PILLAR TWO

Review of the *Modern Slavery Act 2018* (Cth)

DECEMBER 2022

The information set out in this submission is not intended as, and does not constitute, legal advice.

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SUBMISSION TO THE AUSTRALIAN GOVERNMENT'S PUBLIC CONSULTATION PROCESS TO INFORM THE REVIEW OF THE *MODERN SLAVERY ACT 2018* (CTH)

Dear Professor McMillan

We are pleased to provide this submission to support the Australian Government's (the Government) formal review of Australia's *Modern Slavery Act 2018* (Cth)(MSA).

The policy analysis and recommendations set out in this submission address selected elements of the Government's August 2022 'Issues Paper' and seek to provide our view of key opportunities and challenges associated with potential changes to the MSA framework.

We trust this submission will assist the Government to progress its work in this important area and we thank you for the opportunity to contribute to these timely discussions.

We also commend the open and constructive way in which you and the MSA Review Secretariat have conducted the review process. This includes your extensive efforts to engage with a variety of stakeholder groups, including business, civil society and the investor community. These types of steps help recognise the importance of multi-stakeholder consultation and collaboration, which we believe are crucial to effect real change in the fight against modern slavery.

We would be pleased to engage further with you and the Government as appropriate, including to discuss this submission.

Warm regards

Vanessa Zimmerman
CEO, Pillar Two

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About Pillar Two

Pillar Two is a specialist business and human rights advisory firm with extensive global experience supporting businesses and other organisations to identify, assess and develop effective responses to their human rights risks, and to meaningfully engage stakeholders around their human rights approaches. We take a principled, integrated and practical approach founded on international frameworks, national laws and policies, evolving stakeholder expectations, and leading practice.

We have advised companies across multiple sectors, including mining, energy, technology and telecommunications, education, retail, food and beverage, tourism and transport, fashion, professional services, infrastructure, banking and property. This submission draws on our extensive experience working with Australian and global companies to support their modern slavery risk management approaches, including reporting under the Australian and United Kingdom Modern Slavery Acts. We also prepared the first detailed assessment of companies' reporting under the Australian MSA for the Australian Council of Superannuation Investors (ACSI Report).

Our team has deep human rights, including modern slavery, expertise and is based across Australia, Switzerland, Norway and The Netherlands. Our CEO was a member of the team that drafted the UN Guiding Principles on Business and Human Rights (UNGPs), and is also a member of the Australian Government's Modern Slavery Expert Advisory Group and the National Roundtable on Human Trafficking and Slavery amongst other advisory roles. Our team also includes former Australian Government officials closely involved in the development and implementation of the MSA.

Understanding the impact of the MSA: Our experience

We acknowledge that there are strong reasons for the MSA to continue to evolve and support this review process. However, we also believe that the modern slavery risk management landscape today for Australian businesses, particularly the ASX200, has improved since 2019 when the MSA came into effect.

In our experience, the MSA has driven a number of positive changes across the Australian business community over the past three years. These include:

- Significantly increasing awareness of modern slavery across reporting entities, including how this issue could be relevant to a business and what consequences they could face if they do not effectively manage their modern slavery risks.
- Putting modern slavery issues on the agenda for senior executives and Boards of reporting entities, by requiring Board approval of statements and signature by a director.
- Driving a range of foundational actions by reporting entities and their subsidiaries to manage modern slavery risks, such as use of modern slavery contract clauses and supplier codes of conduct, training for both internal staff and suppliers and other business partners, modern slavery risk mapping and assessments and the development and enhancement of grievance mechanisms able to manage modern slavery related complaints. There are also examples of leading practice, including in areas such as worker voice and supplier engagement and capacity building.

- Boosting collaboration within and across sectors around modern slavery risk management. This includes sectors such as mining, infrastructure, and property management, as well as broader cross-sector work through forums such as the UN Global Compact Network Australia (UNGCNA) Modern Slavery Community of Practice.
- Enhancing multi-stakeholder dialogue on modern slavery risk management in businesses' operations and supply chains, including through the 2019 Modern Slavery Conference convened by the Government, the Modern Slavery Expert Advisory Group, the National Roundtable on Human Trafficking and Slavery and other events including the annual Australian Dialogue on Business and Human Rights hosted by the UNGCNA.
- Increasing reporting entities' understanding of their internationally recognised responsibility to respect human rights as articulated in the UNGPs, which should help to support those businesses to more effectively manage all of their human rights risks. This responsibility applies to all internationally recognised human rights. Most reporting entities, alongside other Australian businesses, are likely to face the risk of involvement in a range of adverse human rights impacts beyond modern slavery and stakeholders including employees, investors, civil society and customers will increasingly expect that they can identify and manage all of these risks.

