

March 30, 2020

New South Wales Moves a Step Closer Toward Implementation of Modern Slavery Reporting Requirements for U.S.-based and Other Multinationals

On March 25, the Standing Committee on Social Issues of the Legislative Council of the New South Wales Parliament delivered its recommendations concerning the implementation of the New South Wales Modern Slavery Act. The NSW MSA received Royal Assent during June 2018. However, in light of the subsequent passage of the Australian Commonwealth Modern Slavery Act and its commencement on January 1, 2019, the NSW Government determined that it was appropriate prior to the commencement of the NSW MSA for the Legislative Council's Standing Committee on Social Issues to conduct a review of the NSW MSA and the consultation drafts of the Modern Slavery Bill 2019 and the Modern Slavery Regulation 2019 prepared by the NSW Government. Among other things, the Committee was charged with reviewing the effect of the reporting requirements of the NSW MSA on business and whether the adoption of the Commonwealth MSA renders all or part of the NSW MSA unnecessary or requires it to be amended to address inconsistencies or gaps.

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This Alert discusses the Committee's recommendations. It also describes the reporting provisions of the NSW MSA, the 2019 Amendment Bill and the Regulation.

For a discussion of the Commonwealth MSA, see our earlier Alerts [here](#), [here](#) and [here](#).

The New South Wales Modern Slavery Act

The reporting provisions of the NSW MSA, as adopted in 2018, are described below. Note that the Amendment Bill and the Regulation would amend and/or expand upon aspects of the 2018 NSW MSA, as discussed later in this Alert.

Subject Entities. "Commercial organisations" will be required to comply with the reporting provisions of the NSW MSA. 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. The NSW MSA applies broadly, picking up corporations, incorporated partnerships, other associations and other entities.

Definition of Modern Slavery. As used in the NSW MSA, "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 offence" under the Crimes Act 1900 or the Commonwealth Criminal Code, or an offence committed elsewhere that if committed in New South Wales would be a "modern slavery offence." Modern slavery offences 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. Under the NSW MSA, the statement content is to be specified in subsequent regulations. In this regard, see the discussion of the Regulation below.

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. Following commencement, annual modern slavery statements will be required to be made public and due as provided for in subsequent regulations. In this regard, also see the discussion of the Regulation below. The maximum penalty for failing to comply is 10,000 penalty units.

Anti-slavery Commissioner. The NSW MSA provides for the appointment of an independent Anti-slavery Commissioner. An interim Commissioner was appointed during December 2018.

The NSW MSA indicates that the 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 offences 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 MSA or any other act.

The Commissioner does 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 Commonwealth MSA, the transparency provisions of the NSW MSA 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 monetary thresholds under the NSW MSA are lower than under the Commonwealth MSA (A\$100 million), some multinationals that are not subject to the Commonwealth MSA will be required to publish a modern slavery statement pursuant to the NSW MSA. The interplay between reporting under the NSW MSA and the Commonwealth MSA is further discussed below.

The Modern Slavery Bill 2019

The Modern Slavery Bill 2019 would amend selected aspects of the NSW MSA. Two proposed amendments are relevant to multinationals reporting under the transparency provisions of the NSW MSA.

Calculation of Turnover for Reporting Threshold. The Amendment Bill would clarify that, for purposes of calculating turnover, turnover derived from the supply of goods and services for profit or gain is to be used. As discussed later in this Alert, the Regulation proposes to substitute the term “consolidated revenue” for “turnover.”

Application to Extraterritorial Conduct. As earlier noted, a “modern slavery offence” includes an offence committed outside of New South Wales that, if committed in New South Wales, would be a modern slavery offence. The

Amendment Bill would clarify that a modern slavery offence includes conduct occurring outside of New South Wales and Australia, which, if it occurred in New South Wales, would be a modern slavery offence, even though it might not be an offence in the place in which it occurred.

The NSW Government has indicated that the intent of this amendment is to clarify slightly ambiguous drafting. It views this amendment as consistent with the effect of the NSW MSA as adopted. The Committee's report notes that this provision does not criminalize conduct outside of New South Wales and Australia under the NSW MSA that may not be an offence where it occurs, but is instead intended to impose reporting requirements in relation to the offshore conduct.

The Modern Slavery Regulation 2019

As earlier noted, the NSW MSA left certain details to further regulation. The Regulation is intended to flesh out the modern slavery statement content, approval and publication requirements. As discussed below, the Regulation would align the reporting provisions of the NSW MSA with the Commonwealth MSA.

Calculation of Reporting Threshold. The definition of “commercial organisation” would be amended to change “turnover” to “consolidated revenue.” This amendment is intended to conform the NSW MSA to the terminology used in the Commonwealth MSA.

Statement Content. The mandatory statement criteria would be the same as under the Commonwealth MSA, specifically the following:

- The name of the subject commercial organisation.
- A description of its structure, operations and supply chains.
- A description of the risks of modern slavery practices in the operations and supply chains of the subject commercial organisation and any entities that it owns or controls.
- A description of the actions taken by the subject commercial organisation and any entity it owns or controls to assess and address the risks described in the preceding bullet point, including due diligence and remediation processes.
- A description of how the subject commercial organisation assesses the effectiveness of the actions described in the preceding bullet point.
- A description of the process of consultation with any entities owned or controlled by the subject commercial organisation and, in the case of entities preparing a joint statement, between the entities covered by the statement.
- Any other information that the subject commercial organisation considers relevant.

