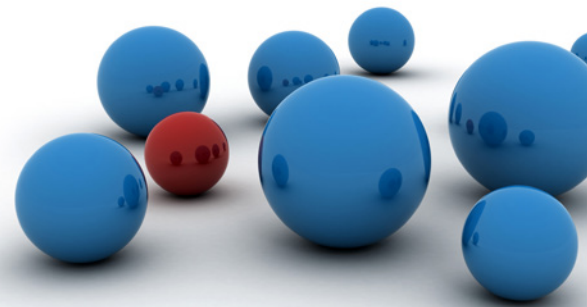


ALLEN & OVERY

Modern Slavery: Preparing for Greater Supply Chain Transparency in Australia



Background

Australia has become the latest jurisdiction to target modern slavery, with the Modern Slavery Bill 2018 (Cth) (**Bill**) being introduced into Federal Parliament on 28 June 2018. Modelled on the UK Modern Slavery Act 2015, if passed, the Bill would introduce significant reporting obligations on entities carrying out business in Australia regarding the presence of slavery, human trafficking and child labour in their global supply chains and operations.

Separately, New South Wales (**NSW**) has become the first state in Australia to introduce its own Modern Slavery Act 2018 that sets out specific penalties for non-compliance with the legislation. With similar legislation being discussed in Hong Kong, the web of soft and hard law touching on business and human rights issues is becoming increasingly complex for multinational corporations.

Will you be affected?

The Bill would require Australian entities and foreign entities carrying on business in Australia to publish a Modern Slavery Statement on the steps they have taken to address modern slavery in their supply chains and operations for every twelve month period that they have annual consolidated revenue of at least AUD100 million.¹ Modern slavery is defined broadly and includes human trafficking, servitude, forced labour, child labour and forced marriage. It is estimated that approximately 3,000 entities will be required to produce Modern Slavery Statements in Australia.

Key elements of the Bill to consider in determining whether your entity will be caught by the reporting requirement include:

- Whether the entity is an ‘**Australian entity**’: this term is defined broadly to include a wide range of Australian-based entities, including companies, partnerships and trusts.²
- Whether the entity ‘**carries on business in Australia**’ at any time in the reporting period. The test for this element draws on the existing meaning of ‘carries on business in Australia’ under section 21 of the Corporations Act 2001 (Cth) which looks at whether an entity has a place of business in Australia.³ The test is broad and also captures foreign entities that carry on business in Australia.

- If the entity’s ‘**consolidated revenue**’ meets the statutory threshold. ‘Consolidated revenue’ is defined as the total revenue of the reporting entity plus the revenue of any other entities it **controls**.⁴ This would include downstream revenue of the entity, including revenue earned in Australia and overseas.

What will you be required to include in a Modern Slavery Statement?

Reporting entities will be required to provide an annual Modern Slavery Statement to the responsible Minister. The statement will be published online and made available through a central register administered by the Government.⁵ Entities that are not required to report can voluntarily provide an annual public Modern Slavery Statement. It is intended that a Modern Slavery Statement will describe:

- the entity’s structure, operations and supply chains;
- the potential modern slavery risks in the entity’s global operations and supply chains, including those of its subsidiaries;
- actions the entity has taken to assess and address those risks, including due diligence and remediation processes; and
- how the entity assesses the effectiveness of those actions.⁶

Joint Modern Slavery Statements may be given on behalf of one or more reporting entities.⁷

¹ Modern Slavery Bill 2018 (Cth) s. 3.

² *Ibid* s. 4, “Australian entity”.

³ It also looks at whether an entity: establishes or uses a share transfer office or share registration office in Australia, or administers, manages, or otherwise deals with property situated in Australia as an agent, legal personal representative or trustee, whether by employees or agents or otherwise. Modern Slavery Bill 2018 (Cth) s. 4 and s. 6(2).

⁴ *Ibid* s. 4 “consolidated revenue”.

