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25 September 2026

Attorney-General's Department
Modern Slavery and Human Trafficking Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Via the consultation hub

Dear Attorney-General

Strengthening Australia's response to modern slavery in supply chains

Thank you for the opportunity to comment on the *Strengthening Australia's legislative response to modern slavery in supply chains* consultation paper (**Consultation Paper**).

The Australian Institute of Company Directors' (**AICD**) mission 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's membership of more than 54,000 includes directors and governance leaders across publicly listed entities, not-for-profits, large and small businesses, and public sector bodies.

The AICD strongly supports the objectives of the modern slavery regime in Australia; that is, requiring Australian organisations to identify and address their modern slavery risks and maintain responsible, transparent supply chains. Australian organisations and their boards recognise the importance of combatting modern slavery and have spent considerable time and resources on improving modern slavery due diligence and reporting since the regime's inception.

The transparency and reporting framework established under the *Modern Slavery Act 2018* (Cth) (**Act**) has been an important step in bringing coordinated national and international focus to the challenge of modern slavery. It has encouraged greater awareness, board oversight and collaboration with stakeholders, and driven a positive normative impact across organisations. The AICD supports maintaining and strengthening this focus on transparency and effective due diligence as part of Australia's efforts to combat modern slavery.

The AICD has in recent years engaged extensively on consultations in support of the introduction of the Act, the independent statutory review of the Act by Professor McMillan AO (**McMillan Review**) and more recently, proposals to strengthen the Act undertaken by the Attorney-General's Department (**Department**) and the Australian Anti-Slavery Commissioner.

Since the Act was introduced, the AICD has been committed to building the capability of directors and boards to tackle modern slavery risks and drivers. The AICD promotes a strong focus on the governance of modern slavery in the AICD's core educational offering, the Company Director Course, as well as regular member content, webinars and resources - including director tools on modern slavery risk oversight and signing off on modern slavery statements.[1]

[1] AICD Director Tool: Modern slavery risk oversight and AICD Director Tool: Signing off on modern slavery statements.

Enclosed at **Attachment A** are our detailed responses to key questions contained within the Consultation Paper. We also enclose at **Attachment B** legal advice obtained from leading corporate law firm Allens on the proposed reforms (**Allens advice**).

The AICD's submission has been informed by consultation with directors and AICD advisory committees, stakeholders, legal experts and the Allens advice.

1. Executive Summary

The AICD opposes the introduction of a 'failure to prevent modern slavery' criminal offence in the *Criminal Code Act 1995* (**Criminal Code**).

We consider the proposed criminal offence will create significant unintended consequences that will undermine the core objectives of Australia's Modern Slavery reporting regime. Effective modern slavery responses depend on organisations being willing to identify, disclose and address risks as they arise. A framework that is centred on the punitive threat of criminal liability will drastically weaken the collaborative approach across industry and civil society that has underpinned progress to date.

Australian boards are committed to reducing modern slavery risks and labour exploitation. However, it is not apparent from the Consultation Paper and the outline of the proposed offence how it will contribute to this goal. The AICD is concerned that the proposal will disincentivise transparency, collaboration and the lifting of standards while placing a high compliance burden on organisations.

We note that the McMillan Review did not recommend the introduction of a 'failure to prevent' offence as part of a suite of proposed reforms to strengthen modern slavery prevention and reporting.

The AICD recommends that Government re-engage with the policy development of a risk-based, mandatory due diligence obligation, as proposed by the Australian Anti-Slavery Commissioner[2], as an *alternative* policy response.

We note that the AICD argued against a due diligence obligation in earlier consultations and, in our view, those arguments continue to be sound.[3] However, if the Government is committed to strengthening modern slavery legislative obligations, we consider a due diligence obligation would be a more effective model than the proposed 'failure to prevent' criminal offence. For clarity, however, the AICD would not support the introduction of a due diligence obligation if the Government proceeds with the proposed criminal offence.

As confirmed by the Allens advice, an enforceable due diligence obligation would meet the Government's intended policy objectives, while limiting the risks and concerns with the proposed offence highlighted below. Our points in opposition to the proposed 'failure to prevent' offence are as follows.

Concerns with the proposed 'failure to prevent modern slavery' criminal offence

- **Practical challenges with a 'failure to prevent' offence applying to supply chains**: Modern slavery is a significant human rights risk in complex, multi-tiered global supply chains, where organisations may have limited visibility or engagement beyond their direct or 'Tier 1'suppliers. Geopolitical factors, including foreign legal restrictions and weaker protections in certain jurisdictions, can make it very challenging for organisations to undertake robust supply chain analysis. It would be highly problematic to impose criminal liability on organisations for third party conduct several tiers removed

[2] Office of the Australian Anti-Slavery Commissioner, Recommendations to strengthen Australia's modern slavery laws: Initial position paper, (January 2026), p. 13, available here.
[3] AICD submission, Consultation on the Modern Slavery Act 2018 (Cth), (March 2026), available here; AICD submission, Recommendations to strengthen Australia's modern slavery laws: Initial Position Paper, (March 2026), available here.

from direct suppliers, and in regions where due diligence efforts can be constrained by factors outside of an organisation's ability to influence.

- **Material differences with the 'failure to prevent foreign bribery' offence**: There are material differences with the existing 'failure to prevent foreign bribery offence' and the proposed criminal offence applying in a modern slavery context. The 'failure to prevent foreign bribery' offence applies only where an organisation's 'associate' commits misconduct for the organisation's benefit, providing a nexus between the underlying crime and the organisation based on control, influence and benefit. In the absence of a concept of 'associate' or direct relationship of control, the proposed offence in the modern slavery context would expose organisations to liability for conduct beyond their reasonable capacity to prevent. This goes against a fundamental rule of law principle for criminal responsibility.

- **Chilling effect on transparency and remediation:** A 'failure to prevent modern slavery' criminal offence would have a significant 'chilling effect' on transparency in reporting and remediation of modern slavery risks. The AICD is concerned that this would risk undermining the central objective of Australia's modern slavery regime. A focus on compliance regimes to protect against criminal liability are likely to distract from more comprehensive due diligence efforts. A corporate criminal offence will drive more legalistic and conservative reporting practices. The offence would also likely drive organisations to exit relationships with suppliers in higher risk sectors and locations rather than leveraging relationships to uplift transparency and standards (as contemplated by the United Nations Guiding Principles on Business and Human Rights (**UNGPs**).

- **Inconsistency with international regimes:** A 'failure to prevent modern slavery' criminal offence would put Australia out of step with international practice. As confirmed by the Allens advice, no comparable jurisdiction imposes criminal liability on organisations for failing to prevent modern slavery within their supply chains. Comparative jurisdictions have adopted transparency-based reporting regimes, risk-based due diligence obligations, civil penalties, and/or import controls aimed at addressing forced labour risks. Introducing a criminal offence would increase regulatory complexity for Australian organisations. It would undermine efforts to align modern slavery compliance obligations across jurisdictions which should be a key objective of any new reforms.

- **Disproportionate impact on SMEs and NFP organisations:** The regulatory and cost burden of the proposed offence will not be limited to organisations captured by the $100M revenue threshold. It will have a whole-of-economy impact, cascading through supply chains and increasing resourcing demands for domestic small and medium-sized enterprises (**SME**) suppliers. It will also have a disproportionate impact on not-for-profit (**NFP**) and smaller organisations, diverting limited resources away from core activities and towards managing the legal, compliance and reputational risks associated with potential criminal liability.

Consider due diligence obligation as an alternative legislative approach

- The AICD recommends that Government re-engage on a mandatory due diligence obligation with civil penalties and appropriate regulator oversight, consistent with the Australian Anti-Slavery Commissioner's 2026 proposal, as an *alternative* legislative approach. However, for clarity, we would not support an outcome where both a due diligence obligation and 'failure to prevent' criminal offence are introduced.
- **Preserve transparency objectives and international regulatory coherence:** A risk-based due diligence obligation informed by well-established international human rights frameworks could provide a more proportionate framework. This would require organisations to take reasonable and practical steps to identify, mitigate and address modern slavery risks, while preserving the transparency objectives of the existing regime – consistent with the McMillan Review recommendations. If a due diligence

obligation were adopted, it would represent a significant expansion of existing obligations for Australian organisations and would go beyond the approach taken in most comparable jurisdictions.

