Submission No 53

INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

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Submission to the Legislative Council Standing Committee on Social Issues, Parliament of NSW: Inquiry into the Modern Slavery Act 2018 and associated matters

We welcome the opportunity to make a submission the Standing Committee on Social Issues regarding the NSW Modern Slavery Act 2018.

Our submission addresses the following issues from the Inquiry's Terms of Reference:

- (a) the operability of the proposed anti-slavery scheme;
- (b) the effect of the anti-slavery scheme of business, including the supply chain reporting obligations under s.24 of the NSW Act;
- (g) whether the passage of the Modern Slavery Act 2018 (Cth) renders parts of all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps;
- (h) the preferred course of action to address the matters identified; and
- (i) any other related matters.

(a) The operability of the proposed anti-slavery scheme

We support the NSW Modern Slavery Act and its reporting scheme. The NSW Act applies to relevant entities with a turnover of not less than $50m while the Cth Modern Slavery Act (Cth Act) applies to relevant entities with an annual consolidated revenue of $100m or above. We understand that it is the intent of the NSW Act to apply to those entities with an annual turnover of between $50m-$100m, after which the Cth Act will apply. We recommend that the NSW Act clarify its maximum threshold and also specify that entities can voluntarily report to the NSW scheme even if they fall under the minimum threshold.

(b) The effect of the anti-slavery scheme of business, including the supply chain reporting obligations under s.24 of the NSW Act

Increased public disclosure of human rights standards in corporate supply chains has become an expectation of companies. What began primarily as a social expectation expressed by investors and consumers is slowly becoming a legal norm in multiple jurisdictions around the world. Led by the development of new legal social disclosure requirements in places such as the UK, the US France, the Netherlands and now Australia, companies are now required to be more transparent about the working conditions in their supply chains. This

regulatory strategy reflects a growing consensus that both government and business have a role to play in addressing the human rights impacts of

business. Since 2010, at least 11 national or regional laws have been approved, or are under consideration that require companies to report on their supply chain practices.[1] The NSW Act with its breadth and enforceability provisions stands out as a leading example of laws to address modern slavery.

The assumption behind the development of the NSW Act is that transparency gained from disclosure will incentivise corporate attention to modern slavery risks by providing greater visibility over their operations and supply chain. The aim of the NSW Act is to provide stakeholders with more information about what both government and businesses are doing to address this serious human rights challenge. The mandated reporting requirements provide stakeholders with a platform to facilitate further discussion and engagement to reduce modern slavery risks. It also helps establish a level playing field for companies so that all are undertaking the same reporting efforts.

Under s.24(5b), "due diligence" processes in relation to modern slavery are mentioned. Human rights due diligence is a relatively novel concept, which is still being institutionalised in national and international regulatory frameworks. This means that producing guidance for companies on what constitutes best practice is important and should not be left to the discretion of business. Minimum standards, and a regulatory infrastructure capable of holding companies accountable with respect to their adherence to these standards, is an essential element of any effective and legitimate public human rights due diligence regulatory initiative. Such standards will most useful if they are industry or sector specific and thus concretely address industry-specific human rights challenges. Industry-specific minimum standards may be set by the Government, but they may also be usefully developed by way of multi-stakeholder initiatives.

The development of minimum standards to define due diligence limits the ability of each business entity to selectively interpret and apply human rights standards. Any approach that is overly individualistic makes measuring and comparing the human rights performance of companies (even within the same industry sector) impossible. As a consequence, consumers or investors cannot reward or punish companies based on their human right performance against a commonly accepted standard, and it renders human rights irrelevant for consumers' purchasing and investors' investment decisions. The Government needs to work in collaboration with civil society and business to consider, and develop guidance on, not only what constitutes good practice with respect to

[1] *Tariff Act of 1930*, 19 USC § 1654 (US); *Federal Acquisitions Regulation (FAR)* 48 CFR 1, 22.17 (US), *Child Labour Due Diligence Law 2017* (Netherlands); *Modern Slavery Act 2015* (UK), s 54; *Duty of Vigilance Law 2017* (France); *Dodd-Frank Wall Street Reform and Consumer Protection Act* 12 USC § 1502 ('Dodd-Frank Act'); *Transparency in Supply Chains Act of 2010*, Cal Civil Code §1714.43; *Conflict Minerals Regulation 2021* (EU), *Responsible Business Initiative* (Switzerland), *Modern Slavery Act 2018* (Cth); *Modern Slavery Act 2018* (NSW).

human rights due diligence, but what does or sould constitute minimum standards necessary to ensure that due diligence is undertaken in a way that is capable of effecting positive and meaningful change.

