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New Australian Modern Slavery Reporting Requirements on the Horizon – A Primer for Multinationals

Corporate modern slavery reporting requirements continue to proliferate. Two new Australian Modern Slavery Acts – one proposed by the federal government and the other adopted by New South Wales – will require a significant number of multinationals doing business in Australia to prepare annual modern slavery statements describing their efforts to address modern slavery in their businesses and supply chains. In this Alert, we discuss both Australian developments and provide a comparison to the UK and California modern slavery reporting requirements.

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Australia is the latest entrant in an increasingly crowded field. Over the last few years, legislation addressing modern slavery risks in businesses and supply chains, either as its primary focus or as part of a broader focus on corporate management of human rights issues generally, has been adopted in several jurisdictions. In addition to California and the United Kingdom, these jurisdictions include the United States (federal), France and the European Union. Legislation also has been proposed in Hong Kong, the Netherlands and Switzerland. For a further discussion of corporate modern slavery legislation around the world, see our earlier Alert [here](#).

The Australian Federal Landscape – The Modern Slavery Bill 2018

On June 28, the Modern Slavery Bill 2018 – proposing a Modern Slavery Act – was introduced to the Australian Parliament. Last year, as a prelude to the Bill, the Commonwealth Minister for Justice released a Consultation Paper outlining a proposed modern slavery regulation. The Consultation Paper is discussed in our earlier Alert [here](#).

Debate on the Bill is expected to begin as early as this month and legislation may be passed by Parliament before year-end. The key elements of the Bill are discussed below.

Subject Entities

The Act, as proposed in the Bill, will apply to (1) Australia-based entities and other entities that carry on business in Australia and (2) that have at least A\$100 million in annual consolidated revenue (approximately US\$73 million as of the date of this Alert) for the reporting year. The Australian Government expects that approximately 3,000 entities will be required to report under the Act.

“Entity” is broadly used in the Bill to include, among other things, corporations, partnerships, unincorporated associations and trusts.

As proposed in the Bill, consolidated revenue will be determined in accordance with Australian Accounting Standards, even if those standards do not otherwise apply to the entity. Control also is determined under Australian Accounting Standards.

An entity carries on business in Australia if it (1) has a place of business in Australia, (2) establishes or uses a share transfer office or share registration office in Australia or (3) administers, manages or otherwise deals with property situated in Australia as an agent, legal personal representative or trustee, whether by employees, agents or otherwise.

Definition of Modern Slavery

“Modern slavery” is broadly defined in the Bill to include all forms of trafficking in persons, slavery and slavery-like practices such as forced labor, debt bondage and deceptive recruiting for labor or services, and the worst forms of child labor. According to the Explanatory Memorandum to the Bill, the Australian Government will provide detailed explanatory information concerning the definition of modern slavery, including case studies, in formal administrative guidance.

Statement Content

Subject entities will be required annually to report on their actions to address modern slavery in both their operations and their supply chains.

As proposed, statements will be required to, at a minimum, identify the reporting entity and describe or include the following:

- the structure, operations and supply chains of the reporting entity;
- the modern slavery risks in the operations and supply chains of the reporting entity and any entities it owns or controls;
- the actions taken by the reporting entity and any entities that it owns or controls to assess and address modern slavery risks, including its due diligence and remediation processes (such as developing and implementing policies and processes and providing training to staff);
- how the reporting entity assesses the effectiveness of those actions;
- the process of consultation with any entities that the reporting entity owns or controls and, in the case of joint statements, between each reporting entity and the entity preparing the joint statement;
- any other information that the reporting entity, or the entity preparing the statement, considers relevant; and
- details of the approval of the statement.

As alluded to above, joint statements covering multiple reporting entities will be permitted. A joint statement will be required to identify all reporting entities covered by the statement, be prepared in consultation with each reporting entity that is covered by the statement and address all mandatory criteria for each of the reporting entities.

