly guidance that promotes best practice by drawing on successful domestic and international examples. Importantly, the AICD believes that the Anti-Slavery Commissioner could play a critical role in bringing together sector insights and coordinate work across industry, Government and civil society to eliminate modern slavery in Australia and global supply chains.

We strongly caution against the Anti-Slavery Commissioner function, if established, having a new layer of administrative penalty powers – which, in our view, would create regulatory complexity. It is appropriate the imposition of any penalties, administrative or civil, remain within the Federal Court's remit. Where the Anti-Slavery Commissioner has however progressed through the range of enforcement tools available to them, without the desired outcome being achieved, it is appropriate that they retain the ability to seek a civil penalty on application the Federal Court.

Finally, we note that any Anti-Slavery Commissioner is likely to have a broad mandate and will need to be resourced accordingly if it is to be able to help support improved modern slavery risk management across the economy.

⁵ To request an entity to explain why it has not complied adequately with the reporting requirement; request an entity to take specified remedial action to ensure compliance; and publish the identity of an entity that does not comply with the request

⁶ The nominated functions are to:

- coordinate work across Government and with industry to eliminate modern slavery in Australia and global supply chains
- monitor the effectiveness of all federal and state institutions to tackle modern slavery
- collaborate with other agencies to increase outreach and information sharing, and
- publish an annual list of countries, regions, industries and products with a high risk of modern slavery.

5. Other comments

The AICD considers that the Act should be reviewed regularly to ensure it remains fit for purpose given the constantly evolving nature of modern slavery risks. A three-year review period would seem appropriate.