- **Collaboration and focus on high-risk sectors and supply chains:** Addressing modern slavery requires a coordinated effort between business, Government, civil society and other stakeholders. While organisations have an important role to play, it is ineffective to place sole responsibility on individual organisations to resolve global human rights issues. We recommend that regulatory settings consider a coordinated focus on regions, locations, products, services, industries, suppliers or supply chains that carry a high risk of modern slavery, consistent with the McMillan Review recommendation.[4] This would help direct resources to areas of greatest risk and encourage cross-sector collaboration.

- **Guidance and support:** The AICD recommends that any new obligations be accompanied by comprehensive and practical supporting guidance and capacity building initiatives for reporting entities and suppliers, particularly in high-risk sectors and supply chains. This guidance should be informed by existing international human rights due diligence guidance to support consistency across the various international regimes and regulatory approaches.

- **Enforcement and civil penalties:** A due diligence obligation accompanied by enforcement options, including a civil penalty regime, would create significant incentives for organisations to strengthen due diligence. It is more appropriate that civil penalties be targeted at failures to implement reasonable due diligence processes, rather than introducing novel corporate criminal liability offences. This would better reflect that even where reasonable steps are taken to embed due diligence, entities cannot fully control behaviour across their full supply chains.

Design parameters if Government proceeds with a 'failure to prevent' criminal offence

- **Appropriate safeguards:** While the AICD opposes the introduction of a 'failure to prevent modern slavery' criminal offence, if Government proceeds with the proposal appropriate safeguards must be put in place to ensure the offence is proportionate and workable. These includes:
    - Limiting the scope of the offence to Tier 1 suppliers only;
    - Limiting the application of the offence to larger entities with an annual revenue threshold significantly higher than the current $100M revenue threshold used for the purposes of reporting under the Act;
    - Requiring a clear nexus whereby an organisation's conduct 'caused or significantly contributed' to the underlying criminal conduct;
    - Developing comprehensive guidance on a 'reasonable steps' defence that is published well in advance of the commencement of any criminal offence. This guidance should align with international guidelines on human rights due diligence, clearly articulate what constitutes 'reasonable steps' for organisations of different sizes and operating in different sectors, and how the defence will account for situations where it is difficult or impossible to get visibility of modern slavery risks in the supply chain for factors outside of an organisation's control;
    - Requiring a minimum fault element of 'recklessness' and an 'evidential burden of proof'; and

[4] Report of the Statutory Review of the Modern Slavery Act 2018 (Cth), (May 2023), p. 99 and Recommendation 27, available here; and Office of the Australian Anti-Slavery Commissioner, Recommendations to strengthen Australia's modern slavery laws: Initial position paper, (January 2026), p. 22, available here.

- Introducing a Deferred Prosecution Agreement (**DPA**) scheme as an alternative enforcement mechanism that incentives self-reporting and cooperation by organisations.

2. Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Ilana Waldman or Laura Bacon, Senior Policy Advisers, at iwaldman@aicd.com.au or lbacon@aicd.com.au, or Simon Mitchell, Acting Head of Policy, at smitchell@aicd.com.au.

Yours sincerely,

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Attachment A – Detailed submission

3. General comments

The AICD is disappointed with the policy process that has been undertaken by the Department on these proposed reforms. A 'failure to prevent modern slavery' criminal offence is a significant proposal that was not consulted on in the two processes conducted by the Department in 2025 and 2026.

Critically, it was not recommended by the McMillan Review 2023, which rejected the concept of a 'duty to prevent' style obligation – observing it would be premature and at odds with the Act's transparency objectives.[5]

We do not consider that the policy case for the proposed criminal offence is strong. We note that the proposal for a mandatory due diligence obligation, consulted on by both the Department and the Australian Anti-Slavery Commissioner earlier this year, has not been advanced.

Given the significance of the proposal, the AICD recommends that a detailed regulatory and cost impact analysis be undertaken before any decision is made to progress the proposed criminal offence.

Further analysis should be undertaken to assess the direct compliance costs associated with the proposed criminal offence, including increased or changed legal, governance, assurance, monitoring and reporting activities.

Consideration should also be given to indirect costs, such as higher procurement expenses, reduced supplier participation and the diversion of board and management resources from strategic risk management towards defensive compliance activities.

A regulatory impact analysis should also compare the proposed offence against alternative measures capable of achieving the Government's stated policy objectives. This should include consideration of a due diligence obligation accompanied by a civil penalty regime. As confirmed by the Allens advice, these options are likely to deliver strong compliance incentives while avoiding the significant unintended consequences – including the anticipated chilling impact on transparency - associated with the imposition of criminal liability.

The proposal should be assessed in the context of the cumulative regulatory burden facing Australian organisations and directors. Australian businesses are already grappling with an unprecedented volume and complexity of federal regulation – the cost of which to meet has reached $160 billion a year.[6]

The significant compliance burden that will be imposed as a result of the proposed criminal offence runs counter to Government's Federal Budget commitment to reducing red tape as well as lifting stagnant productivity and economic growth. It is also inconsistent with the Treasurer's recent announcement for a Productivity Commission inquiry into the cumulative impact of non-financial reporting requirements – aimed at furthering Government's agenda for reducing unnecessary regulatory costs for Australian businesses.[7]

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[5] Report of the Statutory Review of the Modern Slavery Act 2018 (Cth), (May 2023), p. 72, available here.
[6] AICD and Mandala Partners, $160 billion and counting: The cost of Commonwealth regulatory complexity, (November 2025), available here.
[7] Productivity Commission Inquiry: Business reporting requirements, available here.

In this environment, we consider any new regulatory measures should supported by robust evidence that demonstrates their policy objectives cannot be met through less onerous alternatives.

4. Concerns with the proposed 'failure to prevent modern slavery' criminal offence

The AICD opposes the introduction of a 'failure to prevent modern slavery' criminal offence. Our significant concerns with this proposal are detailed below.

a) Practical challenges with a 'failure to prevent' offence applying to supply chains

As noted in the Allens advice, there are practical challenges with imposing criminal liability in the context of modern slavery risks in supply chains, and organisations will face significant challenges in taking 'reasonable steps' to prevent modern slavery, particularly beyond their Tier 1 suppliers.

Modern slavery is a risk in complex, multi-tiered global supply chains where organisations may have limited visibility, control or leverage beyond their Tier 1 suppliers. Consistent director feedback has highlighted that gaining access to, and engagement with, suppliers in certain countries and regions can, at times, be very challenging due to broader geopolitical factors that hinder robust supply chain analysis. As noted in the Allens advice, this can include foreign laws that restrict due diligence activities (such as China's recent Decree 834 and 835) and weaker labour protections in some jurisdictions which present challenges for managing compliance systems.

The AICD has consistently called for greater support for industry to help remediate these issues at an international trade and political level.[8] Measures recommended by the AICD to Government include:

- Publishing an annual list of high-risk regions, locations, industries, products, suppliers or supply chains to serve as a reference point for entities in undertaking due diligence activities;
- Government support and development of codes of practice and certification measures for suppliers to reduce duplicative supplier due diligence and verification processes within sectors, and provide greater certainty and assurance for entities on compliance within supply chains; and
- Facilitating collaboration across industry, Government and civil society to alleviate geopolitical and other barriers to robust supply chain analysis.

Modern slavery is a complex global human rights challenge, requiring coordination and support with a focus on areas of high risk and impact. Absent these forms of intervention and support from Government, it is inappropriate and ineffective to put the onus to prevent modern slavery at individual firm level.

We are also aware of other practical challenges with undertaking supply chain due diligence to the requisite standard of a 'reasonable steps' defence.