The Explanatory Memorandum notes that the Australian Government will issue guidance before the Act commences that explains and clarifies the terms “risks,” “operations,” “supply chains,” “due diligence” and “remediation processes.” However, these terms also are discussed in the Explanatory Memorandum:

- The “risks” of modern slavery practices are intended to mean the potential for an entity to cause, contribute to or otherwise be directly linked to modern slavery practices through its operations and supply chains. It is not intended that entities must necessarily report exhaustively on all modern slavery risks. The requirement to report on modern slavery risks also is not intended to require entities to report on individual modern slavery incidents, although entities may do so where they consider it appropriate.
- “Operations” is intended to cover any activity undertaken by the entity to pursue its business objectives and strategy, including research and development, construction, production, distribution, purchasing, sales and financial lending and investments.
- “Supply chains” is intended to refer to the products and services that contribute to the entity’s own products and services and is not restricted to tier-one or direct suppliers.

- “*Due diligence*” is intended to refer to an entity’s ongoing management processes to identify, prevent, mitigate and account for how it addresses modern slavery incidents.
- “*Remediation processes*” is intended to cover any process or mechanism to remedy modern slavery incidents, such as establishing and maintaining an entity-level grievance mechanism.

The Explanatory Memorandum notes that reporting entities must consider modern slavery risks in their global operations and supply chains, not just their operations and supply chains in Australia. The Australian Government will encourage entities to make use of the UN Guiding Principles on Business and Human Rights – which the Bill draws on – and other relevant frameworks to help identify, prioritize and respond to modern slavery risks.

Approval and Signatory Requirements

Statements will be required to be approved by the principal governing body of the reporting entity, which is the body or group of persons with primary responsibility for the governance of the entity. The statement also will be required to be signed by a responsible member of the reporting entity, which generally must be a member of the principal governing body. For example, a director of a company is a responsible member of that company. The definitions of “principal governing body” and “responsible member” may be further prescribed by rules, which enables the Minister for Home Affairs to further clarify the meanings of these terms for a specific type of entity, if further clarification is needed.

A joint statement will be required to be approved by the principal governing body of at least one reporting entity covered by the statement. Alternatively, it may be approved by the principal governing body of a higher entity that has direct or indirect influence or control over each reporting entity covered by the statement. The joint statement also must be signed by a responsible member of at least one of the reporting entities or by a responsible member of a higher entity. If a joint statement is approved by the principal governing body of a reporting entity that is not a higher entity – such as a sister company – and signed by a responsible member of that entity, the joint statement must explain why it was not practical to have the statement approved by the principal governing body of each reporting entity.

Submission Requirements

Due date. Reporting entities will be required to submit statements to the Minister for publication within six months after the applicable fiscal year-end. Reporting will be required starting with the reporting entity’s first fiscal year commencing after the Act enters into force. If the Act enters into force in late 2018 as currently expected by the Australian Government, the first statements will be required to be submitted in 2020 in respect of fiscal years commencing in 2019.

The Bill does not contain a monetary penalty for failing to timely report.

Voluntary submissions. Entities will be permitted to voluntarily submit modern slavery statements. As proposed, entities that wish to do so will be required to give written notice to the Minister before the end of the reporting period in a manner and form approved by the Minister. Once an entity volunteers to report, it will be required to comply with all of the Act’s reporting requirements, including discussion of the mandatory criteria and the due date.

An entity that has volunteered to report will be able to opt out of future reporting by notifying the Minister before the next reporting period begins. This approach is intended to prevent an entity that volunteers to report from withdrawing during a then current reporting period to avoid reporting on modern slavery risks identified during that period.

Modern Slavery Statements Register

The Australian Government will be publishing submitted statements on an online Modern Slavery Statements Register. Statements on the Register will be accessible by the public free of charge. Although not required, reporting entities also will be permitted to publish their statements on their websites.

The Minister will have the authority to elect not to register a modern slavery statement if the reporting entity does not comply with the requirements of the Act. However, the Explanatory Memorandum notes that a decision not to register a statement only will be made in limited cases of egregious non-compliance after reasonable attempts are made to engage in dialogue and work with the affected entity to ensure the statement meets the minimum requirements of the Act.

Subsequent Review of the Act

The Minister will be required to prepare a report reviewing the operation of the Act during its first three years, and whether the Act or any rules issued thereunder should be amended. The Minister must start the review as soon as practicable after the three-year period has run.

The New South Wales Modern Slavery Act

On June 27, New South Wales adopted its own annual modern slavery reporting requirement, as part of its Modern Slavery Act (the “NSW Act”).