Importantly, the MSA has also provided Government and other stakeholders with a clear picture of the actions businesses are (or are not) taking to manage modern slavery risks. This was one of the primary aims of the legislation and provides a valuable evidence base to inform future legislative and policy changes, including this review process. After three years of reporting, we consider it is appropriate for the Government to evaluate whether MSA reporting indicates businesses are taking adequate steps to manage modern slavery risks and, if not, what additional legislative or other changes may be required.

Alignment of the MSA with the UN Guiding Principles on Business and Human Rights

We recommend the Government ensures that any changes to the MSA and associated guidance continue to align with the UNGPs. The UNGPs are the authoritative global standard for preventing and addressing risks of human rights impacts associated with businesses' activities, including modern slavery.

Importantly, the MSA and current accompanying Government Guidance for Reporting Entities (the Official Guidance) is closely aligned with the UNGPs, which Australia co-sponsored when they were endorsed at the United Nations in 2011.

The mandatory criteria for the content of statements in the MSA are closely aligned with the expectations for human rights due diligence and remediation set out in the UNGPs. For example, the criteria specifically reference 'due diligence' and 'remediation', which the Official Guidance explains are terms of art taken from the UNGPs. The criteria also include a requirement to describe how entities are measuring the effectiveness of their actions, which draws from the expectation in the UNGPs that businesses undertaking human rights due diligence track the effectiveness of their response to adverse human rights impacts. Importantly, the Official Guidance also recommends that entities draw on the UNGPs to describe their modern slavery risks (using the UNGPs continuum of involvement).[1] The

[1] The UNGPs set out a three-part continuum of involvement that outlines how businesses can be involved in adverse human rights impacts, including modern slavery. This continuum of involvement explains businesses

Official Guidance also outlines how entities can assess and address these risks using the key steps involved in human rights due diligence process set out in the UNGPs.

This alignment with the UNGPs enables entities complying with the MSA to draw on well-established and understood principles and frameworks from the broader business and human rights context. It also supports entities to integrate their modern slavery risk management into wider work to respect human rights in line with the UNGPs, which as noted above set an expectation that companies manage all of their human rights risks.

This reliance on the UNGPs is also likely to be valuable in helping to maximise consistency with other new and emerging global responsible business conduct legislation, which also draws on the UNGPs and may directly or indirectly impact Australian companies.[2] For example, the Office of the UN High Commissioner for Human Rights (OHCHR) has highlighted the importance of aligning the proposed EU Corporate Sustainability Due Diligence Directive with the UNGPs.[3]

To ensure the MSA and the Official Guidance remain aligned with the UNGPs, we recommend any amendments and updates should be mapped against the UNGPs and draw on broader business and human rights expertise from a variety of external stakeholders. Alignment with the UNGPs is likely to be particularly important when defining or elaborating any expectations for due diligence activities, clarifying the definition of concepts such as ‘operations’, and addressing issues such as remediation and assessing effectiveness. Additional feedback about these areas is set out below.

Is the current definition of ‘modern slavery’ appropriate?

Our view is that the current definition of modern slavery used by the MSA is clear for reporting entities and other stakeholders and does not require amendment. The MSA definition is significant as the first legislative definition of modern slavery globally and appears, in our experience, to be well understood by business.

As modern slavery is an umbrella term, the MSA necessarily defines this concept with reference to relevant criminal offences in Australian law and relevant international instruments. These concepts are explained in simple terms in the Official Guidance, which also usefully outlines the differences between modern slavery and other comparatively less serious forms of exploitation.

Going forward, the Government should continue to update relevant guidance and factsheets to provide practical guidance on how different types of modern slavery could manifest in Australian businesses’ operations and supply chains both within Australia and abroad. For example, we are aware of various reporting entities seeking to better understand how forced marriage and the worst forms of child labour could manifest in their operations within Australia and abroad. Any new guidance should include information about

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can either cause, contribute to or be directly linked to human rights impacts such as modern slavery through their own activities or business relationships.

[2] Australian companies operating overseas may be directly subject to current or emerging responsible business laws in other jurisdictions, including in EU countries. Overseas laws may also apply to Australian companies’ overseas business partners and / or customers, which may result in increased expectations from these groups for Australian companies to manage their human rights risks in line with those laws.

[3] Office of the UN High Commissioner for Human Rights (OHCHR), *OHCHR Feedback on Proposed Directive on Corporate Sustainability Due Diligence*, May 2022.

new or emerging trends in modern slavery offending identified by the Government in Australia or globally. This will support reporting entities to build and refine their understanding of the different ways modern slavery may manifest in their operations or supply chains, and how this may evolve over time.