As noted in the Allens advice, it may not be possible for organisations to enforce contractual obligations against its direct Tier 1 suppliers to prevent modern slavery further down its supply chain. For example:

- In practice, effective due diligence contemplates organisations being able to negotiate the insertion of contractual provisions in relevant supply agreements that stipulate requirements for compliance with Australian law and audit rights. However, an organisation's ability to negotiate these types of provisions and audit rights is generally dependent on having sufficient bargaining power, which is likely to be beyond the capability of smaller organisations and entities with smaller market share. Even where organisations are able to negotiate contractual provisions into

[8] See AICD submission, Review of Australia's Modern Slavery Act 2018, November 2022, available here; AICD submission, Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023, January 2024, available here.

contracts, they must have the ability to carry out audit inspections and the resources to enforce contractual provisions for any meaningful impact to be felt; and

- Commercial sensitivities around the proprietary nature of certain supply chain information (such as the identity of Tier 2 suppliers, and pricing arrangements between Tier 1 and Tier 2 suppliers) may limit an organisation's ability to gain access to information and documents (including a Tier 1 supplier's contracts with Tier 2 suppliers). This may prevent effective monitoring of whether a Tier 1 supplier is cascading modern slavery expectations down the supply chain.

In these circumstances, it would be unreasonable to impose criminal liability on organisations for third party conduct several tiers removed from direct suppliers, and in regions where due diligence can be significantly constrained by factors outside of an organisation's control or ability to influence.

b) Material differences with the 'failure to prevent foreign bribery' offence

There are material differences with the existing 'failure to prevent foreign bribery by an associate' offence under section 70.5A of the Criminal Code and the proposal for a 'failure to prevent' offence in the modern slavery context.

The 'failure to prevent foreign bribery' offence creates liability only where an 'associate' commits the underlying bribery offence for the profit/gain of the organisation. Critically, the definition of 'associate' (for example, employee, agent, officer, contractor or subsidiary) contemplates a direct commercial relationship between that person or entity and the organisation itself. This appropriately reflects the level of control or influence an organisation can exercise with respect to its associates.

This is a very different approach to the proposed 'failure to prevent modern slavery' criminal offence, where liability would attach even where there is no direct relationship between the organisation and the perpetrator of the underlying offence.

Importantly, the Australian Law Reform Commission's (**ALRC**) has been very clear that the concept of an 'associate' is an appropriate nexus in the context of a 'failure to prevent' criminal offence. The ALRC's Corporate Criminal Responsibility Inquiry Final Report in 2020 noted that:

> *"... while the definition [of associate] is nominally broad, **the limitation that the associate must be acting for the benefit of the corporation is a significant and appropriate limitation**. Importantly, this ensures that corporations will not be liable for any and all misconduct that takes place in their supply chains, but only when the particular misconduct was done by an associate for the purpose of benefiting the corporation. The implication is that, if the relationship between the corporation and the associate is sufficiently close such that the associate's conduct is intended to benefit the corporation, then the corporation is likely to be in a position to influence that conduct. **This ensures that corporations can only be liable for misconduct that they were both in a position to benefit from, and in a position to prevent**."*

In the absence of an 'associate' concept, or in other words, an element of control, there is no reasonable nexus that can be drawn between an organisation and underlying conduct in a supply chain for the purposes of the proposed offence.

3. Chilling effect on transparency and remediation

The AICD (and broader stakeholders) have significant concerns that the proposed criminal offence will have a "chilling effect" on transparency and reporting of modern slavery risks by organisations and undermine genuine due diligence efforts. If introduced, the reforms represent a material shift from transparency and disclosure, towards a punitive enforcement framework.

Australia's modern slavery reporting regime was established on the basis that increased transparency would drive organisational learning, continuous improvement and greater scrutiny of modern slavery risks in supply chains. The policy intent was for reporting entities to identify and publicly disclose modern slavery risks and steps being taken to address those risks, including in areas where controls may be inadequate or where incidents have been detected.

In the AICD's view, the introduction of a 'failure to prevent modern slavery' criminal offence will create necessary caution and disincentives for organisations on disclosure of emerging risks and vulnerabilities.

Organisations will likely adopt more conservative reporting practices and modern slavery statements will become legalistic and focused on risk mitigation, rather than candid assessments of modern slavery risks and the practical challenges organisations face in addressing them.

This shift in practice will not only result in less meaningful information for investors, regulators and civil society, but also create increased compliance costs for reporting entities through extensive legal reviews and documentation processes.

We are also concerned that the proposed offence will detract from more comprehensive due diligence efforts by organisations. A key objective of Australia's modern slavery reporting regime is to encourage organisations to look deeply into their supply chains and identify and disclose actual, potential and emerging risks and efforts to mitigate these. This supports visibility across sectors and systems, including potential collaboration with government and civil society to respond to systemic risks more effectively.

With the introduction of criminal liability, the obligation on directors and officers to act in the best interests of the organisation by limiting risks of exposure to litigation will necessarily demand a more cautious and compliance focused approach.

As noted in the Allens advice, the proposed offence may also compel organisations to exit relationships with higher risks supplier rather than engage or seek to use leverage to uplift standards as contemplated by the UNGPs. Organisations may be left with no alternative other than to withdraw from markets or supply chains where they cannot get visibility of supply chain risks beyond their direct suppliers.

In feedback to the AICD, directors have also expressed concerns that new incentives to disengage from higher-risk markets and supply chains may also undermine sustainability objectives, such as Australia's transition to net zero. For example, a significant proportion of Australia's renewable energy is generated in solar. Key components of solar power are manufactured in regions of China where supply chains are exposed to modern slavery risks and there are limitations on due diligence scope under executive orders. A new criminal offence risks disincentivising organisations from working constructively with suppliers in higher risk regions to drive improvements in procurement and labour practices.

4. <u>Inconsistency with international regimes</u>

As noted in the Allens advice, the introduction of a 'failure to prevent' criminal offence would be a "paradigm shift in Australia's approach to the regulation of modern slavery" which goes far beyond any other regime internationally.

No other jurisdiction imposes criminal liability on organisations for a failure to prevent modern slavery in their supply chains. Other regimes internationally typically require a form of risk-based due diligence and reporting and may impose civil liability for failures in this regard, while others have in place market access restrictions in the form of trade and import controls. For example:

- **European Union**: the EU adopts a mandatory due diligence model. The Corporate Sustainability Due Diligence Directive (**CSDDD**) requires large companies to identify, prevent, mitigate and address adverse human rights and environmental impacts within their value chains. As part of broader competitiveness and regulatory simplification measures, the CSDDD was narrowed and implementation deferred, with application now focused on only EU companies with both more than 5,000 employees and above €1.5 billion net turnover worldwide. Companies will have to comply with the measures by July 2029. From 2027, the EU will also introduce a regulation prohibiting products made by forced labour.

- **United Kingdom**: the UK *Modern Slavery Act 2015* requires companies with an annual turnover of over £36 million to publish a statement detailing steps taken to address modern slavery risks. It does not mandate due diligence itself, although the Independent Anti-Slavery Commissioner has recently recommended a new legislative obligation.

- **Canada**: Canada's regime under the *Fighting Against Forced Labour and Child Labour in Supply Chains Act* is closer to the Australian and UK reporting and transparency approach, rather than the EU's due diligence model. Canada's regime includes enforcement provisions, including fines for failing to report or for making false or misleading statements.

- **New Zealand**: New Zealand does not currently have modern slavery legislation but is progressing a *Modern Slavery Bill* through Parliament. The proposed regime is broadly modelled on Australia's reporting framework (not a due diligence obligation) and would require large entities to publish annual modern slavery statements. The Bill also includes penalties for non-compliance and additional reporting requirements regarding incidents, complaints, remediation and training.

- **United States**: the US does not have a national modern slavery reporting or due diligence law, but has a forced labour prohibition enforced by the US Customs and Border Protection agency.

This demonstrates that, internationally, policymakers are favouring transparency-based regimes and in some instances the introduction of due diligence obligations, rather than criminal liability frameworks.

In the AICD's view, improving consistency across the various international regimes should be a key objective of any new reforms. Introducing a punitive criminal offence would put Australia out of step with comparable jurisdictions and key trade partners, adding significant complexity to an already challenging risk landscape and resource-intensive reporting obligation. As noted in the Allens advice, compliance with 'reasonable steps' in the context of a 'failure to prevent modern slavery' criminal offence will go further than a requirement to undertake mandatory due diligence.

