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The Australian Modern Slavery Act Three Years In – The Government Review and Public Feedback Process May Usher In Enhanced Compliance Requirements

The Australian Commonwealth Modern Slavery Act requires large entities based or otherwise operating in Australia to report annually on how they are addressing modern slavery risks in their operations and supply chains. The Australian Government currently is undertaking a required review of the Act. As part of its review, the Government published an Issues Paper and has invited stakeholders to provide feedback on many key aspects of the Act. Feedback can be provided until later this month. In this Alert, we discuss the review process, insights from the Issues Paper and selected consultation topics that may inform future legislative or administrative action.

Attorneys
[Michael R. Littenberg](#)
[Samantha Elliott](#)
[Austin Bohn](#)

See also our earlier Alerts regarding compliance with the Act [here](#), [here](#) and [here](#).

An Overview of the Review

By its terms, the Act requires a review to be undertaken three years after its commencement. The review is required to be completed within one year, and the report is to be tabled in the Parliament. The review was announced in March. The stated objective of the review is to consider the operation of the Act over the first three years and to look at options for improved operation and compliance.

As part of its review, the Government is conducting the public consultation discussed in this Alert. The public consultation will be supplemented by, among other things, targeted consultations inside and outside Government, additional research and a survey of entities reporting under the Act.

Selected Compliance Statistics

The Issues Paper contains data on modern slavery statements submitted pursuant to the Act.

Thus far, two full reporting cycles under the Act have concluded. In the first cycle, 1,727 modern slavery statements were published. In the second cycle, this increased to 3,429 statements. The statements published pertained to an estimated 6,293 entities from 42 countries.

The Issues Paper discusses six disclosure areas of published statements assessed for compliance: (1) consultation; (2) effectiveness; (3) actions taken; (4) description of risks; (5) description of operations and supply chain; and (6) identification of the reporting entity. Overall, based on the Government's review, the rate of compliance increased from the first to the second cycle. The Government found that 59% of statements submitted in the first reporting cycle were likely compliant, which improved to 72% in the second reporting cycle.

Far and away for both cycles, the biggest reason cited for likely noncompliance was disclosure relating to the consultation process undertaken. Of the likely noncompliant statements, this criterion was cited for 57.62% of those statements in the first cycle and 59.47% in the second cycle. Next highest was disclosure relating to how the reporting entity assesses the effectiveness of actions taken to assess and address modern slavery risks, cited for 28.53% and 23.79% of the likely noncompliant statements in the first and second cycles, respectively. No other assessed topic was cited as the reason for likely noncompliance in over 10% of statements, except description of modern slavery risks for the second cycle (11.10%).

The Issues Paper also indicates the percentage of statements not published in each cycle due to a failure to meet the signature and/or principal governing body approval requirements. In the first reporting cycle, 27% of statements failed to include the necessary approvals, which dropped to 17% in the second reporting cycle.

The Consultation Topics

To assist in its review, the Government identifies in the Issues Paper the following broad areas for public input:

The impact of the Act on modern slavery;

The appropriateness of the Act's reporting requirements;

Measures to improve compliance with the Act's reporting requirements; and

A miscellany of other topics, including the online statement register, the establishment of a modern slavery commissioner and further reviews of the Act.

These topics are further discussed below.

Impact of the Act on Modern Slavery

As part of its review, the Government is examining whether the transparency model of the Act makes a difference strategically in confronting modern slavery on a global scale and reducing its prevalence. As noted in the Issues Paper, the Act aims to have that impact in various direct and indirect ways: increasing business awareness of modern slavery risks and drivers; encouraging government and business to shoulder greater responsibility for supply chain analysis and shielding vulnerable people against threats of enslavement; supporting and equipping business to take effective action; and initiating stronger collaboration between government, business, academia and the community.

In connection with assessing impact, the Government is seeking feedback on the following questions, some of which overlap with questions posed in other parts of the Issues Paper:

Has the Act had a positive impact in the first three years?

Is the transparency framework approach of the Act an effective strategy for confronting and addressing modern slavery risks, including the drivers of modern slavery?

Should the Act be extended to require additional modern slavery reporting by entities on exposure to specified issues of concern? If so, what form should that reporting obligation take?

Should the Act spell out more explicitly the due diligence steps required of entities to identify and address modern slavery risks?

Has the Act been adequately supported and promoted by government, business and civil society?