Is the current concept of 'operations' in the Official Guidance appropriate?

We recommend that the concept of 'operations' set out in the Official Guidance be amended to clarify the Government's expectations for entities to report on customer related modern slavery risks – often known as 'downstream' risks.

Currently, the Official Guidance states that 'reporting entities are not required to report on modern slavery risks associated with how their customers use their products or services they purchase.'[4] The Official Guidance also specifically provides that landlords and lessors are not required to report on modern slavery risks associated with the operations and supply chains of their lessees (tenants). This differs from the expectations set out in the Official Guidance for financial sector entities. While also not required to report on individual investees, financial sector entities including investors are (unlike landlords and lessors) encouraged to 'assess at an overarching level whether they may be exposed to modern slavery risks' through these activities.[5]

Going forward, we encourage the Government to explore opportunities to amend the Official Guidance to remove the specific exemption for landlords and lessors to not report on lessee related risks. Instead, the Government could indicate that it expects landlords and lessors to assess and report on lessee related risks at an overarching level, consistent with its expectations for financial sector entities, including investors. This change would reflect that some lessees may pose higher modern slavery risks relating to use of the property being leased, such as car washes, nail bars and restaurants. The Government could also clarify that it would not expect landlords and lessors to report in detail on supply chain risks associated with products sold by lessees (such as risks that garments sold by a fashion store were made using modern slavery).

We appreciate stakeholders may see a distinction between lessees and the broader concept of customers, including due to the nature of the relationship between lessor and lessee and the extent to which leasing activities are a core part of landlords' operations. In addition to addressing reporting on lessee risks, we recommend Government also take broader action to support reporting on all customer related risks. We appreciate assessing and reporting on downstream modern slavery risks relating to customers can be complex and businesses may have limited visibility and leverage in this area. However, we consider it is important that businesses do begin identifying and acting on these customer related risks.

For example, Government could update the Official Guidance to encourage all entities to report on customer related risks as appropriate and in line with the UNGPs.[6] This should include removing the example suggesting mining companies are not required to report on customer related risks. The updated guidance could give practical examples of customer

[4] Australian Government, *Guidance for Reporting Entities*, 2019, page 34.
[5] Australian Government, *Guidance for Reporting Entities*, 2019, page 34.
[6] For example, there may be risks that commodities produced by mining companies are processed by customers' factories using modern slavery. A professional services firm could also report on risks relating to advice given to clients around cost savings and business transformation, which could increase the clients' modern slavery risks.

related modern slavery risks to facilitate this reporting. Importantly, encouraging reporting on customer related risks by entities is consistent with the UNGPs, which provide that entities' responsibility to respect human rights extends across the full scope of their business activities and relationships, and is not limited only to supply chains and their direct operations.

Alternatively, Government could consider replacing the current terms 'operations' and 'supply chains' with the terms 'business activities' and 'business relationships' respectively, as used in the UNGPs. The use of the term 'business relationships' in this context would encompass entities in upstream and downstream value chains, as well as other types of business partners such as joint venture partners and investors. Adopting this terminology could provide greater clarity for business and help ensure alignment with other evolving legislative frameworks, which also draw on the UNGPs. If progressed, further guidance would be required to explain these changes to ensure they are clearly understood by reporting entities and other stakeholders.

Is the current revenue threshold for reporting under the MSA appropriate?

Our view is that the current reporting threshold of $100 million annual consolidated revenue is appropriate and consistent with the policy intent of the MSA. We also recommend that the Government carefully considers any policy assumptions that there is a correlation between increasing the total number of entities covered by the MSA and the overall effectiveness of the legislation in addressing modern slavery.

The Australian Government's stated aim in developing the MSA has been to drive business action to assess and address modern slavery risks in their domestic and global operations and supply chains.[7] The current revenue threshold focuses the application of the MSA to larger entities in the Australian market. These entities are likely to have the greatest capacity and leverage at this time to meaningfully identify, assess and address modern slavery risks.

All businesses have a responsibility to respect human rights, including smaller businesses. However, the UNGPs make it clear that the steps taken by businesses to respect human rights may vary, including due to differences in size and capacity.[8] While the Australian Government should explore opportunities to work with smaller businesses to build their awareness of, and capacity to manage, modern slavery risks, requiring these businesses to report under the MSA in the same way as larger businesses may be counterproductive at this time for the reasons outlined below.

In particular, we anticipate that many entities with revenue below the current threshold would not have the capacity to meaningfully comply with the MSA. For example, entities of this size are unlikely to have internal legal advisors, sustainability teams or other policy functions able to lead modern slavery reporting.