5. <u>Disproportionate impact on SMEs and NFPs</u>

The AICD is concerned that the introduction of the proposed criminal offence will have a disproportionate impact on small organisations, SME suppliers (that are not reporting entities) and not-for-profit organisations that are captured by the regime, given the low $100M revenue threshold.

Many SMEs and NFPs operate with limited financial resources, lean governance structures and constrained compliance capabilities. While these organisations may be committed to identifying and addressing modern slavery risks, they lack the dedicated legal, procurement and risk management functions available to larger organisations.

In feedback to the AICD, NFP directors have noted significant concerns that the legal and reputational consequences associated with criminal liability will force many organisations to divert scarce resources away from their core activities towards more compliance processes.

The proposed offence may also create significant barriers to participation in supply chains by SME suppliers. Larger organisations are expected to seek to manage increased liability risks with more extensive contractual protections, assurances and due diligence information from suppliers. SMEs often have limited leverage over upstream suppliers and limited capacity to meet increasingly onerous reporting and verification requirements. This may result in SME suppliers being excluded from procurement opportunities or disincentivised from operating in certain sectors and markets.

The AICD continues to argue that the reporting threshold for modern slavery under the Act, and any related or future obligations, should be set at a higher level. The current $100M revenue threshold captures smaller reporting entities that lack the scale and ability to influence supplier practices, while creating a high compliance burden at entity level. A more effective Government response to combatting modern slavery risks would be to focus on high-risk supply chains and large organisations, with risk-based collaboration and guidance for SME suppliers (that are not reporting entities).

5. A due diligence obligation as an alternative legislative approach

The AICD considers that the introduction of a risk-based due diligence obligation under the Act, consistent with the model proposed by the Australian Anti-Slavery Commissioner in early 2026, would be a more proportionate and effective approach to meeting the Government's policy objectives.

We recommend that Government consider a due diligence obligation, with appropriate protections and guidance for entities, as an *alternative* to the proposed 'failure to prevent' criminal offence.

While the AICD did not support a due diligence obligation in earlier consultations, if Government is committed to strengthening modern slavery legislative obligations, we consider that a due diligence obligation would be a more effective model than the proposed 'failure to prevent' criminal offence.

The AICD would not however support the introduction of both a due diligence obligation and the proposed criminal offence. As noted in the Allens advice, a due diligence obligation under the Act could achieve the Government's intended policy objectives without requiring the introduction of the proposed criminal offence.

Critically, a mandatory due diligence obligation would require organisations to strengthen systems for identifying and addressing modern slavery risks, while preserving the Act's objectives of transparency and improved outcomes for vulnerable workers and affected communities. In our view, these objectives should be at the centre of any new reforms.

We note that the model proposed by the Anti-Slavery Commissioner contemplated a 2-year-phase-in period for all reporting entities under the Act, and development of practical supporting guidance and capacity building for reporting entities and suppliers in high-risk sectors. The AICD strongly supports this approach.

The Commissioner has also proposed a mechanism for the declaration of a 'region, location, product, service or industry, supplier or supply chain' that carries a high risk of modern slavery, consistent with the McMillan Review recommendation.[9] The AICD supports this approach. In our view, it would serve as a support for organisations' risk identification and access to supply chain information, as well as cross-sector collaboration on well-known or significant risks.

[9] Office of the Australian Anti-Slavery Commissioner, Recommendations to strengthen Australia's modern slavery laws: Initial position paper, (January 2026), p. 22, available here.

Due diligence is not a new concept under Australia's modern slavery reporting regime. The Act already requires entities to report on their 'due diligence and remediation processes'.

a) <u>Alignment with international frameworks</u>

A key advantage of a mandatory due diligence model is that it would build on concepts that many organisations are already familiar with. For example, there is a well-established body of international guidance that sets expectations for human rights due diligence and provides a practical framework for implementation. In particular, the UNGPs and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct have become the globally accepted benchmarks for responsible business conduct. These guidelines are widely relied upon by organisations, investors and civil society organisations and have informed the development of emerging due diligence regimes internationally.

Many Australian organisations are already undertaking due diligence processes aligned with these international standards. This is particularly the case for organisations with global operations or those subject to overseas regulatory requirements and investor expectations. These organisations have invested significant resources in developing governance arrangements, supplier engagement programs, risk assessments, grievance mechanisms and remediation frameworks that are broadly consistent with the UNGPs and OECD Guidelines.

Importantly, these international standards generally adopt a risk-based and proportionate approach, enabling due diligence efforts to be calibrated according to an organisation's size, the nature of its operations and level of risk involved. A risk-based approach also allows organisations to focus their efforts on the areas where the likelihood and severity of modern slavery risks are greatest, rather than encouraging a 'one-size-fits-all' compliance exercise.

The AICD encourages the Government to build on existing business practices and internationally recognised frameworks rather than introducing a new and untested criminal offence in the modern slavery context. As noted in the Allens advice, harmonisation would also minimise the compliance burden for both organisations caught by the regime and SME suppliers within the value chain.

b) <u>Enforcement</u>

The proposal for a mandatory due diligence obligation by the Australian Anti-Slavery Commissioner contemplated:

- a graduated approach to enforcement, allowing a 'learning phase' period for reporting entities to fully understand and implement the obligation;
- the appointment of a regulator to monitor and investigate compliance with the obligation; and
- a range of enforcement options, escalating to more punitive responses in the case of serious breaches or ongoing non-compliance – including the application of civil penalties.

The AICD supports this approach. We would also support a more targeted enforcement focus on higher-risk sectors and supply chains with systemically significant suppliers.

In our view, a due diligence obligation accompanied by enforcement options, including a civil penalty regime, would create incentives for organisations to strengthen due diligence. Civil penalties can be targeted towards failures to implement reasonable due diligence processes relevant to the organisation's position. This reflects the practical reality, as acknowledged by the Anti-Slavery

Commissioner, that even where reasonable steps are taken to embed due diligence, entities cannot fully control behaviour across their complex supply chains.[10]

Design parameters required if Government proceeds with a 'failure to prevent' offence

The AICD has raised strong concerns about the proposal and opposes the introduction of a 'failure to prevent' offence. If Government nonetheless proceeds, we provide comment below in response to questions 1-5 of the Consultation Paper.

Our focus is on practical and reasonable design parameters for the 'failure to prevent' criminal offence, informed by the Allens advice.

a) Scope and application

The AICD recommends that the scope and application of the proposed criminal offence should be limited in several ways:

- First, the scope of the offence should be limited to Tier 1 suppliers only. An organisation can generally be expected to have a greater degree of control, and exercise a greater level of leverage, with respect to its Tier 1 suppliers. This would position the proposed offence closer to the existing 'failure to prevent foreign bribery' offence where a direct relationship exists between the organisation and an 'associate' (i.e. person or entity) engaged in the primary conduct.

- Secondly, the annual revenue threshold should be set higher than the current $100M revenue threshold for the purposes of reporting under the Act. The existing reporting obligations are less onerous and do not expose entities to potential criminal liability. In our view, a higher revenue threshold is a critical requirement given the proposed offence will be considerably more burdensome and require organisations to demonstrate a range of measures are in place to meet a 'reasonable steps' defence.

- Thirdly, the proposed offence should apply at the corporate level, and not to directors or other office holders. As noted in the Allens advice, there is already potential for a corporate criminal finding to create personal liability risks for individual directors and officers. For example, a criminal finding against an organisation may increase the risk of related claims or action under existing accessorial liability provisions, directors' duties and other enforcement mechanisms. This reflects Australia's unique corporate criminal liability model.[11]

b) Connection to an organisation's conduct

Consistent with the Allens advice, we recommend that the company's conduct must have 'caused or significantly contributed to' the underlying conduct before a requisite nexus can be established. This connection or nexus should apply in the context of the proposed criminal offence being limited to an obligation to prevent modern slavery as far as it relates Tier 1 suppliers only.

