

ORGANISATION

Modern slavery risk oversight

Modern slavery can occur in every sector and industry and, like many human rights violations, is often 'hidden in plain sight'.¹ The International Labour Office, Walk Free Foundation and International Organization for Migration estimate there are approximately 40 million victims of modern slavery around the world.² Given the prevalence of modern slavery globally, it is highly likely that Australian businesses are exposed to modern slavery risks.

To address this global human rights issue, the Australian Government passed the *Modern Slavery Act 2018 (Cth)* (Act), which entered into force on 1 January 2019.

The new law requires Australian businesses to provide a statement on modern slavery risks in their operations and supply chains and take steps to address these risks.

Importantly, directors are required to approve the statement, and so directors must educate themselves about modern slavery and what is required of them and their entity under the Act.

This tool summarises the legislative framework for directors and the questions are designed to provide practical guidance to assist directors in their oversight role of modern slavery risks in their operations and supply chains.

The AICD encourages directors and entities to promote ethical business practices and eradicate modern slavery in their operations and supply chains. We suggest that directors use these questions in their engagement with management and as a point of reference when reviewing and evaluating their entity's annual modern slavery statement.

¹ Joint Standing Committee on Foreign Affairs, Defence and Trade, 2017, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia*, December, Parliament of the Commonwealth of Australia, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Final_report (accessed 17 December 2020).

² International Labour Office, Walk Free Foundation and International Organization for Migration, 2017, *Global estimates of modern slavery: Forced labour and forced marriage*, ILO Publications, https://www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm (accessed 4 October 2019).

Legislative framework

What is modern slavery?

Modern slavery includes trafficking in persons, slavery, slavery-like practices (including forced labour and forced marriage) and the worst forms of child labour (including using children for prostitution or hazardous work).

The Australian Government's Modern Slavery Business Engagement Unit notes that "the term modern slavery is used to describe situations where threats, coercion or deception are used to exploit victims and undermine or deprive them of their freedom."³

Although illegal and harmful, modern slavery does not include practices like substandard working conditions or underpayment of workers.

Entities required to report

The Act requires all entities that are based or operating in Australia, which have annual consolidated revenue of at least \$100 million, to report annually on their modern slavery risks in their global operations and supply chains. It applies to a wide range of entity types, including individuals, companies, superannuation funds, not-for-profit entities and charities.

The Act also allows entities that are not legally required to report to voluntarily prepare a statement.

Mandatory reporting requirements

Section 16 of the Act sets out the following seven mandatory criteria for the content of modern slavery statements:

1. The identity of the reporting entity
2. The entity's structure, operations and supply chain
3. Risks of modern slavery practices in the entity's operations and supply chain and any entities owned or controlled by the reporting entity
4. Actions taken to assess and address modern slavery risks, including due diligence and remediation processes
5. How the entity assesses the effectiveness of its actions
6. The process of consultation with entities that the entity owns or controls
7. Any other information considered relevant

The UK has led the way in terms of legislation to address modern slavery risks in entity operations and supply chains. In many ways, the Australian regime reflects the UK Modern Slavery Act 2015 and so it is useful to look to the UK for examples of good practice.

In 2018, the Business & Human Rights Resource Centre⁴ highlighted the following entities as having prepared standout modern slavery statements:

- Marks & Spencer⁵
- British American Tobacco⁷
- Diageo⁶
- Burberry⁸

³ Modern Slavery Business Engagement Unit, 2019, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*, Australian Government, 26 September, p 8, <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>, (accessed 8 October 2019).

⁴ Business & Human Rights Resource Centre, 2018, *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action*, <https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Briefing%202018.pdf>, (accessed 8 October 2019).

⁵ Marks & Spencer Modern Slavery Statement 2017/2018, <https://corporate.marksandspencer.com/documents/plan-a-our-approach/mns-modern-slavery-statement-june2018.pdf> (accessed 17 December 2020).

⁶ Modern Slavery Act Statement for the Financial Year ended 30 June 2018, Diageo, https://www.diageo.com/PR1346/aws/media/7282/74125_diageo_modern_slavery_act_2018-12-21_jy.pdf, (accessed 8 October 2019).

⁷ Modern Slavery Act Statement 2017, British American Tobacco, <https://www.modernslaveryregistry.org/companies/7105-british-american-tobacco-plc/statements/26778>, (accessed 8 October 2019).