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[7] Australian Government, *Explanatory Memoranda to the Modern Slavery Act 2018* (Cth), 2018.

[8] The commentary to Principle 14 in the UNGPs notes that the means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. For example, small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes may take on different forms.

Requiring smaller entities to comply with the MSA would also lead to a significant increase in the overall number of statements. Due to the factors outlined above, there is a risk that many of these statements would be of poor quality and reflect a superficial, compliance-based approach to reporting. As a result, significant extra resourcing would likely be required from Government to monitor compliance and support smaller entities to understand their obligations. It is also unlikely that external stakeholders, including civil society and investors, would have the capacity to review these additional statements, which would further dilute these stakeholders' already limited capacity to scrutinise current reporting from larger entities.

In addition, there is a risk that any material increases in poor quality reporting associated with a reduction in the reporting threshold would undermine stakeholders' perception of the MSA and create an environment where larger sized entities also reduce the quality of their own reporting. Government efforts relating to smaller entities may therefore be better placed in focusing on identifying opportunities to build these entities' capacity to identify and manage modern slavery risks, including encouraging current reporting entities to report on equivalent efforts with smaller business partners.

There may be a view from some stakeholders that lowering the threshold would enable larger entities to rely on statements from their smaller suppliers to inform their due diligence, rather than requiring these suppliers to complete supplier assessment questionnaires or other processes. In practice, we think the likely variable quality of reporting from smaller entities if required is unlikely to satisfy due diligence requirements from larger companies, who will need to continue to rely on other supplier due diligence tools.

Importantly, opting not to lower the threshold at this time would not preclude the reporting threshold being lowered at a future date, should the Government consider a change is warranted. In this context, the Government could continue to monitor the appropriateness of the reporting threshold and the impact of other changes made as a result of this review.

We also note that there is a current inconsistency in the way the MSA refers to the revenue threshold which may cause confusion. The simplified outline of the MSA in section 3 refers to the threshold as 'more than $100 million', whereas the definition of a reporting entity in section 5 refers to the threshold as 'at least 100 million'. This inconsistency could be addressed as part of broader legislative amendments to the MSA.

Should the Australian Government move to a single reporting deadline for all entities?

We strongly recommend that the MSA continue to allow entities to report on their financial year or other relevant annual accounting period.

This flexibility ensures that each entity is able to align their modern slavery reporting with other corporate reporting processes, including the drafting and publication of annual reports and sustainability reports. For example, many large entities collate and manage supplier and other data based on their financial year, which forms the basis for disclosures made in their statements (and other disclosures including sustainability reports). From an implementation perspective, this also allows reporting entities to align and integrate modern slavery strategies and action plans with other business plans which run according to the relevant financial year for the reporting entity.

Importantly, linking reporting deadlines to entities' financial years also ensures that entities are able to calculate their consolidated annual revenue for that period to determine whether they need to report. Changing to a single reporting deadline would complicate these revenue calculations.

We are also concerned about emerging inconsistencies in international legislative frameworks relating to timing of modern slavery reporting, including the United Kingdom's (UK) intention to move to a single reporting deadline based on the UK Financial Year.[9] If progressed, this change has the potential to impact a number of Australian entities reporting in both the UK and Australia. We recommend the Australian Government (including any potential Anti-Slavery Commissioner) work with international partners to advocate for the development of consistent legislative frameworks and prioritise engagement with the UK to address potential inconsistencies.

Are changes required to the mandatory criteria for the content of statements?

After three years of reporting, this review provides a timely opportunity to clarify the Government's expectations in relation to the mandatory criteria for content set out in the MSA. The Government's decision to include mandatory criteria for content in the MSA was an important step forward from previous legislation in other jurisdictions and it is key that these criteria remain fit for purpose.

We recommend the Government considers addressing the following aspects of the mandatory criteria, including by amending the legislation and / or providing additional guidance as part of any refresh of the Official Guidance, or as part of any additional tools.

Describing due diligence and remediation processes

The MSA requires statements to describe actions taken to assess and address modern slavery risks, including due diligence and remediation processes. There may be benefit in establishing a separate criterion for content focused specifically on remediation and the implementation of effective company grievance mechanisms, which may help to ensure this issue is more clearly addressed in statements.

The Government could also consider amending the MSA to specifically require reporting on other areas, such as engagement with external stakeholders (which would also align with the UNGPs' expectations). For example, a criterion could be added requiring reporting entities to describe any stakeholder engagement with potentially affected groups (or their credible proxies) and other stakeholders to identify and assess their risks, implement and assess the effectiveness of key due diligence actions, and design and implement grievance mechanisms. To date, reporting on stakeholder engagement has been a weak area of reporting under the MSA as well as broader business human rights risk management.[10] Requiring entities to address this issue in statements could help to drive more effective business action in this area.