We reiterate our concerns outlined in Section Three (a) and (b) regarding the practical complexity of getting visibility and engagement with suppliers within global, multi-tiered supply chains and the absence of an 'associate' connection providing a direct relationship of control within the formulation of the

[10] Office of the Australian Anti-Slavery Commissioner, Recommendations to strengthen Australia's modern slavery laws: Initial position paper, January 2026, p. 17, available here.
[11] Allens Memorandum, Director Liability: Comparative assessment of Australia and international peers, (September 2025), available here.

proposed offence. In light of these factors, it should not be enough in our view that an organisation was only linked, either directly or indirectly, to the underlying conduct to be criminally liable.

c) 'Reasonable steps' defence

Detailed and practical guidance on the 'reasonable steps' defence, informed by consultation with stakeholders, would be critical well in advance of any new offence commencing.

As noted in the Allens advice, the guidance should:

- Set clear expectations on what constitutes 'reasonable steps' in the in the context of preventing modern slavery in supply chains, including illustrative worked examples. These expectations should be informed by what is reasonably practicable, particularly in light of the complexity of global supply chains;

- Acknowledge that a company's compliance resources and efforts be proportionate to the risks faced and discuss what constitutes 'reasonable steps' for organisations of different sizes;

- Clearly articulate how a 'reasonable steps' defence would account for situations where it is difficult or impossible to undertake due diligence or prevent an organisation's linkage to modern slavery in a supply chain (for example, where there may be state imposed forced labour or foreign laws prohibiting due diligence activities);

- Confirm that where it is not reasonably practicable for an organisation to conduct their own due diligence activities (for example, because they do not have the requisite expertise or are unable to travel to the relevant locations), they may rely upon third-party audits; and

- Align with international frameworks such as the UNGPs and OECD guidelines.

d) Fault element

If the proposal proceeds, the fault element must be set as "recklessness" as a minimum. In our view, it is wholly unreasonable for criminal liability to be imposed on organisations on a 'strict' or 'absolute' liability basis – or in other words, a 'no fault' basis.

As noted above, the foreign bribery 'failure to prevent' offence relies on the concept of an 'associate' and has a resulting nexus of control. The proposed modern slavery offence contains no comparable nexus of control. Instead, it could result in organisations being held criminally liable for conduct committed by actors beyond their control and with whom they have no direct commercial or other relationship. In these circumstances, the imposition of strict liability would be both disproportionate and inconsistent with fundamental principles of criminal responsibility.

Even to the extent that the scope of the offence is confined to Tier 1 suppliers only, as we strongly recommend, 'strict' or 'absolute' liability would represent an unduly punitive approach.

e) Burden of proof

The AICD strongly recommends that the burden of proof placed on a defendant organisation be 'evidentiary', being the usual standard of proof under the Criminal Code. This would require the defendant to raise a real possibility that the defence may apply and the prosecution to disprove that the defence applies.

We do not support a 'legal burden' of proof requiring the defendant to prove the defence on the balance of probabilities – in other words, a reverse onus of proof.

As noted in the Allens advice, a 'legal burden' of proof is a more onerous requirement than an 'evidential burden'. It is also unclear why such a departure from the usual position under the Criminal Code is justified, particularly where:

- the proposed offence could impose criminal liability on an organisation for the conduct of a third party with whom it may have no direct relationship, unlike the foreign bribery offence which is confined to the conduct of an 'associate';
- organisations may have limited visibility or control over the underlying conduct; and
- there is no set or prescribed standard for the regulation of supply chains to prevent modern slavery incidents. In these circumstances, the prosecution may be better placed to prove that 'reasonable steps' were *not* taken in any particular case, noting that what may be 'reasonable' would be highly dependent on the circumstance of that case.

In our view, the adoption of an 'evidential burden' becomes even more critical in the event that (despite our strong concerns outlined in (d) above), the Government elects to proceed with the proposal to apply 'strict' or 'absolute' liability fault element.

6. Self-reporting and DPAs

If Government proceeds with the proposed offence, the AICD strongly recommends that:

- safe harbour provisions or channels through which companies may self-report an identified incident of modern slavery to relevant authorities or regulators without facing criminal prosecution be established. This may be achieved through the provision of immunity from prosecution or other leniency arrangements that are sufficiently beneficial to encourage self-disclosure; and
- a DPA scheme be introduced to serve as an alternative enforcement mechanism.

The AICD has consistently supported the introduction of a DPA scheme to accompany the 'failure to prevent foreign bribery' criminal offence.[12] We consider that a DPA scheme is particularly critical in the context of a 'failure to prevent' offence where conduct only comes to the attention of an organisation attention after it has occurred. In these situations, a DPA scheme would provide a clear incentive to encourage self-reporting and cooperation with law enforcement authorities in respect of a range of specified remedies.

As noted by the Allens advice, DPAs also have the potential to facilitate more expeditious resolutions of modern slavery investigations and prosecutions, and provide greater flexibility to develop alternative, tailored penalties for corporations that are beyond the reach of a sentencing court. This could include, for example, requiring an uplift to compliance programs (alongside the payment of penalties), or providing an avenue for remediation for victims of modern slavery, which can contribute to a broader compliance culture amongst companies.

The introduction of a DPA scheme would also bring Australia into line with other jurisdictions that utilise DPA schemes, such as the United Kingdom, USA, Canada, France and Singapore.

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[12] See AICD submission, Statutory Review of the Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024, September 2026, available here.

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Attachment B – Allens advice

Advice on proposed modern slavery reforms

1 Summary

1 The Australian Government has announced its intention to introduce a new criminal offence directed at companies with an annual consolidated revenue exceeding $100 million that fail to prevent modern slavery in their supply chains (***proposed criminal offence***). A defence will be available if a company can demonstrate it took reasonable steps to prevent modern slavery in its supply chain.

2 Noting that no exposure draft for the proposed criminal offence or related guidance has been released, this advice covers:

(a) key concerns with the proposed criminal offence;

(b) whether a mandatory due diligence obligation under the *Modern Slavery Act 2018* (Cth) (***MSA***) would achieve the Government's intended policy objectives without the need for the proposed criminal offence;

(c) if the proposed criminal offence was pursued, specific measures or guardrails that could be implemented to avoid unnecessary cost and unintended adverse impacts; and

(d) the effectiveness of a civil penalty regime compared to a criminal penalty regime.

3 In summary:

(a) Key concerns with the proposed criminal offence include:

(i) The seriousness and context of this offence.

(ii) The distinct nature of modern slavery and material differences from the 'failure to prevent' regime in the foreign bribery context.

(iii) The practical challenges that companies will likely face in preventing modern slavery beyond the first tier of their supply chains with which they have a direct contractual relationship (***Tier 1***). It would not be effective or reasonable to impose criminal liability for failing to prevent modern slavery beyond Tier 1 suppliers, where a company has limited visibility and control over the underlying criminal conduct.

(iv) Practical factors that may make it difficult for companies to demonstrate whether 'reasonable steps' have been taken. If the Government proceeds with the proposed criminal offence, these factors should inform its enforcement and how the 'reasonable steps' defence is framed.

(v) The fact that the imposition of criminal liability for a failure to prevent modern slavery is currently inconsistent with the approach taken in comparable jurisdictions.

These concerns are set out in further detail in section 2 below.

(b) A mandatory due diligence obligation under the MSA could achieve the Government's intended policy objectives without the need for the proposed criminal offence because:

(i) It would require businesses to proactively manage modern slavery risks in their supply chains in a manner more closely aligned with global human rights standards and the approaches taken in other jurisdictions. This would also minimise the compliance burden on companies.

(ii) It would have a lesser 'chilling effect' on transparency and reporting by corporations than the proposed criminal offence.

(iii) Companies' responses to the stakeholder consultation processes that have already been undertaken on a due diligence obligation indicate that mandatory due diligence is capable of mobilising businesses to proactively manage modern slavery risks in their supply chains.

These issues are set out further in section 3 below.

(c) If the proposed criminal offence is introduced, several practical parameters should inform:

(i) The scope and application of the proposed criminal offence. At a minimum, the scope of the offence should be limited to an obligation to prevent modern slavery at Tier 1 of the supply chain only. Consideration should also be given to increasing the minimum revenue threshold applicable to companies that are captured by the proposed criminal offence, having regard to higher thresholds under other regimes.