⁸ Modern Slavery Act 2015 and Transparency in Supply Chains Act of 2010, Burberry Group PLC Statement, <https://www.modernslaveryregistry.org/companies/7127-burberry-group-plc/statements/27609>, (accessed 8 October 2019).

No penalties for now

No penalties exist in the legislation for non-compliance with the Act. However, to strengthen compliance rates, the Minister for Home Affairs can send an entity a ‘please explain’ request if they fail to report. Further, if the Minister considers an entity has failed to comply with the requirements, they may publicly name the entity.

The need for penalties will be considered again as part of a three-year review of the legislation.

Timelines for reporting

Statements must be submitted annually, encouraging entities to continually assess their modern slavery risks and improve their responses and actions over time. Deadlines for the first reporting period are:

Reporting period	First reporting period	Due date for statement
1 July to 30 June	1 July 2019 to 30 June 2020	No later than 30 March 2021*
1 January to 31 December	1 January 2020 to 31 December 2020	No later than 30 June 2021
1 April to 31 March	1 April 2019 to 31 March 2020	No later than 31 December 2020*

* Due to the COVID-19 pandemic the Federal Government has extended the reporting deadline by three months.

Board approval required

Statements must be approved by the principal governing body of the reporting entity (the board, in most cases) and signed by a member of that body (a director).

Directors must also ensure that their entity’s statement is provided to the Australian Government for publication.

What is the status of the NSW Modern Slavery 2018 Act?

The NSW *Modern Slavery Act 2018* (NSW Act) is currently on hold.

The NSW Government has committed to harmonising the NSW Act with the Commonwealth Act, though with the NSW Government view that the reporting threshold should be \$50 million consolidated revenue (rather than the \$100 million requirement under the Act). The NSW Government has also stated that the NSW Act should commence on or before 1 January 2021.

It is unclear whether the Commonwealth will have the appetite for adopting a lower threshold for reporting, and how long the NSW-Commonwealth discussions are likely to take. It is unclear if and when the NSW Act will commence.

Further guidance and online register

The Department of Home Affairs has published a range of guidance material, including a comprehensive note titled *Guidance for Reporting Entities*, a fact sheet on good practice trends and areas for improvement identified from modern slavery statements that have already been submitted, and supplementary guidance on the consultation requirements.

While non-binding, these materials will be used as yardsticks for assessing modern slavery statements going forward. These guidance materials can be found [here](#).⁹

The Department’s online register for modern slavery statements can be found [here](#).¹⁰ The website houses modern slavery statements provided by entities reporting under the Act.

The AICD, in conjunction with Herbert Smith Freehills, has also published the director tool *Signing off on modern slavery statements*.

⁹ Australian Government Department of Home Affairs, 2020, *Modern slavery*, [website], <https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/modern-slavery>, (accessed 17 December 2020).

¹⁰ Australian Government Department of Home Affairs, 2020, *Online Register for Modern Slavery Statements*, [website], <https://modernslaveryregister.gov.au/>, (accessed 11 December 2020).

Insights from experts

Education is crucial

Louise Nicholls, former head of human rights, food sourcing and sustainability at Marks & Spencer (UK), encourages directors to take steps to embed the responsibility to protect human rights into the entity's culture and practices. Ms Nicholls encourages boards to "ensure they and key personnel have sufficient knowledge about how modern slavery might manifest in their sector and encourage staff to talk openly about human rights issues".¹¹

Acknowledge that human rights is not a zero-sum game

Richard Boele and Meg Brodie, from KPMG Banarra, note that while directors are wrestling with the organisational tensions that arise as a consequence of the Act – compliance versus strategy, risk versus opportunity, profit versus trust – conversations with directors revealed that these are not 'either or' propositions.¹² They argue that profit and growth can only be secured with stakeholder and community acceptance of an entity. This means businesses need a systematic and defensible approach to dealing with the risks of negatively impacting people.

To do this, they encourage directors to frame questions of management with an eye to creating opportunity. Mr Boele notes that some directors and entities are taking "opportunities to create supply chain efficiencies, deeper supplier relationships and to cultivate community partnerships. Others are already creating differentiated products in the market using technology to assure quality, origin and the absence of harm to people".¹³

Focus on accountability for non-financial risks

Mr Boele and Dr Brodie suggest that directors need to look at modern slavery as a non-financial risk and develop their accountability for the associated risks. Mandatory modern slavery reporting crystallises evolving expectations that directors should respond to community expectations and take responsibility to respect human rights.