Requiring reporting on specified issues, such as state-sponsored forced labour

Based on the Issues Paper, we understand that consideration is being given to requiring statements to address 'specified issues', such as potential supply chain links to

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[9] UK Government, *Response to the Independent Review of the Modern Slavery Act 2015*, 2019.
[10] Australian Council of Superannuation Investors, *Moving from Paper to Practice: ASX200 Reporting under Australia's Modern Slavery Act*, 2021; Corporate Human Rights Benchmark, *Insights Report*, 2022.

state-sponsored forced labour. These issues can be very sensitive and may present complex challenges for entities. For example, entities sourcing from or operating in markets where state-sponsored forced labour is reported may be exposed to legal risks and other retaliatory measures in those jurisdictions for reporting on relevant risks. Reporting directly on these issues in statements may also jeopardise the safety of entities' staff in these jurisdictions.

If this requirement were to be added to the MSA, there would need to be a clear evidence base for requiring reporting on a particular issue, as well as detailed guidance to support entities to report safely on sensitive issues. As an alternative approach, we recommend the Government considers scope to task any Anti-Slavery Commissioner with responsibility for engaging with businesses about these types of issues, including by developing guidance and sharing good practice.

Assessing effectiveness

Assessing effectiveness continues to be a weak area of reporting.[11] This criterion is aligned with the expectations for human rights due diligence in the UNGPs, particularly the element around tracking a company's human rights performance, and underpins the focus of the MSA on continuous improvement. However, in our experience, many entities find it difficult to understand how to assess effectiveness in a modern slavery context. These difficulties are consistent with challenges experienced by entities globally in assessing their effectiveness in a broader human rights context, in line with the UNGPs.

We consider it is important to retain the criterion relating to effectiveness and do not consider any legislative amendments to this criterion are required at this time. However, entities would benefit from further clarity about what the Government and other stakeholders expect. This could include adding material in the Official Guidance about how to develop an effectiveness framework and determine relevant metrics and KPIs.

Consultation

The MSA requires statements to be prepared in consultation with each reporting entity covered by the statement and to describe this consultation. The MSA also requires statements to describe the process of consultation with owned or controlled entities that are not reporting entities.

The requirement to consult with reporting entities is an important element of the MSA. At a practical level, this requirement helps to ensure the content of statements reflects the risk profiles and risk management actions taken by each reporting entity. This is particularly important where joint statements covering multiple reporting entities are given by large corporate groups that involve diverse reporting entities and / or where reporting entities operate independently from other entities in the group. The requirement to consult reporting entities in the preparation of the statement also reflects that each reporting entity has a specific legal obligation to report under the MSA (including in relation to each mandatory criterion) and so should be involved in the preparation of the statement.

However, in our experience, the separate requirement to describe consultation with owned or controlled entities does not add significant value to the statement process and does not

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[11] Australian Council of Superannuation Investors, *Moving from Paper to Practice: ASX200 Reporting under Australia's Modern Slavery Act*, 2021.

appear to be well understood by reporting entities.[12] The extent of this entity-specific consultation is often constrained because smaller owned and controlled entities within a corporate group may not undertake distinct operations, employ staff or maintain separate sustainability, risk, procurement or other teams.

In practice, internal collaboration and consultation within corporate groups generally focuses on engagement across functions (such as procurement or sustainability teams), which have responsibility for multiple or all entities within the group. These cross-functional (rather than owned or controlled entity focused) processes generally allow for more meaningful consultation and engagement with functions involved in the day-to-day activities of these entities and more practically help embed modern slavery risk management across corporate groups.

In addition, we have observed that some entities are uncertain whether the current requirements relating to consultation apply to consultation to develop the statement or rather to ongoing engagement across the business to implement their modern slavery response, or both these actions. As currently drafted, the Official Guidance appears to suggest consultation could include both the preparation of the statement and broader engagement and collaboration between entities but the MSA itself is not clear on this point. This potential ambiguity may contribute to the generally poor quality of disclosures in this area.

To address the issues outlined above, we recommend Government consider scope to enhance the consultation requirements in the MSA by amending the legislation and guidance as appropriate to:

a) Continue to require statements to describe consultation to prepare the statement with each reporting entity covered by the statement.

b) Remove the requirement to describe consultation with owned or controlled entities (section 16 (1)(f)(i)) and replace with a more general requirement to explain how internal consultation, collaboration and engagement was undertaken to embed and implement modern slavery risk management actions across the relevant corporate group/s, including non-reporting and reporting entities,[13] during the reporting period.