(ii) The requisite connection between the company's conduct and the underlying criminal conduct. This includes the challenges of applying the UNGPs' 'connection to impact' framework in the context of criminal liability, which may undermine the effectiveness of the proposed criminal offence.

(iii) The fault element of the proposed criminal offence (if any). Criminal liability in this context should not be imposed without a fault element that is reasonable and commensurate with the seriousness of a conviction.

(iv) The burden of proof in relation to the proposed criminal offence and its defence. Consideration should be given to the serious nature of criminal liability and the significance of related reputational impacts for a convicted company.

(v) How the proposed criminal offence encourages companies to self-report modern slavery issues identified in their supply chains and cooperate with law enforcement and regulatory authorities. In that regard, consideration should be given to safe harbour provisions or channels through which companies may self-report an identified modern slavery incident without facing criminal prosecution, and an appropriately designed and implemented scheme for Deferred Prosecution Agreements (***DPAs***).

(vi) The 'reasonable steps' defence. This includes the need for detailed guidance that is informed by robust consultation with companies and responsive to key issues that would influence a company's approach to taking reasonable steps.

(vii) The penalty for non-compliance with the proposed criminal offence. This includes consideration of the potentially limited nexus between the company's conduct and the underlying modern slavery offence (particularly in the case of suppliers beyond Tier 1), which may justify a lesser maximum penalty.

These matters are set out further in section 4 below.

(d) A mandatory due diligence obligation that imposes civil liability for non-compliance could effectively achieve the Government's intended policy objectives, while giving rise to fewer concerns, as set out in section 5 below.

2 Key concerns with the proposed criminal offence

2.1 The seriousness of this offence

4 As a starting point, no exposure draft for the proposed criminal offence has been released. However, the consultation sets out key elements of its potential scope, including:

(a) that criminal liability may be imposed for a failure to prevent modern slavery in supply chains beyond Tier 1, noting that the consultation paper refers to the expansive definition of 'supply chain' from the current guidance on reporting requirements under the MSA; and

(b) that strict or absolute liability may apply, meaning there may be no fault element.

5 This would be a paradigm shift in Australia's approach to the regulation of modern slavery, and is the first time that we are aware internationally of a company being held criminally liable for failing to prevent modern slavery in its supply chains (where there is no primary responsibility for the underlying offence itself).

6 And, as outlined further below, there will likely be challenges in pursuing a prosecution under this offence in line with the Prosecution Policy of the Office of the Director of Public Prosecutions (***CDPP***) because:

(a) there are likely to be significant barriers to proving the underlying conduct, amongst other facts, to a standard beyond reasonable doubt, meaning it may be difficult to have sufficient evidence to prosecute; and

(b) given the potential unintended adverse consequences of the proposed criminal offence, such as the likely chilling effect on the transparency objectives of the MSA and the concern that companies may exit relationships with higher risk suppliers rather than engage or seek to use leverage to try and uplift standards as contemplated by the United Nations Guiding Principles on Business and Human Rights (***UNGPs***), there may not be sufficient public interest in the prosecution of the proposed criminal offence.

7 Further, the consequences of a criminal finding of this nature are severe. They include the stigma associated with offences related to modern slavery and significant flow-on effects in relation to the potential personal liability of individual officers and directors, and other regulatory repercussions that can significantly impact a company's approvals and operations.

8 It is also significant that the proposed criminal offence was not raised during the two-year consultation process that followed the statutory review of the MSA (known as the McMillan review). This may be because the McMillan review itself rejected introducing a 'duty to prevent' style obligation, observing it would be premature and at odds with the MSA's transparency objectives.[1]

9 These observations give important context to the advice that follows.

2.2 Material differences from 'failure to prevent' under the foreign bribery regime

10 The proposed criminal offence concerns the prevention of modern slavery,[2] which often occurs within complex and multinational supply chains. The proposed criminal offence has parallels with existing regulatory regimes, in particular the corporate failure to prevent foreign bribery offence at

[1] McMillan, *Report of the statutory review of the* Modern Slavery Act 2018 (Cth)*: The first three years* (Commonwealth of Australia, 2023), p 72.

[2] The Government's Consultation Paper indicates that the underlying criminal conduct that corporations would be required to prevent would be limited to certain types of modern slavery currently criminalised under Divisions 270 and 271 of the Criminal Code, focusing on the slavery, servitude, forced labour and debt bondage offences. Notably, the Consultation Paper expressly excludes the offences relating to deceptive recruitment.

section 70.5A in the *Criminal Code Act 1995* (Cth) (***Criminal Code***). However, the way in which modern slavery occurs, particularly the multi-faceted causal factors that can lead to incidents occurring, as well as the significant lack of visibility and control that companies have over what occurs in certain parts of their supply chain, introduce levels of opacity and complexity that are unique to this proposed offence.

11 Moreover, the analogous offence in the anti-bribery context only creates liability where an 'associate' of a company commits a prescribed bribery offence for the profit/gain of the company (and the company is unable to rely on the defence of adequate procedures). Crucially, the definition of 'associate' contemplates a direct commercial relationship between that person or entity and the company – which appears to appropriately reflect the level of control a company can exercise with respect to its associates.

12 This is highly relevant in considering the reasonableness of imposing criminal liability for a failure to prevent such conduct from occurring within a company's supply chain in circumstances where there may not be a direct relationship between the company and the perpetrator of the underlying offence (unlike the foreign bribery offence which only imposes liability in the context of direct relationships between a company and its associate, and the offence itself has different drivers).

13 Indeed, in the case of Australian sanctions laws, due to the unworkable breadth of the relevant obligations, a reform process is underway to consider how the legislation can be streamlined to improve usability, including by potentially introducing concepts of 'indirectness' and 'triviality' to reduce the scope of the offence to exclude certain indirect conduct and trivial transactions.

2.3 Practical challenges in 'failure to prevent' offence applying beyond Tier 1

14 Companies will likely face significant challenges in preventing modern slavery beyond Tier 1 of their supply chains, having regard to the following factors:

(a) Limited control and ability to exercise leverage over third parties in the absence of a direct contractual relationship.

(b) Limited visibility, including due to difficulties in obtaining and verifying information provided by or relating to suppliers beyond Tier 1 due to legal and commercial obstacles.

(c) Practical difficulties in enforcing, against Tier 1 suppliers, contractual obligations to prevent modern slavery further down the Tier 1 supplier's supply chain (which is often one of the key mechanisms a company may use to exert influence beyond Tier 1 suppliers). For example:

(i) Commercial sensitivities and the proprietary nature of certain supply chain information beyond Tier 1 (such as the identity of Tier 2 suppliers, and pricing arrangements between Tier 1 and Tier 2 suppliers) may limit a company's ability to gain access to certain information and documents (including a Tier 1 supplier's contracts with Tier 2 suppliers). That may prevent the company from effectively monitoring whether the Tier 1 supplier is cascading modern slavery expectations down the supply chain.

(ii) Foreign laws that restrict due diligence activities in some jurisdictions (for example, China's recent Decree 834 and 835) may limit what a Tier 1 supplier can reasonably require its suppliers to do to prevent modern slavery.

15 Given these constraints, it would not be effective or reasonable to impose criminal liability beyond the conduct of Tier 1 suppliers, where a company has such limited visibility and control (though we note this does not preclude a company from having a modern slavery risk and compliance framework that seeks to extend expectations via Tier 1 suppliers).

