

13 September 2019

NSW Department of Premier and Cabinet  
GPO Box 5341  
Sydney NSW 2001

*Via email: [anti-slavery@dpc.nsw.gov.au](mailto:anti-slavery@dpc.nsw.gov.au)*

Dear NSW Department of Premier and Cabinet

### **NSW Modern Slavery Regulation 2019**

Thank you for the opportunity to provide feedback on the draft Modern Slavery Regulation 2019 (the **Regulation**) and the questions contained in the explanatory paper.

The Australian Institute of Company Directors (**AICD**) has a membership of more than 44,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

The AICD supports transparency in business operations and supply chains and calls on organisations to undertake due diligence on their modern slavery risks and address any issues identified. While the AICD supports the introduction of legislation as a means of combatting modern slavery in Australia or by Australian businesses, we do not support duplicative requirements at the State and Commonwealth levels. The national level is the appropriate jurisdiction in which to undertake action against modern slavery, through the recently introduced Commonwealth *Modern Slavery Act 2018 (Cth)* (**Commonwealth Modern Slavery Act**).

In this submission, the AICD has limited its comments to questions related to the type of guidance businesses would find helpful in preparing modern slavery statements (question 1), views on a public register (question 4) and exemptions for certain businesses, including not-for-profit (**NFP**) organisations and charities (questions 7 and 8).

Our submission includes:

- an overview of the position of the AICD on the Inquiry into the *NSW Modern Slavery Act 2018* and Associated Matters (**Section 1**);
- an overview of our responses to certain questions on the draft Regulation (**Section 2**); and
- responses to select questions contained in the explanatory paper (**Attachment**).

#### **1. Inquiry into NSW Modern Slavery Act 2018 and Associated Matters**

The AICD acknowledges that, in parallel with this consultation, a separate parliamentary inquiry (**Parliamentary Inquiry**) by the Standing Committee on Social Issues is currently underway into the *Modern Slavery Act 2018 (NSW)* (**NSW Modern Slavery Act**), draft

Modern Slavery Bill 2019 and the Regulation. The Parliamentary Inquiry covers broader issues such as the operability of the proposed anti-slavery scheme and whether the passage of the Commonwealth Modern Slavery Act renders parts or all of the NSW Modern Slavery Act unnecessary.

The AICD will lodge a separate submission with the Parliamentary Inquiry regarding these broader issues and has limited its comments in this submission to the questions set out above.

At a high level, the draft Regulation and proposed amendments to the NSW Modern Slavery Act go a long way to complementing the reporting requirements under the Commonwealth Modern Slavery Act and establishing mutual recognition between the New South Wales and Commonwealth regimes. However, there remain inconsistencies between the two regimes and the AICD remains of the view that a nationally consistent framework is preferable to differentiated Commonwealth and State legislation.

Our key concerns relate to the penalties proposed under the NSW Modern Slavery Act and the lower monetary threshold.

#### *Penalties are not appropriate*

The AICD does not support penalties (including financial penalties of up to \$1.1million) for non-compliance introduced under the NSW Modern Slavery Act. The AICD supports the position under the Commonwealth regime, which relies on public breach reporting and associated reputational damage, as the primary deterrent to non-compliance.

The focus, as set out in the objects of the NSW Modern Slavery Act, should be on helping organisations identify risk areas within their supply chains and educating them on how to mitigate the risks and handle any incidences which arise. Punitive measures could discourage organisations from bringing relevant issues and risks identified in supply chains to light, which would have the effect of deterring the primary objective of the legislation.

The introduction of penalties would also be out of step with international practice, which has focused on encouraging companies to turn their minds to modern slavery issues and develop organisational and reporting expertise, rather than taking a punitive approach. We consider that a regime with a focus on transparency (like the Commonwealth regime) is the most effective way to encourage companies to collectively improve performance and share lessons with other organisations and regulators.

Notably, this will be the first time many organisations have grappled with complex modern slavery issues, and it is inappropriate to introduce penalties at the outset. International experience indicates that it takes time to develop an understanding of modern slavery risks in a supply chain, assess and investigate risks, and train staff effectively to undertake this work. At this point, the legislation should focus on establishing the reporting regime and then work with businesses to improve their practices and performance.

#### *Monetary threshold*

The lower turnover threshold of \$50 million in turnover (as opposed to \$100 million revenue under the Commonwealth Modern Slavery Act) will capture more organisations than the Commonwealth provisions and place an increased compliance burden on those organisations. The AICD is of the view that one nationally consistent framework with one financial threshold is to be preferred. The AICD is also concerned that the messaging and

education to businesses and consumers will be confusing and could undermine the efficacy of the Commonwealth regime.