   The Official Guidance should make it clear that statements addressing this criterion should explain where entities in the group do not use group wide policies and processes or have distinct modern slavery risk profiles (such as where a subsidiary operates in a higher risk country overseas) and how these dynamics are addressed.

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[12] We recognise the Government has released supplementary guidance on this criterion, but suggest the Government's expectations could be further clarified.

[13] The concept of a corporate group would encompass both reporting entities and owned or controlled entities that are not reporting entities. For example, as part of its response to this criterion, a statement might explain that modern slavery risk management actions are implemented through a cross-functional working group which includes representatives from key functions that operate across all entities in the group, including the reporting entities. Where reporting entities are quite distinct from centralised functions, the statement could explain what specific consultation was done with the reporting entities to drive consistent modern slavery risk management. In both situations this reporting would be in addition to reporting on consultation with the other reporting entities on the statement itself.

We recommend that any changes to this criterion also involve further consultation with company secretaries from a range of reporting entities to ensure that the realities of corporate governance structures are taken into account in driving a robust and meaningful new model.

Is an Anti-Slavery Commissioner required to support the implementation of the MSA?

An Anti-Slavery Commissioner (with independence from Government) could play an important role in supporting Australian businesses to strengthen their responses to modern slavery. For example, an Anti-Slavery Commissioner could act as a 'critical friend'[14] for businesses, including through public and private engagement with businesses and other stakeholders. This could include the development of sector specific tools and good practice guidance in consultation with business, the investor community, academia and civil society stakeholders.

There may also be potential for an Anti-Slavery Commissioner to facilitate public scrutiny of business' reporting, including by scoring or grading statements and publishing these assessments. However, the Government would need to carefully consider whether these activities might detract from an Anti-Slavery Commissioner's broader ability to engage with businesses. Scoring and grading statements would also require significant resourcing and may need to be based at least initially on a risk-based approach, such as starting with reporting entities in higher risk sectors.

It is our view that an Anti-Slavery Commissioner should not have a role in administering any potential penalty framework. The imposition of penalties is a matter that appropriately rests with the relevant Government Minister and Department. Making any Anti-Slavery Commissioner responsible for penalties would also limit their ability to engage openly and constructively with business as a critical friend. However, the Government could seek guidance from the Anti-Slavery Commissioner on the design and application of any penalty framework, based on their engagement with business and other stakeholders.

The functions and independence of an Anti-Slavery Commissioner should be clearly delineated. Importantly, these functions should include the power to scrutinise the Australian Government's own response to modern slavery, in the context of public procurement, Australia's wider criminal justice response and the Government's own Commonwealth Modern Slavery Statement. The Australian Government should also carefully consider how to ensure transparency around the work of, and safeguard the independence of, the Anti-Slavery Commissioner (such as through annual reporting to Parliament by the Commissioner) and commit to providing an Anti-Slavery Commissioner with adequate resourcing to exercise the functions of the office.

An Anti-Slavery Commissioner could also play a key role in convening robust multi-stakeholder discussions, as well as encouraging more partnerships within and between multi-stakeholder groups. For example, we have observed that there is still a lack of engagement between business and civil society on survivor support initiatives. We believe that an Anti-Slavery Commissioner could help to identify and address these types of engagement gaps.

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[14] The use of the term 'critical friend' has been used in the UK context to describe the role played by UK Independent Anti-Slavery Commissioners in engaging with businesses.

Are penalties required to strengthen compliance with the MSA?

It is our view that some form of enforcement mechanism is needed to drive greater compliance with the MSA. This could include the implementation of civil penalties or enhancements to the current ability of the relevant Minister to publicly name non-compliant entities.

The regulatory model underpinning the MSA relies on market scrutiny as the primary driver of compliance with the legislation. This approach suggests that entities that prepare higher quality statements will receive reputational and other benefits. Conversely, entities that fail to comply or prepare poor quality statements will be exposed to reputational damage and other consequences, such as loss of access to business opportunities.

To date, we have seen some efforts from stakeholder groups like civil society and investors to drive this scrutiny, including through benchmarking reports and direct engagement with entities. Importantly, where external scrutiny does occur, there is some evidence that this has a positive impact on the quality of compliance.[15] However the effectiveness of this engagement has been constrained by the limited capacity of stakeholder groups to engage with large numbers of statements. For example, while investors and civil society have engaged with some cohorts of statements (such as large publicly listed companies and entities in higher risk sectors),[16] these stakeholders are unable to review and engage with every published statement due to capacity constraints. And while some companies, especially consumer facing or listed entities, may have particular drivers to respond to this scrutiny, other companies that may not face similar reputational and other pressures may still not respond.