⁵ *Ibid* s. 11-14.

⁶ *Ibid* s. 16.

⁷ *Ibid* s. 14.

How far into your supply chain do you need to go?

Reporting entities will need to consider modern slavery risks in their *global* operations and supply chains, not only their operations and supply chains in Australia. Australian entities are also required to describe the modern slavery risks of any subsidiaries and entities 'owned or controlled' by the Australian entity, even if the entity's subsidiaries operate abroad. Therefore entities with foreign subsidiaries in countries prone to slavery risks should take particular care when reviewing their operations and supply chain. At this stage, the Bill does not distinguish between upstream and downstream supply chains.⁸ Following the UK approach, it is anticipated that the obligations will only apply upstream, in respect of goods and services being supplied to the entity.

Implications

While the Bill requires reporting on global supply chains and seeks to encourage a 'race to the top',⁹ it does not impose a legally binding requirement on an entity to conduct due diligence on its supply chains. The Bill's mandatory requirements are limited to the publication of a modern slavery statement, describing the entity and the modern slavery risks in its supply chain and operations. It also incorporates no penalties for non-compliance with the Bill's reporting requirements.

However, given the increasing focus from NGOs and stakeholders on human rights compliance issues, pressure is likely to be brought to bear on those organisations which report that no or limited action has been taken. The proposed public registry of modern slavery statements in the Bill will moreover make any such deficiencies more visible. Investors and shareholders are also increasingly looking at corporate social responsibility commitments and likely to monitor such statements closely. Reporting entities may therefore need to consider committing resources to conduct due diligence at a level which satisfies stakeholders and customers.

The NSW Modern Slavery Act

The NSW Parliament has taken the lead on modern slavery in Australia and has been the first State to pass modern slavery legislation. Under the NSW Modern Slavery Act 2018 (**Act**), commercial organisations with at least one employee in NSW and that have a total turnover of not less than AUD50m are required to publish an annual Modern Slavery Statement. This is substantially lower than the revenue threshold contained in the proposed federal legislation, although the reporting requirements are likely to be similar.

Although the NSW Act is not in force yet, it envisions that regulations will be published that will detail what a Modern Slavery Statement under the Act should look like. The Act provides that the regulations require that an annual modern slavery statement should cover:

- the organisation's structure, its business and supply chains;
- due diligence processes in relation to modern slavery in its business and supply chains;
- the parts of the business and supply chains where there is a risk of modern slavery taking place and the steps taken to manage that risk; and
- the organisation's training practices in respect of modern slavery.

The Act provides for a range of penalties not contained in the federal Bill that penalise failure to prepare a modern slavery statement or to publish it in accordance with regulations, or knowingly providing false and misleading information in a modern slavery statement.¹ Penalties of up to 10,000 penalty units (the equivalent of AUD1.1m) will apply to companies for such violations.

Companies that meet the reporting thresholds and comply with the federal reporting requirements will be exempt from the requirements under the NSW Act.²

¹ NSW Modern Slavery Act, s.24(2) and (6).

² Ibid. s.14(9).

⁸ Upstream supply chains are those in which materials are being supplied to the organisation. Downstream supply chains are those in which materials, mostly in the form of finished products, are delivered from the organisation to its customers.

⁹ Explanatory Memorandum, Modern Slavery Bill 2018, page 2.

What should you be doing now?

While the Bill is under consideration, steps you may wish to look at now to prepare for the reporting requirements in upcoming modern slavery legislation at both State and federal level, include:

- assess whether your business is likely to be within the scope of the Bill's reporting requirements. If you are an entity operating or with employees in NSW, assess whether you fall within the scope of the NSW Act;
- if you are likely to be caught, consider the type of statement you may wish to make in the initial reporting years. This will help you define the scope of your due diligence;
- assess the current level of information on your supply chains. What additional information do you need and how reliable is the existing data? As necessary, prepare to start engaging with your direct and indirect suppliers;
- consider the most effective ways of obtaining information from your suppliers. This could be through written Q&A and/or certifications. Consider the need to audit suppliers' facilities, and introduce contractual warranties and representations in your supplier contracts;
- assess the need for training within the organisation and your supply chains on best practice in human rights compliance; and
- review how these obligations fit within any wider mandatory or voluntary reporting undertaken by the business.