We also suggest that a higher threshold (that only captures larger organisations with more resources and capacity to comply effectively with the requirements) may ultimately result in stronger compliance and improved practices throughout the economy. Market practice is more likely to be thorough and consistent than if a broad range of entities are caught (thereby setting a stronger benchmark), and despite the limited application, there should be a 'trickle-down' effect through the supply chain that will impact suppliers' behaviour.

## **2. Overview of response to the Regulation**

Pending the outcome of the Parliamentary Inquiry and noting our comments above, the AICD makes the following points in relation to the Regulation:

- As with the Commonwealth legislation, guidance will be critical to ensure the effective implementation of the NSW Modern Slavery Act. It will be crucial for guidance to include examples of good policies and processes that are considered effective in reducing risks.
- The AICD supports the need for one public register (for both Commonwealth and NSW statements) that should be publicly available and searchable.
- The AICD supports the exemption for voluntary reporters and subsidiaries of parent entities reporting under the Commonwealth legislation. However, the NSW penalty provisions should also be included in the exemption. Enforcement and penalties for alleged breaches of Commonwealth laws should be left to the Commonwealth.
- The AICD supports the exemption for NFPs and charities but suggests some amendments to ensure *all* NFPs and charities are captured by the exemption.

Please refer to the Attachment for specific comment on each of the questions in the consultation paper.

## **3. Next steps**

If you would like to discuss any aspect of this submission further, please contact Christian Gergis, Head of Policy at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au) or Christie McGrath, Senior Policy Adviser at [cmcgrath@aicd.com.au](mailto:cmcgrath@aicd.com.au).

Yours sincerely



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**ATTACHMENT: RESPONSES TO SELECTED CONSULTATION QUESTIONS**

**Question 1: How can the Anti-Slavery Commissioner best support businesses to comply with the reporting requirement under the Act? What guidance would businesses find helpful in preparing their statements?**

The AICD recognises that principles-based guidance is critical to the effective implementation of the modern slavery reporting requirements under the NSW Modern Slavery Act and agrees with other stakeholders that guidance needs to provide clear and practical guidance on how businesses should respond to modern slavery risks. We consider guidance should:

- Include tailored guidance materials relevant to sectors and organisations of different sizes to assist organisations to identify and respond to modern slavery risks.
- Highlight examples of good practice, practical application of the reporting criteria and examples of policies and processes that are considered effective in reducing risks.
- Information on how a board would practically provide oversight on assessing the entity's response to its obligations would be helpful. This could include sample questions the board (or a relevant board committee) may ask as part of its oversight role. We would be happy to assist with preparing such questions.
- Include guidance on the meaning of undefined terms, such as 'operations', 'supply chains', 'due diligence', 'remediation' and 'assessing the effectiveness of actions', including examples of the type of information that could be provided in a statement.
- Clearly articulate that transparent and comprehensive reports will be viewed positively and not punitively.

**Question 4: What are stakeholder views on the public register, and what functions could it include?**

The AICD agrees that a public register will enhance transparency of business operations and supply chains in identifying and addressing modern slavery risks. However, the AICD remains of the view that one public register (for both Commonwealth and NSW statements) is preferable so as not to confuse the public.

In terms of functions, the AICD considers that a public register should be searchable, accessible and inclusive of all relevant entities' reporting.

**Question 7: What are stakeholders' views on the exemptions in the draft Regulation for voluntary reporters, subsidiaries of parent entities reporting under the Commonwealth Act?**

The AICD supports the exemptions in the draft Regulation for subsidiaries of parent entities reporting under the Commonwealth Modern Slavery Act. However, we are concerned that the penalty provisions of s.24(7) of the NSW Modern Slavery Act could still apparently apply to an entity which has reported to the Commonwealth under the Commonwealth Modern Slavery Act. This would mean the NSW government would be imposing a penalty on an entity for allegedly failing to meet an obligation to the Commonwealth, in circumstances where the Commonwealth has determined that there is no need for a penalty. It is incongruous that one level of government would seek to enforce a duty owed to another level of government. Enforcement and penalties for alleged breaches of Commonwealth laws should be left to the Commonwealth.