Notably, the MSA also already provides for a role for Government in supporting market scrutiny of statements by publicly naming entities that have not complied with the legislation. Our understanding is that the MSA would enable the relevant Minister not only to name entities that fail to report, but also to name entities that fail to address the mandatory criteria for content in their statements. This provides the relevant Minister with significant scope to engage with and publicly critique the quality of reporting.[17]

If used, we consider that this power to publicly name non-compliant entities would be likely to have a significant impact on compliance rates. However, this power has not been exercised by the Government to date. This may, in part, reflect the steps required to be taken by the Minister under the MSA before naming an entity, which the Government could consider simplifying.[18] The power to name non-compliant entities (and the extent of this

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[15] For example, in Monash University's 2022 *Report on Modern Slavery Disclosure Quality Ratings*, 64 percent of FY2021 modern slavery statements were upgraded compared to FY2020, and no statements were downgraded.

[16] Monash University, *Report on Modern Slavery Disclosure Quality Ratings*, 2022; Various authors, *Broken Promises: Two years of corporate reporting under the Modern Slavery Act*, 2022; Australian Council of Superannuation Investors, *Moving from Paper to Practice: ASX200 Reporting under Australia's Modern Slavery Act,* 2021.

[17] For example, the Minister may be able to identify statements that the Government considers fail to address one or more of the mandatory criteria.

[18] Section 16A of the MSA requires the Minister to provide a written notice to a suspected non-compliant entity requesting an explanation or remedial action to be undertaken. The Minister may only name the suspected non-compliant entity if the Minister is reasonably satisfied that the entity has failed to comply with the written notice.

power) is also not well understood by businesses and could be more clearly communicated to reporting entities. This could include the relevant Minister publicly stating an intention to name non-compliant entities and the inclusion of examples in guidance material illustrating for reporting entities how this power could be used.

In considering penalties for non-compliance, we recommend the Government consider:

- The potential resources required to develop and administer a civil penalty framework, including options to ensure this additional resourcing does not detract from current business engagement work undertaken by the Government.
- Whether the use of financial penalties (and the associated reputational impacts of being penalised) would have a greater effect on entities' compliance rates than the Government publicly naming non-compliant entities (which would likely also involve significant reputational damage). This could include consideration of linking the quantum of any financial penalties to the annual revenue of the non-compliant entity, which would help ensure any penalties are proportionate to the entity's size.
- How to ensure any penalties are practically and consistently enforceable and can be clearly understood by business and external stakeholders. For example, imposing penalties for failure to submit a statement or to have a statement properly approved and signed would be significantly more feasible than seeking to penalise statements for not addressing mandatory criteria for content. Penalties for failing to address mandatory criteria for content based on the current criteria would require subjective assessments of statement content by subject matter experts and would be difficult to apply consistently. There may also be scope to specify penalties for false or misleading content provided in statements (noting existing corporate law provisions in this area may already apply to reporting under the MSA). Importantly, penalties for false or misleading content would be likely to be comparatively simpler to enforce than any penalties for failing to address mandatory criteria for content (although may still be complex).
- Alternative options to enhance compliance other than or in addition to a civil penalties framework. As noted above this could include opportunities for any Anti-Slavery Commissioner to identify good and poor practice across sectors. It could also include restrictions on access to public procurement opportunities or overseas support from Export Finance Australia. An Anti-Slavery Commissioner could also play a role in recommending future changes to penalties or enforcement mechanisms.

How does the MSA align with global moves towards mandatory human rights due diligence obligations?

Globally, there is an increasing trend towards legislating for responsible business conduct by requiring entities to undertake human rights due diligence. Notably, these laws are generally founded on, or otherwise aligned with, the key principles of the UNGPs and face consistent calls for them to stay aligned with those principles.

Based on our experience working with businesses, we believe human rights due diligence laws have the potential to bring significant benefits to the rights-holders they are trying to safeguard and to businesses by providing consistent frameworks to drive more robust and transparent business action to respect human rights. Specific benefits for business associated with mandatory human rights due diligence (MHRDD) laws can include:

- levelling the playing field by providing a consistent legislative framework that applies equally to relevant businesses;
- providing certainty about the standards and types of actions expected (and not expected) from businesses; and
- guiding proactive measures by businesses to identify and act on human rights risks, as part of overall risk management frameworks, to ensure they are better prepared to respond to emerging risks and avoid escalation of harm to people as well as consequences for the business.

These international moves towards MHRDD add another layer of complexity to the international regulatory framework around responsible business conduct and may impact Australian businesses in a range of ways. As noted above, in some instances, Australian businesses operating in overseas jurisdictions such as the EU may be directly covered by MHRDD laws. However, MHRDD laws are also likely to have a wider, indirect impact on Australian businesses, including by shaping investor, corporate customer and civil society expectations.