2.4 Practical challenges in demonstrating whether 'reasonable steps' have been taken

16 The form of the 'reasonable steps' defence and related guidance is not yet known. However, by analogy to comparable offences and related guidance (including the Australian Government's Guidance on Adequate Procedures to Prevent the Commission of Foreign Bribery), and considering the expectations set by the MSA to assess and address modern slavery risks, the NSW Anti-slavery Commissioner's 'Guidance on Reasonable Steps to Manage Modern Slavery Risks', and guidance from the UNGPs, we expect that, at a minimum, companies would need to show they have a range of controls in place. Drawing from these frameworks, it is likely that demonstrating reasonable steps would require a company to undertake specific measures including the following:

(a) top-level management and board oversight over the company's full modern slavery program (beyond only due diligence processes), with regular reporting on, and scrutiny of, any material incidents, as well as the effectiveness of the modern slavery program;

(b) conducting and documenting a targeted assessment of modern slavery risk in the company's supply chains to identify its exposure posed by geography and business activity, with sufficient detail to inform where the company is to focus its resources and controls;

(c) conducting ongoing modern slavery due diligence, including processes to facilitate ongoing research, investigation, assessment and monitoring of the company's key modern slavery risks and controls (noting that the proposed criminal offence would likely encourage companies to terminate supplier relationships that may pose risk, rather than encouraging the use of leverage to mitigate risk where possible);

(d) communication and training, including by having a modern slavery policy in place, and providing training (including targeted training) that is tailored to the company; and

(e) designing and implementing effective incident identification and response processes including, for example, grievance mechanisms that align with the effectiveness criteria in Principle 31 of the UNGPs.

17 These requirements go further than a bare requirement to undertake mandatory human rights due diligence. However, we acknowledge that there would be some overlap between the requirement to demonstrate reasonable steps and a robust risk-informed modern slavery due diligence program.

18 Various factors may make it difficult to implement some of these measures, which should inform the enforcement of the proposed criminal offence and how this defence is framed, including:

(a) the effect of regulatory regimes that may restrict due diligence activities in some jurisdictions (for example, China's recent Decree 834 and 835);

(b) a potential lack of capability by smaller suppliers to meaningfully engage with a company's modern slavery processes and requests; and

(c) challenges in managing compliance systems across jurisdictions with weaker labour protections and lower trade union activity, particularly where a company's expectations of its suppliers go substantially beyond local law requirements.

2.5 Inconsistencies with comparable international jurisdictions

19 We are not aware of any other jurisdiction that imposes criminal liability on companies, on an absolute or strict liability or even on a recklessness basis, for the failure to prevent modern slavery in their supply chain. Other regimes internationally typically require a form of risk-based due diligence and/or reporting and may impose civil liability for failures in this regard. For example:

(a) The EU's Corporate Sustainability Due Diligence Directive (***CSDDD***) will require certain businesses to conduct risk-based human rights due diligence. However, it will not impose strict or absolute criminal liability for a company's failure to prevent modern slavery in its supply chains in a manner comparable to the proposed criminal offence.

(b) There are several modern slavery reporting regimes globally, such as the United Kingdom's *Modern Slavery Act 2015*, Canada's *Fighting Against Forced Labour and Child Labor in Supply Chains Act*, and California's *Transparency in Supply Chains Act 2010.* These impose reporting requirements similar to Australia's under the current MSA, but do not impose criminal liability on companies for failing to prevent modern slavery in their supply chains.

(c) While several regimes include import bans focused on modern slavery (for example, Canada, the USA and the EU), some of which may criminalise non-compliance, they are materially different in nature, and in the circumstances in which they impose criminal liability, compared to the proposed criminal offence.

20 This could be taken as an indicator of the lack of practicality and reasonableness of such an offence.

3 Would a mandatory due diligence obligation under the MSA achieve the intended objectives?

21 The proposed criminal offence is intended to strengthen Australia's response to modern slavery by seeking to:

(a) reduce the likelihood of goods and services connected to modern slavery entering Australian supply chains and markets by enhancing corporate accountability;

(b) improve protections for workers vulnerable to exploitation; and

(c) create a level playing field for businesses that are already taking meaningful action to identify, manage and address modern slavery risks.

22 A mandatory due diligence obligation under the MSA that imposes civil liability for non-compliance could achieve the Government's intended policy objectives because:

(a) A modern slavery due diligence obligation would require businesses to proactively design and implement processes targeting modern slavery risks in their supply chains. For example, the elements of the due diligence obligation proposed by the Office of the Australian Anti-Slavery Commissioner in January 2026 could drive preventative actions by prescribing key processes that companies would be required to take, which are expressly intended to be aligned with established global human rights standards, in a manner that is more consistent with the approaches taken in other jurisdictions. This harmonisation would also minimise the compliance burden on companies.

(b) A key concern with the proposed criminal offence is the likely ‘chilling effect’ on transparency and reporting by corporations. That is because it would likely incentivise companies to adopt a more conservative and defensive approach to modern slavery disclosures so as to mitigate potential exposure to criminal liability. This is in direct opposition to the stated purpose and practical effect of the current MSA, which is aimed at promoting transparency. A mandatory due diligence obligation would have a lesser chilling effect on transparency and on encouraging preventative actions through public reporting and shared learnings. Additionally, a mandatory due diligence regime administered by a regulator focused on educating businesses and building their prevention capabilities may promote corporate engagement and cooperation more than the deterrent factor of a criminal offence. Egregious non-compliance could also be addressed through a regulator that is empowered to issue improvement or infringement notices, or apply to a court for civil penalties or injunctions without criminal prosecution, as contemplated in the Australian Anti-Slavery Commissioner's proposed due diligence obligation.

(c) Mandatory due diligence was a focus of the substantial stakeholder consultation that has already been undertaken on potential reforms to Australia's modern slavery regime. Many companies have already invested time and resources into preparing for a mandatory due diligence obligation and understanding how it would interact with their business and supply chains. This provides an early indication of the capacity of a mandatory due diligence obligation to mobilise businesses to proactively identify, assess and address modern slavery risks in their supply chains.

4 If a 'failure to prevent modern slavery' offence is introduced, what are some practical and reasonable design parameters?

4.1 Scope and application

23 The scope of the proposed criminal offence should be limited in several ways.

24 At a minimum, the scope of the offence should be limited to an obligation to prevent modern slavery at the Tier 1 level only. As outlined at 11 above, this would be consistent with the scope of the existing foreign bribery offence where a direct relationship exists between the corporation and the person or entity engaged in the primary conduct. In general terms, a company can reasonably be expected to have a greater degree of control, and exercise a greater level of leverage, with respect to its Tier 1 suppliers that may justify the imposition of criminal liability for any failures in this regard. The case for the imposition of criminal liability is highly problematic where a company has less or no control or visibility, which would most often be the case for suppliers beyond Tier 1.

25 Secondly, consideration should be given to increasing the minimum revenue threshold applicable to companies that are captured by the proposed criminal offence. Currently, it aligns with the existing threshold requirements under the MSA – however, the reporting obligations under the MSA are significantly less onerous and, critically, do not carry potential criminal liability. In the context of the proposed new offence, where the available 'reasonable steps' defence will likely require companies to demonstrate that a range of measures are in place, a higher minimum revenue threshold is warranted (or alternatively, staggered commencement with descending minimum revenue thresholds over several years).

26 Notably, under the CSDDD (which imposes a due diligence obligation and does not impose any criminal liability), in certain circumstances the relevant monetary threshold for companies required to comply is €1.5 billion (subject to other criteria), and in-scope companies will have several years to prepare for the requirements before they apply.

4.2 Connection to the corporation's conduct

27 Given that criminality is proposed as well as substantial penalties, it would be appropriate to specify that the company's conduct must have caused or significantly contributed to the underlying conduct before a requisite nexus can be established. That is, it would not be enough that the company was only linked to the underlying conduct to be criminally liable.

28 However, there may be challenges in applying a 'connection to impact' test in the context of criminal liability. First, it may be challenging to establish the requisite connection to impact beyond reasonable doubt. This is because in practice multiple entities are often connected to a human rights

impact in different ways and assessing each entity's connection to impact usually requires not only detailed and complex factual analysis but, ultimately, a degree of discretion.

29 Moreover, the concept of 'connection to impact' is taken from the UNGPs where it is considered as a spectrum to enable companies to determine what steps it should take, including with respect to remediation, if a human rights impact has occurred within its supply chain (that is, is not a test of causation to determine criminal liability or culpability for that human rights impact).

30 The difficulties in determining the connection between a corporation’s conduct and the underlying modern slavery offence underline the likely ineffectiveness of introducing this criminal offence and the practical difficulties that law enforcement may face in proving this offence. This is exacerbated given that modern slavery in this context will most often involve conduct outside of Australia by non-Australian entities which poses substantial evidentiary barriers for law enforcement authorities.