Entities must exercise due diligence to identify where people are at risk of harm and take action to prevent or remediate it. Directors should hold management to account for undertaking thorough due diligence.

Collaboration is key

As set out in the guidance for reporting entities, collaboration with civil society entities such as non-government entities,¹⁴ workers and their representatives can also be an important way to strengthen an organisation's response to modern slavery. For example, engaging with NGOs may enable an organisation to access expertise on critical issues such as child protection, country or sector-specific risks and context-specific sensitivities.

Ms Nicholls emphasises that "civil society can be a great ally in supporting victims to raise concerns and in the rehabilitation needed for survivors".¹⁴

¹¹ K Walters, 2019, "What organisations can do to tackle modern slavery", *Company Director*, September, AICD, <https://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-editions/september/modern-slavery>, (accessed 8 October 2019).

¹² R Boele and M Brodie, 2019, "What we've learned talking to 150 directors about trust and modern slavery", *Across the Board*, 18 February, KPMG, p 3, <https://assets.kpmg/content/dam/kpmg/au/pdf/2019/across-the-board-february-2019.pdf>, (accessed 10 October 2019).

¹³ R Boele, 2019, "Modern Slavery reporting requirements", *Essential Director Update 2019 Handbook*, AICD, p 35, <https://aicd.companydirectors.com.au/-/media/cd2/resources/events/essential-director-update/2019/pdf/07346-6-edu-2019-handbook-a4sp-4a.ashx>, (accessed 8 October 2019).

¹⁴ Modern Slavery Business Engagement Unit, Australian Government, 2019, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*, 26 September, p 87, <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>, (accessed 8 October 2019).

¹⁵ K Walters, 2019, op cit.

Practical questions for directors

The following questions are drawn from *Modern Slavery Risks, Rights & Responsibilities*¹⁶, an Australian Council of Superannuation Investors report prepared by KPMG, and are designed to provide practical guidance for directors in exercising their oversight role of modern slavery risks.

These questions may be useful for directors to ask of management, and as a point of reference when reviewing and evaluating their entity's annual modern slavery statement.

Understanding how modern slavery risks present in operations and supply chains

- Do you understand what behaviours and practices constitute modern slavery and likely risk factors for the business and sector?
- Has the board included modern slavery risks on its risk register?
- Has the board established accountabilities for identification of modern slavery risk (that is, allocated lead responsibility at operational and senior management levels, and equipped staff for those roles)?
- Has the entity collaborated with experts, civil society, victim advocates or other relevant stakeholders to assist with better identification of modern slavery risks?

Assessing an entity's existing supply chain

- Is the entity able to report at a group-level on behalf of all subsidiaries and across all geographies?
- Does the board receive regular updates on changes to the structure, operations and supply chain of the entity?
- Has the board determined its approach to publicly releasing detailed information about its operations and supply chain?

Designing and implementing a framework to address modern slavery risks

- Has the board established senior executive key performance indicators (KPIs) for managing modern slavery risk?
- Does the entity express its commitment to protect human rights, including modern slavery, through a board-approved public statement of policy?
- Does the board receive periodic reports on modern slavery risk? Is the risk committee (or equivalent) undertaking the more granular work associated with addressing modern slavery risks and addressing risks identified on the risk register?
- Has the board introduced assurance measures for reporting on modern slavery due diligence?
- Has the entity established a framework for what to do when modern slavery is identified in its supply chain?
- Has appropriate staff training and education been put in place to ensure the entity is able to implement its modern slavery obligations effectively?

Monitoring and evaluating the effectiveness of the entity's actions

- Does the board monitor and review its human rights policies and their implementation?
- Has the entity engaged with organisations that have in place more mature practices or have implemented modern slavery regulatory obligations in other jurisdictions?
- Have the entity's management systems and controls uncovered any instances of modern slavery and, if not, are they robust enough?

¹⁶ Australian Council of Superannuation Investors, 2019, *Modern Slavery Risks, Rights & Responsibilities: A guide for companies and investors*, February, <https://acsi.org.au/research-reports/modern-slavery-risks-rights-and-responsibilities/>, (accessed 17 December 2020).

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