In light of these broader legislative developments, we recommend the Government considers options to support the Australian business community to respond to growing expectations around MHRDD. To facilitate this process, the Government could establish a multi-stakeholder working group with representatives from Government, business (including investors), academia and civil society (including trade unions). This group could be modelled on a previous Government advisory group established to consider a potential Australian National Action Plan on Business and Human Rights and operate for 12 months or another agreed period. The Government could ask the group to review how international MHRDD laws may affect Australian businesses, what guidance and support could be provided to support Australian businesses and assess the challenges and opportunities of implementing similar laws in Australia. The Government could commit to publishing the working group's report along with a Government response to key recommendations. While the terms of reference of such a group could be limited to due diligence obligations relating to modern slavery, we would recommend a broader scope covering all internationally recognised human rights to account for emerging global trends.

The Government, including through the working group proposed above, could also explore lessons from existing legislation in Australia that address due diligence concepts. This includes legislation relating to areas such as work health and safety, corporations law, the concept of corporate culture in the *Criminal Code Act 1995* (Cth), illegal logging and anti-money laundering.[19] A recent example is the new positive duty introduced by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) for employers to implement 'all reasonable and proportionate measures to eliminate as far as possible' sexual harassment, sex discrimination and victimisation.'[20] We would see value in the working group assessing whether a similar requirement could potentially apply to preventing and addressing involvement in modern slavery, and in time, to involvement in adverse impacts on all internationally recognised human rights.

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[19] *Work, Health and Safety Act 2011* (Cth); *Corporations Act 2001* (Cth); *Illegal Logging Prohibition Act 2012* (Cth); *Criminal Code Act 1995* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).
[20] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).

More broadly, we note that entities seeking to meaningfully comply with the MSA are already likely to be undertaking the foundational steps expected as part of human rights due diligence under the UNGPs, albeit in a modern slavery focused way. For example, in order to fully address the mandatory criteria for content in the MSA, entities arguably need to undertake risk assessments, integrate and act on these findings, communicate the steps they have taken and track the impact of their actions – which are all consistent with the four elements of human rights due diligence.[21]

The Government should consider providing further guidance (including case studies) and support to entities to assist them to expand and build on these actions to implement wider human rights due diligence, noting that all Australian entities are expected to follow the UNGPs. For example, expanded Government guidance could support businesses by highlighting best practice examples of what it means to go 'beyond' social audits, and by identifying effective approaches to the elevation of 'worker voice' as part of modern slavery risk management, drawing on lessons from worker-led models such as the Cleaning Accountability Framework.

While any additional guidance would likely be welcomed by reporting entities, more targeted guidance for smaller entities would also be helpful so that they can also begin to strengthen their approach to human rights due diligence. Smaller entities may have different capacities and expertise to reporting entities and any Government guidance materials should be fit for purpose for these entities.[22]

Collaborative industry approaches can also support robust human rights due diligence helping to avoid duplication and ensure that responses are meaningful in particular sector contexts. Business would also benefit from Government guidance on the application of competition law to sector-based collaboration on modern slavery issues and the types of collaborative activities appropriate in this context.

Conclusion

The development and implementation of the MSA is a significant achievement. Over three years, we have observed that the MSA has helped to drive increased business action to manage modern slavery risks and contributed to growing awareness of this issue in the wider community. However, as demonstrated by the inclusion of the review mechanism in the legislation, the MSA is also intended to evolve over time.

It is important that the Government carefully considers how to ensure the MSA remains fit for purpose, including where there may be opportunities to use this legislation as a catalyst to drive greater business action to respect a broader set of human rights. This review is also taking place at a time of significant change in international legislative frameworks around responsible business conduct and global discussion about the most effective legislative approaches. Australia has a strategic opportunity to use this review process and its outcomes to continue to take a leadership role in this area into the future.

[21] The four elements of human rights due diligence include identifying and assessing actual and potential adverse human rights impacts the company is/could be involved in; integrating findings from those assessments and taking appropriate action; tracking the company's human rights performance; and communicating publicly on the company's human rights response.

[22] We recognise that smaller entities may have limited capacity to engage with guidance materials and Government should consider the most appropriate tools for engagement.

Ultimately, the core aim of the MSA is to prevent modern slavery by helping to ensure that human beings in Australia and overseas are not exploited in businesses' operations and supply chains. While it will remain challenging to measure the exact impact of legislation on this aim, this objective should continue to guide the Government as it considers changes to the MSA framework. To that end we would encourage the Government, alongside business and all other relevant stakeholders, to keep the protection and empowerment of rights-holders as the key drivers of every change.