Subject Entities

“Commercial organisations” must comply with the NSW Act. An entity is a commercial organisation if (1) it has employees in NSW, (2) supplies goods and services for profit or gain and (3) has a total turnover for the applicable fiscal year of at least A\$50 million or such other amount as may be prescribed by regulation. Like the proposed federal Australian Modern Slavery Act (the “Federal Act”), the NSW Act applies broadly, picking up corporations, incorporated partnerships, other associations and other entities.

Definition of Modern Slavery

As used in the NSW Act, “modern slavery” includes any conduct involving the use of any form of slavery, servitude or forced labor to exploit children or other persons taking place in supply chains. It also includes any conduct constituting a modern slavery offense under the Crimes Act 1900 or the Commonwealth Criminal Code, or an offense committed elsewhere that if committed in New South Wales would be a modern slavery offense. Modern slavery offenses under the Crimes Act 1900 and the Commonwealth Criminal Code include, without limitation, slavery, servitude, forced labor, deceptive recruiting, trafficking and debt bondage.

Statement Content

Modern slavery statements will be required to contain information pertaining to the steps taken by the commercial organisation during the applicable fiscal year to ensure that its goods and services are not a product of supply chains in which modern slavery is taking place. The statement content requirements will be specified in subsequent regulations.

The NSW Act does, however, provide some visibility as to likely content. The NSW Act provides that the regulations may, without limitation, require a modern slavery statement to include information about (1) the commercial organisation’s structure, business and supply chains, (2) its due diligence processes in relation to modern slavery in its business and supply chains, (3) the parts of its business and supply chains where there is a risk of

modern slavery taking place, and the steps it has taken to assess and manage that risk, and (4) the training about modern slavery available to its employees.

A person that provides information in a statement that the person knows, or ought reasonably to know, is false or misleading in a material particular may be fined up to 10,000 penalty units, or A\$1.1 million (a penalty unit currently is A\$110). This is in addition to potential liability under the Crimes Act 1900 for false and misleading information.

Publication Requirements

The commencement date for reporting has not yet been set. Following commencement, annual statements will be required to be made public and due as provided for in subsequent regulations. The maximum penalty for failing to comply is 10,000 penalty units.

Anti-slavery Commissioner

An independent Anti-slavery Commissioner will be appointed pursuant to the NSW Act. The stated general functions of the Commissioner are to (1) advocate for and promote action to combat modern slavery, (2) identify and provide assistance and support for victims of modern slavery, (3) make recommendations and provide information, advice, education and training about action to prevent, detect, investigate and prosecute offenses involving modern slavery, (4) cooperate with or work jointly with government and non-government agencies and other bodies and persons to combat modern slavery and provide assistance and support to victims of modern slavery, (5) monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies and commercial organisations, (6) monitor the effectiveness of legislation and governmental policies and action in combating modern slavery, (7) raise community awareness of modern slavery and (8) exercise such other functions as are conferred or imposed on the Commissioner by or under the NSW Act or any other act.

The Commissioner will not have enforcement powers or the authority to investigate or deal directly with individual cases, although it may refer information to law enforcement or other investigative or government agencies.

Public Register

The Commissioner is required to keep a publicly available electronic register that identifies any commercial organisation that has disclosed in a modern slavery statement that its goods and services are, or may be, a product of supply chains in which modern slavery may be taking place, and whether the commercial organisation has taken steps to address the concern. The public register also is required to identify any other entity that has voluntarily disclosed to the Commissioner that its goods and services are, or may be, a product of supply chains in which modern slavery is taking place and whether the entity has taken steps to address the concern.

Preemption

In contemplation of the Federal Act, the transparency provisions of the NSW Act do not apply to commercial organisations that are subject to obligations under a law of the Commonwealth or another State or a Territory that is prescribed as a corresponding law. However, since the compliance thresholds under the NSW Act are lower than under the Federal Act, some multinationals that are not subject to the Federal Act will be subject to the NSW Act.

A Comparison to Existing Corporate Modern Slavery Legislation

The table below provides a high-level comparison of the proposed Federal Act, the NSW Act, the UK Modern Slavery Act and the California Transparency in Supply Chains Act. For additional information on the UK Modern Slavery Act and the California Transparency in Supply Chains Act, see our earlier publications [here](#), [here](#), [here](#) and [here](#). Additional publications and source materials are available on our [Supply Chain Compliance & Corporate Social Responsibility website](#).