4.3 Fault elements

31 The proposed criminal offence concerns conduct that occurs in circumstances where the company itself may have very limited control or visibility when compared with the context of existing strict liability offences (that, for example, often concern incidents within a company's own operations, or otherwise in circumstances where the company has a higher level of control or connection to the relevant conduct). As currently framed in the consultation paper, a company could be held liable for failing to prevent a modern slavery incident within its supply chain in circumstances where there is no direct commercial or other relationship between the company and the perpetrator of the underlying offence.

32 Significantly too, unlike certain safety or public health laws which may impose absolute or strict liability on the basis that they require strict adherence to prescribed standards to be effective, there is no set or prescribed standard for the regulation of supply chains to prevent modern slavery incidents. Rather, what would be reasonable, proportionate and indeed, effective, varies across companies, sectors and supply chains. This also impacts upon potential deterrence value of a strict/absolute liability offence.

33 Accordingly, a standard of absolute liability or strict liability is inappropriate in this context. A more appropriate standard would require that the offence has a fault element that is reasonable in light of the practical realities outlined above, and commensurate with the seriousness of a conviction, such that a company must be found to have been at least 'reckless' before criminal liability is imposed.

4.4 Burden of proof

34 The consultation paper suggests that the proposed criminal offence may be a strict or absolute liability offence where a defendant is required to prove their defence on the balance of probabilities.

35 If the defendant must prove the defence on the balance of probabilities, then the defendant bears a 'legal burden of proof' which is a more onerous requirement than the 'evidential burden of proof' that usually applies to defences in the Criminal Code. Under an 'evidential burden of proof', once a defendant has provided enough evidence that suggests there is a reasonable possibility that a defence might apply, then the prosecution must *disprove* that the defence applies in their case.

36 The position suggested in the consultation paper is therefore a departure from the usual position for defences under the Criminal Code. It is not clear why such a departure is justified having regard to the proposed criminal offence, and particularly, considerations including that:

(a) under the proposed criminal offence, a company is being made criminally liable on the basis of another person's conduct (i.e. the direct perpetrator) even where there may not be a direct relationship between the company and that person (unlike in the case of the anti-foreign bribery offence, which as discussed above at 11, is limited to an 'associate's' conduct);

(b) a 'legal burden of proof' could effectively operate like a reverse onus of proof in a context where a company has very limited visibility or control over the underlying conduct; and

(c) as outlined above at 32, in a context where there is no set or prescribed standard for the regulation of supply chains to prevent modern slavery incidents, the prosecution may be better placed to prove that reasonable steps were *not* taken in any particular case, noting that what may be 'reasonable' would be highly dependent on the circumstance of that case.

4.5 Self-reporting and cooperation: immunity, leniency and DPAs

37 There is substantial utility and public interest in encouraging companies to self-report modern slavery issues identified in their supply chains and cooperate with law enforcement and regulatory authorities. Companies should be appropriately incentivised to do so. However, the proposed criminal offence would, on its own, likely disincentivise self-reporting and cooperation if doing so could expose the company to criminal liability.

38 Consideration should therefore be given to:

(a) Safe harbour provisions or channels through which companies may self-report an identified incident of modern slavery to relevant authorities or regulators without facing criminal prosecution. This may be achieved, for example, through the provision of immunity from prosecution or other leniency arrangements that are sufficiently beneficial to encourage self-disclosure.

(b) An appropriately designed and implemented scheme for DPAs that can provide an alternative to corporate prosecution and encourages companies to cooperate with law enforcement and regulatory authorities. There are numerous potential benefits to establishing a DPA scheme in this context, including:

(i) DPA schemes have strong potential to increase self-reporting by companies and therefore bolster enforcement efforts by the AFP and CDPP by focusing on efficiency and cooperation. The increase in self-reporting has the potential to increase detection of modern slavery, and may alleviate present difficulties and delays in investigating and prosecuting modern slavery offences.

(ii) A DPA scheme that incentivises both self-reporting and cooperation has the potential to facilitate more expeditious resolutions of modern slavery investigations and prosecutions, while also facilitating remediation initiatives that directly benefit persons impacted by modern slavery.

(iii) DPAs also provide greater flexibility to develop alternative, tailored penalties for corporations that are beyond the reach of a sentencing court, for example, by providing for uplift to compliance programs (alongside the payment of penalties), or providing an avenue for remediation for victims of modern slavery, which can contribute to a broader compliance culture amongst companies.

4.6 Defence

39 First, similar to the anti-foreign bribery offence, it will be necessary to have detailed guidance material. Related to this, it will be essential to ensure that there is wide consultation, particularly with companies that may be captured under the proposed criminal offence, on any guidance material with respect to the 'reasonable steps' defence. While, as noted above at 16, we have an understanding of the overall types of measures that would likely be required to be in place, it will be important for the

guidance material on the content of this defence to be informed by what is reasonably practicable, particularly in light of the issues associated with the complexity of supply chain regulation.

40 As a minimum, we consider that any guidance material on the 'reasonable steps' defence should:

(a) accept that a company's compliance resources and efforts are proportionate to the risks faced including as established by risk assessments conducted;

(b) acknowledge that undertaking certain risk assessments and due diligence activities in particular jurisdictions may not be reasonably practicable (for example, because undertaking these activities may contravene local laws) or where these activities may pose additional risks to individuals in precarious or vulnerable circumstances;

(c) emphasise that exiting relationships with suppliers who are identified as 'high risk' should be an option of last resort, as this outcome may not advance the objectives of these reforms, which include encouraging supply chain transparency and uplifting standards;

(d) confirm that where it is not reasonably practicable for a company to conduct their own due diligence activities (for example, because they do not have the requisite expertise or are unable to travel to the relevant locations), they may rely upon third-party audits; and

(e) consideration could be given to specifying certain baseline standards which, if not met, would mean that a defence would be unlikely to be available.

41 More broadly, the construction of what constitutes 'reasonable steps' should be responsive to the practical issues and challenges identified in section 2 above, including companies' limited oversight of their supply chains beyond Tier 1.

4.7 Penalty

42 The consultation paper outlines three options for the proposed penalty, namely:

(a) 100,000 penalty units;

(b) three times the value of the benefit obtained from the offending conduct; or

(c) where the value of the benefit cannot be determined, 10% of the company's annual turnover during the relevant turnover period.

43 The maximum penalty for the failure to prevent foreign bribery in the Criminal Code is currently calculated based on the greatest of the above. However, unlike in the context of a foreign bribery offence, the nexus between a company's acts (or omissions) and the underlying criminal conduct could be far weaker, particularly in the case of suppliers beyond Tier 1. This may provide a basis for a lesser maximum penalty.

44 As noted above at 4.5, where companies self-report, there should be alternatives to criminal prosecution.

5 The effectiveness of a civil penalty regime instead of a criminal penalty regime

45 As outlined above in section 3, a mandatory due diligence obligation that imposes civil (rather than criminal) liability for non-compliance could effectively achieve the Government's intended policy objectives, while also giving rise to fewer of the concerns identified above in section 2.

46 It is important to recall that in the McMillan review, the introduction of a 'duty to prevent' modern slavery obligation in the MSA was considered, before being rejected. It was considered that the next step, after introducing a reporting obligation, would be to introduce a mandatory due diligence

obligation, strengthened reporting requirements, and compliance oversight. Indeed, it was noted that '[s]ubstantial changes of that kind should be bedded down before additional duties are introduced.'[3]

47 This logic still holds today, as companies continue to grapple with the complex realities and challenges involved in effective modern slavery risk management in a supply chain, and stand to benefit from the types of learning, capability building, and uplifted expectations of conduct that only comes when companies are encouraged to be transparent about how to meet these challenges.

48 There is a real risk that the proposed criminal offence may have the opposite effect, particularly if it encourages companies to divest from higher-risk suppliers or jurisdictions rather than engage, which may ultimately mean that those conditions that may be conducive to modern slavery remain unchanged.

[3] McMillan Review, p 72.

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