(g) Whether the passage of the Modern Slavery Act 2018 (Cth) renders parts of all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps

The NSW Act stands in contrast to the Cth Act which is purely a supply chains transparency law. The breadth of the NSW Act, the establishment of the Anti-Slavery Commissioner and the inclusion of penalties are all advances on the Cth Act. The Cth Act applies to relevant entities with an annual consolidated revenue of $100m and above. We understand the NSW Act will apply to entities with a turnover of between $50m-100m and complements the Cth Act.

(h) The preferred course of action to address the matters identified

We suggest:

- clarifying that the NSW Act reporting requirement applies to relevant entities that are in the threshold between $50m-$100m
- -adopting the terminology from the Cth Act to define the relevant financial threshold i.e. annual consolidated revenue rather than turnover.
- clearly define due diligence standards and expectations under the NSW Act, based on multistakeholder consultation.

(i) Any other related matters.

The **Public Register (s26)** identifies any commercial organisation that has disclosed in a modern slavery statement that its goods or services may be at risk of modern slavery, yet it is does not include a list of all commercial organisations that are *required* to report. This absence hampers the potential effectiveness of the NSW Act, as “naming and shaming” is a key enforcement mechanism of the Act. The absence of such a list has also been identified as one of the shortcomings of the UK Modern Slavery Act. The UK House of Commons Committee of Public Accounts recommended in its 2018 report, ‘Reducing Modern Slavery’, that the Government ‘should consider publishing itself a list of companies who have complied and not complied with the legislation, rather than relying on NGOs to police the system.’ The UK Anti-Slavery Commissioner has also led calls for the development of such a list. The Australian Parliamentary Inquiry also recommended the provision of a list of entities that are required to report.

Since 2004, Brazil has published a ‘dirty list’ disclosing companies that have engaged in illicit labour practices, who are then banned from accessing any public financing. The Brazilian approach combines public and private regulatory

mechanisms to reduce modern slavery and recognises that the government must make a significant resource commitment in order for such strategies to have a chance of success so the so-called 'dirty list' is part of a more holistic approach to addressing modern slavery. Commercial organisations that fail to report under the NSW Act should be made public by the state Government, and should be ineligible to receive NSW Government contacts.

Penalties are an important element of the NSW Act (s24(1)(6). The Cth Act does not impose penalties on companies for failing to lodge a report or for lodging an incomplete report. Instead, enforcement relies on civil society and consumers. The idea is that mandatory reporting enables civil society to expose poorly-performing companies, prompting a consumer backlash. On the flipside, reporting provides companies with an opportunity to showcase their social performance and enhance their reputation. This reliance on non-state actors for soft enforcement is not without issues.

The British counterpart of Australia's Cth act was introduced in 2015 and also relies on a soft enforcement mechanism. In 2017, 43 per cent of companies on the London Stock Exchange did not bother to submit a report on modern slavery, nor did 42 per cent of the top 100 companies that were awarded government contracts. Evidently, the lack of hard sanctions has resulted in many businesses considering compliance with this law as something discretionary rather than obligatory. They had no fear of a consumer backlash, even if that consumer was the government itself.

Review participation levels and the standards of reporting within three years of the establishment of the legislation. If the NSW Government's proposed approach to ensuring entities participate and address modern slavery ultimately results in a tick-the-box approach to reporting that is 'all form and no substance' then the Government should be prepared to amend the law to formally stipulate due diligence requirements.

Thank you for your consideration of this submission.

Sincerely,

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