

# AUSTRALIAN GOVERNMENT CONSULTS ON THREE-YEAR REVIEW OF MODERN SLAVERY ACT 2018

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Legal Briefings – By **Antony Crockett, Mark Smyth, Timothy Stutt, Jacqueline Wootton, Barry Wang, Rukaiyah Abdullah and Jane Wang**

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On 22 August 2022, the Australian Government released an issues paper on the effectiveness of the first three years of the *Modern Slavery Act 2018* for public consultation.

The Australian *Modern Slavery Act 2018* (Cth) (**Act**) commenced on 1 January 2019. Among other things, the Act created an obligation for large businesses to annually prepare and lodge a modern slavery statement outlining the risks of modern slavery in their operations and supply chains and the actions that they have taken to assess and address those risks.

The Act provides for a review of the Act's operation over the period of three years following its commencement. As part of that review, the Australian Government released an [issues paper](#) on 22 August 2022 to invite public submissions on the key issues to be considered, which include the Act's transparency-focused approach and the potential introduction of mandatory due diligence requirements, the appropriateness of the current reporting requirements (including the reporting thresholds and criteria), possible additional measures (such as penalties) to improve compliance with the Act, and the establishment of a Federal Anti-Slavery Commissioner.

The consultation period will close on 22 November 2022. The review is led by Prof John McMillan AO, and will be completed by 31 March 2023, following which a final report will be tabled in Parliament.

## **WHAT YOU NEED TO KNOW**

**Key issues being explored in the review include:**

- **whether to introduce due diligence obligations**
- **whether to lower the reporting threshold below its current level of A\$100 million in annual consolidated revenue**
- **whether to adjust reporting criteria**
- **whether to introduce enforcement measures for non-compliance, including financial penalties**
- **the role, function and powers of the proposed Anti-Slavery Commissioner**

## **CONTEXT**

Over the past decade or so, there has been growing legislative interest internationally in the enactment of laws to combat contemporary forms of slavery and forced labour. Some of the earlier regimes include the Californian *Transparency in Supply Chains Act 2010* and the UK *Modern Slavery Act 2015*. More recently, jurisdictions such as Australia, France, Germany, the Netherlands, Canada and New Zealand have also adopted modern slavery legislation. However, different approaches have been adopted in different jurisdictions, with countries such as the UK, Australia and Canada taking a reporting-focused approach, while a number of other jurisdictions (principally in Europe) have taken the approach of imposing mandatory due diligence requirements.

Since the enactment of the Australian Act, non-government bodies and academic institutions have taken an interest in the modern slavery statements lodged under the Australian regime. Among other things, it has been claimed that there is a wide divergence in the quality of statements lodged, and that there are inadequacies in reporting entities' explanation of how they have identified and responded to modern slavery risks. There have also been calls for more explicit proactive steps to be taken by reporting entities to address modern slavery risks.

A review of the Act commenced just before the May 2022 Australian Federal Election. The newly elected Albanese Labor Government has made a number of commitments relating to some of the matters that are now under consultation, including the introduction of penalties for non-compliance with the Act and the appointment of an Anti-Slavery Commissioner.

## **TRANSPARENCY-FOCUSED APPROACH OF THE ACT**

The Government is seeking comments on whether the Act has had a positive impact in the first three years. As a part of this enquiry, it is consulting on whether the Act's transparency-focused approach is an effective strategy for addressing modern slavery.

A key question is whether the Act should mandate the due diligence steps required of reporting entities in assessing and addressing their modern slavery risks. Currently, s 16(1)(d) of the Act only requires a reporting entity to describe the 'due diligence and remediation processes' that it uses to assess and address its modern slavery risks. The Government is consulting on whether the concept of 'due diligence' should be embedded more specifically or concretely in the Act.

If due diligence obligations were introduced into the Act as a result of the review, the Act would be brought into closer alignment with regulatory trends in Europe — noting that the possible harmonisation of Australia's modern slavery regime with overseas regimes is another theme that was explored in the issues paper. However, even if Australia does transition to a positive obligations-focused approach, it would still not go as far as developments in Europe, where the EU is currently proposing to implement a Human Rights and Environmental Due Diligence Directive (see our article [here](#)).

Separately, the Government is seeking comments on whether the transparency premise of the Act should be extended — for example, by requiring a reporting entity to explain the process it follows to be reasonably satisfied that modern slavery practice is not occurring in a specified region, industry or product, or in relation to a specified issue of pressing concern.

## **APPROPRIATENESS OF CURRENT REPORTING REQUIREMENTS**

The mandatory reporting obligation under the Act currently applies to entities that have a consolidated revenue of at least A\$100 million during the reporting period. The issues paper explores the possible impacts, advantages and disadvantages of lowering the reporting threshold, potentially to as low as A\$50 million.

The Government is also consulting on the current reporting criteria, including whether to reframe reporting criteria that are presently less well complied with (i.e. the requirements to describe a reporting entity's consultation process and how it assesses the effectiveness of its actions), and whether additional guidance should be provided on the scope of a reporting entity's 'operations and supply chains'.

## MEASURES TO IMPROVE COMPLIANCE

Currently, the Act does not impose any civil or criminal penalties for non-compliance. The issues paper explores a range of possible enforcement measures, including giving courts power to grant injunctions to compel compliance, adopting a policy that non-compliant reporting entities will be excluded from government contracts, or the introduction of financial penalties.

The issues paper noted that the 2017 report of the Australian Parliament's Joint Standing Committee *Hidden in Plain Sight* and the UK Parliament's 2019 Independent Review into the UK *Modern Slavery Act* both recommended the imposition of penalties for non-compliance with modern slavery reporting requirements in Australia and the UK. The issues paper seeks comments on specific questions such as what conduct or omission would be penalised, what kind of penalty would apply, who would apply the penalty, and what procedure should be followed in applying a penalty.

Further, the Government is seeking comments on whether any other administrative actions should be taken to assist reporting entities with complying with the Act — for example, additional guidance materials.

## ADMINISTRATION AND REVIEW OF THE ACT

The Australian Government has committed to establishing an independent Anti-Slavery Commissioner. As part of that commitment, it is consulting on what role the Commissioner should play (if any) in administering and/or enforcing the reporting requirements of the Act, and what functions and powers the Commissioner should have for that role.

The Government is also consulting on whether a further statutory review of the Act should take place, and if so, when and by whom.

## WHAT HAPPENS NEXT?

Written submissions may be made to the Modern Slavery Act Review Secretariat. An online [survey](#) has also been made available, with questions that correspond to the themes of the review. Further, targeted in-person and online consultation sessions will be held.

It will likely be at least a year until any amendments are made to the Act in light of the outcome of review. However, given what is currently known about the Government's policy — and in particular, its commitment to introduce penalties for non-compliance with the Act — reporting entities should continue to focus on enhancing their modern slavery reporting processes. Additionally, reporting entities may do well to consider whether there are appropriate opportunities to strengthen due diligence processes, given the likely increased focus on these aspects of Australia's regime.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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