If the Bill is passed, it is expected that there will be up to six months between passage of the Act and commencement of relevant sections to allow companies time to consider whether they fall within the scope of the legislation, and what actions they need to take to comply.¹⁰ Reporting is likely to be required at some stage in 2019. Although the NSW Act is not in force yet, businesses with employees in NSW are advised to focus on their reporting requirements and commence a review of their suppliers, particularly if they operate in a geographical location with heightened slavery risks.

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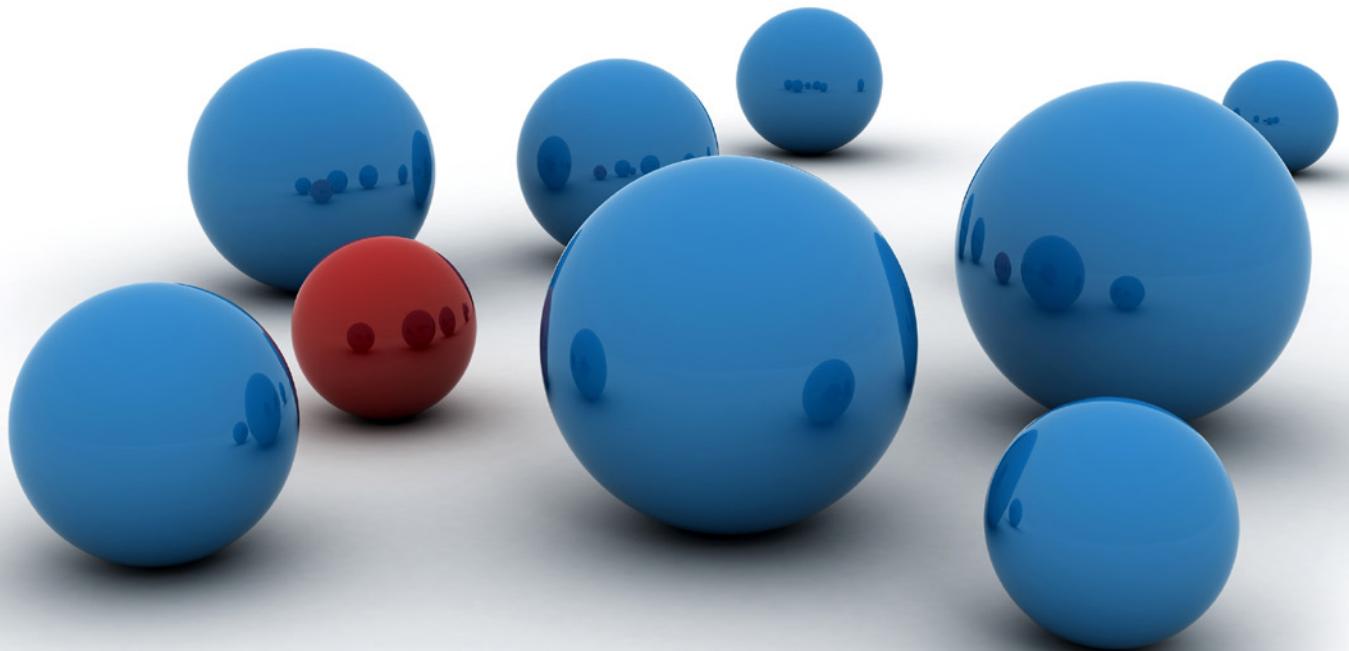


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¹⁰ Modern Slavery Bill 2018 (Cth) s. 2; Explanatory Memorandum, Modern Slavery Bill 2018 (Cth) page 4.