Approval and Signature Requirements. A modern slavery statement would be required to be approved by the principal governing body of the subject commercial organisation, and signed by a responsible member of that entity. “Principal governing body” would be the body, or group of members of the commercial organisation, with primary responsibility for its governance, such as a corporation’s board of directors and, for an incorporated partnership or an incorporated association, the equivalent managing body. A “responsible member” would be an individual member of the principal governing body authorized to sign modern slavery statements.

Subject commercial organisations that are part of the same consolidated group would be permitted to prepare a joint statement. The statement would be required to be prepared in consultation with each entity covered by the statement. The statement also would be required to be approved by the principal governing body of each entity covered by the statement, or by a higher-level entity in a position, directly or indirectly, to influence or control each entity covered by the

statement, whether or not the higher-level entity is itself covered by the statement. In addition, the statement would be required to be signed by a responsible member of each entity covered by the statement or the higher-level entity, as applicable, based on the approval process followed. However, if neither of the foregoing approval processes is practicable, the statement would be able to be approved by at least one commercial organisation covered by the statement and signed by a responsible member of the commercial organisation approving the statement.

In addition to the statement content requirements noted earlier, if the statement is for a single commercial organisation, it must include details of the approval by the principal governing body of the commercial organisation. If a joint statement, it must include details of the approval by the relevant principal governing body or bodies. Alternatively, if it is not practicable to comply with the approval requirements otherwise applicable to joint statements (i.e., approval by each entity covered by the statement or a higher-level entity), the statement would be required to include an explanation of why it is not practicable to do so.

Statement Publication. Modern slavery statements would be required to be submitted to the Commissioner. The Commissioner would in turn be required to include the statement in a free online public register that it will be required to establish.

Due Date. Statements would be due within six months after fiscal year-end. The reporting provisions would not apply in respect of any fiscal year that began before the commencement of the Regulation.

Exemptions from Reporting. Commercial organisations that meet the jurisdictional and financial thresholds for reporting would nevertheless be exempt from reporting if they satisfy any of the following conditions:

- The commercial organisation is a voluntary reporter under the Commonwealth MSA or a subsidiary of a reporting entity under that Act. In either of the foregoing cases, the commercial organisation would be required to, within six months after the applicable fiscal year-end, provide the Commissioner with notice of the foregoing and a copy of the modern slavery statement submitted under the Commonwealth MSA. The statement would still come under the earlier discussed provisions of the NSW MSA that makes it an offence to provide information in a statement that the person knows, or ought reasonably to know, is false or misleading in a material particular.
- During the applicable fiscal year, the commercial organisation had less than 20 employees.

The Committee's Recommendations

In its report, the Committee makes the following recommendations relating to the reporting provisions of the NSW MSA:

- Notwithstanding the adoption of the Commonwealth MSA, the NSW Government should proceed to introduce amendments to the NSW MSA taking into consideration the comments and recommendations in the Committee's report. The Committee strongly recommends a target commencement date not later than January 1, 2021.
- The NSW Government should work with the Australian Government to seek harmonization of the reporting thresholds under the NSW MSA and the Commonwealth MSA, ideally at the A\$50 million level, for a standard national approach to modern slavery reporting.
- The NSW Government should seek to amend the reporting threshold terminology in the NSW MSA to replace the term "turnover" with "consolidated revenue."
- The NSW Government should seek to amend the NSW MSA to specify a relevant authority responsible for conducting prosecutions that involve breaches of the reporting provisions of the Act.

- The Commissioner should, on an ongoing basis, examine and report on matters regarding the appropriateness of bringing franchisors, on behalf of franchisees not otherwise captured by the NSW MSA, within its scope.
- The NSW Government should finalize the development of a voluntary reporting mechanism for businesses falling under the A\$50 million reporting threshold of the NSW MSA. This already is in process by the NSW Government.
- The NSW Government should seek to amend the NSW MSA to provide for a statutory review to be conducted in conjunction with the Australian Government’s statutory review of the Commonwealth MSA. This would provide an opportunity to evaluate the NSW MSA’s operation in its initial phase, including as to how the NSW MSA and the Commonwealth MSA operate together.

Although not listed as formal recommendations, in its report the Committee also indicated support for the penalty provisions of the NSW MSA and the proposed amendment to the definition of “modern slavery offence” described above. The Committee characterized this amendment as a straightforward and sensible clarification that ensures extraterritorial conduct comes within the reporting obligations of the NSW MSA.

Next Steps

As noted above, the Committee has strongly recommended that the NSW MSA (as amended, taking into consideration the comments and recommendations in the Committee’s report) commence no later than the beginning of next year. Whether that will occur of course still remains to be seen. U.S.-based and other multinationals should put the possible commencement of the NSW MSA on their medium-term corporate social responsibility compliance checklist as a potential action item, along with the many other pieces of CSR legislation that are in the works across several jurisdictions. However, at this point, no special action needs to be taken in contemplation of the NSW MSA. Even once the Act is adopted, most multinationals will be reasonably well-prepared, since they are likely already required to publish a modern slavery statement under either or both of the California Transparency in Supply Chains Act and U.K. Modern Slavery Act. Furthermore, those that meet the A\$100 million threshold of the Commonwealth MSA already will be publishing a statement under that Act and will not have a separate statement requirement under the NSW MSA.

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