Appropriateness of Reporting Requirements

The Government is seeking comment on the appropriateness of the following reporting requirements in the Act:

Reporting Threshold. The Act's reporting obligations apply to Australian and foreign entities conducting business in Australia that have annual consolidated revenue of at least AU\$100 million. The Government is seeking comment on

whether to maintain that threshold or reduce it, and if the latter, to what amount. As noted in the Issues Paper, AU\$50 million is commonly suggested (which would align with the reporting threshold contemplated by the New South Wales Modern Slavery Act), although others have made intermediate suggestions of AU\$60 million or AU\$75 million, as well as lower thresholds as low as AU\$25 million. Based on its preliminary modelling of the impact of lowering the threshold, the Government indicated in the Issues Paper there may be a 19% increase in the number of entities required to report under the Act for each AU\$10 million reduction in the reporting threshold. Many of these would be multinationals based outside of Australia.

Reporting Period. The Government seeks comment on the suitability of the reporting period. The Act requires subject entities to submit modern slavery statements within six months after the end of their fiscal year. As a result, submission dates and periods vary depending upon an entity’s fiscal year. In the Issues Paper, the Government notes this currently impacts comparative analysis of statements across entities.

Reporting Criteria. The Act contains seven mandatory reporting criteria to be addressed in modern slavery statements. The Issues Paper raises five specific issues for consideration:

Should the Government reframe, or elaborate on, criteria that have been less well complied with? As earlier noted, areas where the Government has determined there to be the highest likely noncompliance relate to (1) the discussion of how reporting entities assess the effectiveness of actions taken to assess and address modern slavery risks, the discussion of such actions in turn being required to include a description of the entity’s due diligence and remediation processes, and (2) the requirement to describe the process of consultation between higher and subsidiary entities. The Issues Paper asks whether the textual ambiguity in the requirement to describe how a reporting entity assesses the effectiveness of its own actions should be addressed and whether the due diligence element of the reporting obligation should be spelled out.

The Act defines “modern slavery” by referencing the precise terms of criminal offence provisions. Should the Government approach the definition differently, such as by framing it more broadly like international agreements?

The Act requires reporting on the risks of modern slavery in an entity’s “operations and supply chains.” The Act does not define this phrase. The Issues Paper asks whether the Government should provide clarity on those terms, either generally or in reference to specific activities, whether in the Act or in administrative guidelines?

The Act includes a list of modern slavery practices to include in reporting, some of which are not as related to business operations and supply chains and may be difficult or intrusive to assess, such as forced marriage. Should the Government exclude any modern slavery practices from reporting requirements?

Other jurisdictions have different modern slavery reporting requirements. Have these differences hindered the Act’s operation and, as a result, should the Government harmonize the reporting requirements with other jurisdictions’ requirements?

Improving Compliance

As part of the review, the Government is exploring methods of improving compliance through guidance or enforcement. Earlier in this Alert, selected compliance statistics from the Issues Report are cited.

Guidance; Public Procurement. The Government asks what administrative actions it can take to further improve compliance. For example, it asks whether compliance might improve by providing additional, specific guidance on modern slavery risks that entities are expected to address relating to specified regions, industries, products or concerns, or requiring an entity to be compliant before it can secure contracts with the Australian Government or participate in a procurement process.

Enforcement. The Act presently confers limited regulatory powers to enforce the reporting requirement. The Government asks whether additional enforcement mechanisms should be implemented to improve compliance. The enforcement mechanisms raised for consideration include (1) providing for injunctive relief, (2) conferring power on a nominated person (such as a Government Minister or an anti-slavery commissioner) to publish standards or guidelines that entities are expected to observe in preparing modern slavery statements, (3) establishing a third-party complaints mechanism and (4) implementing a penalty regime such as civil fines for noncompliance. The Government seeks comment on these enforcement mechanisms and, if applicable, further details on their implementation.

Other Areas for Comment

The Government seeks comment on the following additional matters related to the Act and its implementation, among others:

Online Register Transparency. The Government seeks comment on the adequacy of the public register through which entities are required to submit their statements and how to improve it, including with respect to accessibility, searchability and transparency.

Anti-slavery Commissioner. The Government has committed to establishing an independent anti-slavery commissioner. The nominated functions are to (1) coordinate work across the Government and with industry to eliminate modern slavery in Australia and global supply chains, (2) monitor the effectiveness of all federal and state institutions to tackle modern slavery, (3) collaborate with other agencies to increase outreach and information sharing, and (4) publish an annual list of countries, regions, industries and products with a high risk of modern slavery. As noted in the Issues Paper, the role and functions of an anti-slavery commissioner are potentially far broader than the terms of reference for the review of the Act. Specifically for purposes of the review, the Government is seeking feedback on whether an anti-slavery commissioner should play a role in overseeing and/or enforcing the Act's reporting requirements.

Further Review of the Act. The Government seeks comment on whether further reviews of the Act should occur, including when, by whom and what form that review process should take.

Participating in the Public Consultation

Comments can be submitted until November 22. Instructions for submitting comments and the Government's list of questions on the key topics described herein can be found [here](#).

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