	<u>Federal Act</u>	<u>NSW Act</u>	<u>United Kingdom</u>	<u>California</u>
Subject Companies	Any entity that meets the turnover and jurisdictional nexus requirements below	Supplies goods and services for profit or gain	Supplier of goods or services, including a trade or profession	Manufacturer or retailer
Annual Turnover Threshold	A\$100 million	A\$50 million	£36 million	US\$100 million
Jurisdictional Nexus	Australia-based entity or carries on business in Australia	Employees in NSW	Doing business in the United Kingdom	California Revenue and Taxation Code
Covered Business Activities	The subject entity's operations and supply chains	The subject entity's business and supply chains	Any of the subject entity's supply chains, and any part of its own business	Direct supply chain for tangible goods offered for sale
Statement Content <i>(Similar, but not identical, across all jurisdictions)</i>	Required topics	Required topics to be provided for in subsequent regulations	Suggested topics	Required topics
Publication	Submission to the Minister, for inclusion in a central Modern Slavery Statements Register	To be provided for in subsequent regulations	Website, with a prominent homepage link, or upon written request	Website, with a conspicuous and easily understood homepage link, or upon written request
Signature/Board Approval	Required	Not specified, but likely to be required by subsequent regulations	Required	None

	<u>Federal Act</u>	<u>NSW Act</u>	<u>United Kingdom</u>	<u>California</u>
Frequency	Annual	Annual	Annual	Not specified; on an as-needed basis
Due Date	Within six months after fiscal year-end	To be provided for in subsequent regulations	No mandatory due date; expected within six months after fiscal year-end	Not specified
Specified Penalties	Up to A\$1.1 million	None	None	None

Thoughts on the Australian Legislation and the Continuing Evolution of Modern Slavery Compliance

There Isn't Much for Most Multinationals to Do Now under the Australian Legislation, but There Are a Couple of Near-Term Assessments to Consider

At this point, it is premature for most multinationals to begin preparing in earnest for compliance with Australian modern slavery legislation. The Federal Act is still at the proposal stage and the NSW Act is subject to further implementing regulations. The due dates of the first statements under both Acts also are not yet known.

With that said, multinationals should determine which entities in the consolidated group may be subject to either or both of the Federal Act and the NSW Act. Multinationals also should assess whether those entities present modern slavery risks that may require different disclosures and/or compliance procedures than other group companies already publishing modern slavery statements.

Australian Modern Slavery Legislation Is Likely to Accelerate the Movement Toward Combined Disclosure Statements and Centralized Compliance

Many multinationals that are subject to both the UK Modern Slavery Act and the California Transparency in Supply Chains Act already have opted to prepare a single combined statement to address both disclosure requirements. This tends to be more efficient, since substantive modern slavery compliance procedures typically are the same across the consolidated group. With potentially four jurisdictions at issue, we expect most of the remaining holdouts to move over time to combined statements.

Notwithstanding the trend toward combined statements, at many multinationals, responsibility for CSR disclosures remains spread out across functions, business units and geographies. With the increase in mandatory human rights disclosures on modern slavery and other topics, this approach is becoming unwieldy and is in many instances creating risk. As a result, we are, with increasing frequency, seeing multinationals move global responsibility for modern slavery and other human rights-related disclosures into a single team, and we expect this trend to accelerate. The potential for penalties under the NSW Act and for compliance reviews under the Federal Act are likely to further encourage the centralization of modern slavery reporting with designated internal domain experts.

Keep the Big Picture in Mind – Mandatory Disclosures Are Only One Piece of Modern Slavery Compliance

Modern slavery disclosure requirements are intended to create a “race to the top.” NGOs and other stakeholders already have published several expectations documents and assessments and rankings of UK and California modern slavery disclosures and company compliance practices. In addition, companies are benchmarking their modern slavery disclosures and compliance programs against those of peers and competitors. These factors – along with greater awareness of modern slavery, more supply chain transparency and an increasing focus on ethical sourcing generally – will for the foreseeable future continue to drive enhancements to compliance programs and disclosures, well beyond what is required by Australian, UK or California legislation.

About Our Supply Chain Compliance and Corporate Social Responsibility Practice

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