We suggest that the draft regulations 10(1) and 10(2) be amended to include sub-section 24 (7) of the NSW Modern Slavery Act in the exemption, as follows:

*A commercial organisation is exempt from the requirements of section 24 (2)–(6) (7) of the Act in relation to a financial year of the organisation if the organisation...*

**Question 8: What are stakeholder views on the exemptions in the draft Regulation for charities, not-for-profit organisations and small businesses? Are these appropriate to reduce regulatory burden and at the same time ensuring businesses take seriously their responsibility to combat modern slavery?**

The AICD notes that as a general rule NFPs and charities see ‘modern slavery’ as fundamentally at odds with their ethos and values and many are already taking steps to identify and eliminate modern slavery in their supply chains. For this reason, members in the NFP and charities sector supported the introduction of legislation as a means of combatting modern slavery in Australia and did not seek an exemption from the Commonwealth Modern Slavery Act.

However, as outlined above, the AICD has concerns with the lower monetary threshold and penalties under the NSW Modern Slavery Act. Charities, NFP organisations and small businesses would face proportionality greater administrative burden and increased compliance costs in meeting their reporting requirements compared to larger commercial organisations. Accordingly, they are at greater risk of facing penalties for non-compliance with reporting requirements. NFPs and charities have limited resources and whilst they should be encouraged to focus on their supply chain and investigate issues, they should not be subject to penalties. For this reason, the AICD supports an exemption being included in the Regulation.

The consultation paper notes that the intention of the exemption is to exempt *all* NFPs and charities from reporting obligations. However, the AICD is concerned that certain charities and NFPs may not be captured by the proposed wording of the exemption.

In summary, the exemption applies if the organisation:

- a) has a constitution (however described) that prohibits the distribution of profits or property to its members; and
- b) does not conduct its affairs (including its affairs as trustee of any trust) so as to provide pecuniary gain for its members (within the meaning of *the Associations Incorporation Act 2009*); and
- c) is exempt from paying income tax under the *Income Tax Assessment Act 1997* of the Commonwealth.

In relation to limb a), there will be certain organisations that do not meet this requirement – in particular, charities created by statute, of which there are many, including most religious organisations. In order to address this concern, the AICD suggests that this limb be amended as follows:

*(a) if an organisation has members, it has a constituent document or documents (however described) that has the effect of prohibiting the distribution of profits or property to its members.*

In relation to limb b), the definition of “pecuniary gain” as set out in the *Associations Incorporation Act 2009* is set out below. Importantly, this specifies that “an organisation provides pecuniary gain for its members if ... it has capital that is divided into shares or stock

held by the organisation's members". Some charities have share capital, but constitutions which prohibit distributions to members. Based on a strict interpretation of the exemption, such charities would fail this requirement. There is also an issue for an organisation that provides services only to its members as a way of fulfilling its charitable purpose (for example, a peak body of charities).

**Definition of "pecuniary gain"**

(1) *An organisation provides **pecuniary gain** for its members if:*

- a) *it carries on any activity for the purpose of securing pecuniary gain for its members, or*
- b) *it has capital that is divided into shares or stock held by the organisation's members, or*
- c) *it holds property in which the organisation's members have a disposable interest (whether directly, or in the form of shares or stock in the capital of the organisation or otherwise), or*
- d) *it is an organisation that is, or is included in a class of organisations that is, prescribed by the regulations for the purposes of this subsection.*

(2) *For the purposes of subsection (1) (a), an organisation **does not** provide pecuniary gain for its members merely because of any of the following:*

- *the organisation itself makes a pecuniary gain, unless that gain or any part of it is divided among or received by the organisation's members or any of them,*
- *the organisation is established for the protection of a trade, business, industry or calling in which the organisation's members are engaged or interested, but the organisation itself does not engage or take part in, or in any part or branch of, any such trade, business, industry or calling,*
- *members of the organisation derive pecuniary gain through the enjoyment of facilities or services provided by the organisation for social, recreational, educational or other like purposes,*
- *members of the organisation derive pecuniary gain from the organisation by way of bona fide payment of remuneration,*
- *members of the organisation derive pecuniary gain from the organisation of a kind which they could also derive if they were not members of the organisation,*
- *members of the organisation compete for trophies or prizes in contests directly related to the objects of the organisation,*
- *the organisation provides pecuniary gain of a class prescribed by the regulations for the purposes of this section.*

In addition, subsidiaries of a NFP may make a profit for the explicit purpose of distributing the profit to the charity or NFP for charitable purposes. Such organisations should be exempt but may not be because of a narrow interpretation of the proposed exemption.

In relation to c), many clubs which are not charities (for example, sporting clubs) do not pay tax because they can apply the mutuality principle and not because they are 'exempt' from income tax.

It is not clear why an entity needs to satisfy all three of these requirements in the exemption. In order to ensure all NFPs and charities are captured by the exemption, the AICD suggests that the 'and' at the end of each limb be replaced with 'or'. Alternatively, the exemption could be amended to specify that an entity must satisfy two out of the three limbs.