Reporting for Action

Submission of the NSW Anti-slavery Commissioner to the Review of the *Modern Slavery Act 2018* (Cth)

Discussion Paper #003, December 2022

Office of the NSW Anti-slavery Commissioner

Acknowledgement of Country

The Office of NSW Anti-slavery Commissioner acknowledges that Aboriginal and Torres Strait Islander peoples are the first peoples and traditional custodians of Australia, and the oldest continuing culture in human history.

We pay respect to elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to country and acknowledge their continuing custodianship of the land, seas and sky.

We acknowledge the ongoing stewardship of Aboriginal and Torres Strait Islander peoples, and the important contribution they make to our communities and economies.

We acknowledge the enduring legacies of coerced labour, exploitation and practices today described as modern slavery, on Aboriginal and Torres Strait Islander peoples.

We reflect on the continuing impact of government policies and practices and recognise our responsibility to work together with and for Aboriginal and Torres Strait Islander peoples, families and communities, towards improved economic, social and cultural outcomes.

Artwork: ‘Regeneration’ by Josie Rose 2020

Table of Contents

Table of Figures

Summary of Recommendations

1. To realise the promise of the transparency framework underpinning the *Modern Slavery Act 2018* (Cth), **amend the Act to creative an effective system of administrative supervision**, complementary to judicial enforcement options, in line with practice in peer OECD countries and Australia's commitments under the UN Guiding Principles on Business and Human Rights (UNGPs).

2. Amend the Act to:

    - **extend due diligence reporting obligations** to those entities that either 1) meet the existing revenue threshold, or 2) meet a lower revenue threshold *and* are connected to designated high-risk products, locations, suppliers or supply-chains
    - **clarify the relationship between periodic reporting obligations** (relating to due diligence and remediation of modern slavery *risks*) **and immediate reporting obligations** (for modern slavery *cases*).

3. **Adopt secondary legislation and reporting arrangements to clarify** that **existing due diligence expectations** under the Act reflect the standards of conduct set out in the UNGPs and relevant OECD guidance (including relevant sectoral guidance). This should include:

    - an explicit clarification that reporting entities' due diligence should respond to modern slavery **risks to people**, while also acknowledging that due diligence expectations reflect an entity's capacity to create and use leverage
    - specification of **hallmarks of good due diligence** in six areas: 1) governance, 2) stakeholder engagement, 3) risk identification and prioritisation, 4) acting on identified risks, 5) monitoring and evaluating effectiveness in addressing risks, 6) providing and enabling remedy.
    - providing a **standardised reporting form** requiring reporting against these hallmarks and defined outcome indicators, in order to facilitate third party use of reported data, longitudinal and cohort-based risk analysis, and efficient supervisory resource allocation.

4. **Create an independent statutory office of federal Anti-Slavery Commissioner** with responsibility for oversight of the Act's reporting regime and for supporting the development of modern slavery risk management capabilities by all reporting entities. The Anti-Slavery Commissioner should be empowered to:

    - **designate high risk products, locations, suppliers or supply-chains** (triggering extension of reporting obligations to the lower revenue threshold cohort)
    - **undertake inquiries** into specific cases, reporting entities or sectors, and where appropriate refer matters to relevant enforcement bodies
    - **issue codes of practice** for implementation of the Act in specific sectors
    - **receive complaints and reports** of non-compliance

- **issue administrative sanctions** such as infringement notices, enforceable undertakings, license restrictions or conditions relating to an entity's participation in public procurement, awards or grants schemes
- designate a reporting entity for access to **a limited-time lighter-touch reporting and supervisory programme**, based on sustained demonstration of the hallmarks of good due diligence (including remedy)
- issue **notices rewarding early disclosure of actual modern slavery harms** by granting the disclosing entity access to a short remediation period during which to provide or enable remedy and address related modern slavery risks, while penalising entities that do not disclose harms within a designated short period
- develop **training and advisory support** offerings to enhance reporting entities' modern slavery risk management capabilities (including on remedy).

5. Amend the *Public Governance, Performance and Accountability Act 2013* (Cth) and other legislation to exclude actors causing or contributing to modern slavery, or failing to meet defined reporting standards, from **Commonwealth procurement, investment and grant-making**; and empower the Commonwealth **Auditor-General** to conduct risk-based modern slavery audits of covered entities.

Introduction

1. In 2018, New South Wales Parliament passed the *Modern Slavery Act 2018* (NSW) ('the NSW Act'). The NSW Act came into effect in 2022 following amendments in 2021.[1] The NSW Act creates a new, independent statutory office – the role of Anti-slavery Commissioner – which I am now privileged to occupy. This submission to the Review of the *Modern Slavery Act 2018* (Cth) ('the Cth Act' or 'the Act') is offered based on my early experience in the role, since I took office on 1 August 2022, and two decades' prior experience working on these and related issues. It is important to note that as an independent statutory office holder, I do not speak for the New South Wales Government.

2. The position of NSW Anti-slavery Commissioner is the first such role in Australia, and only the second in the world (after the United Kingdom). The NSW Act gives the NSW Anti-slavery Commissioner a range of functions, which together position the Commissioner to work to address the system failure that modern slavery represents. There is, in fact, growing evidence that modern slavery leaves us all worse off.[2] Yet in the short run, anti-slavery investments – including in supply-chain risk management – are hard to distinguish from costs.

3. As NSW Anti-slavery Commissioner, part of my role involves articulating how efforts to upgrade supply-chain modern slavery risk management capabilities can pay off over time. This requires encouraging individual firms and organisations to understand modern slavery efforts in systemic terms: not just as a narrow compliance exercise – reporting for reporting's sake – but as a contribution to a larger process of change leading to better system-wide outcomes – *reporting for action*.

4. Reporting entities are more likely to adopt this perspective if regulatory arrangements treat reporting not as an end in itself, but as a means to reduce modern slavery. That requires clear thinking about how the transparency and access to information achieved through disclosure translates into effective collaborative action reducing modern slavery. What is the path that leads from reporting to action?

5. The submission begins by exploring the answer to that question. It suggests that the "transparency framework" approach that has underpinned implementation of the Cth Act to date has assumed the availability and effectiveness of two different sources of pressure driving a "race to the top"[3] amongst reporting entities: external market forces (notably changed procurement and investment behaviours); and internal pressures within reporting entities.[4] Has this theory been borne out in practice? Has it led to changed social outcomes – reduced modern slavery risks to people? The danger is that, as International Justice Mission Australia concluded in its recent submission to this Review

process, “To date, transparency has sparked disclosure with little action towards meaningful change.”[5]

6. The submission then moves on to consider what other regulatory levers might be available to ensure reporting translates into action. These include not only judicial enforcement through civil litigation, but also mechanisms such as audit, worker voice and administrative supervision. The submission focuses in particular on the potential of administrative supervision to strengthen the impact of the Act, for several reasons.

7. First, because while there has been significant attention to civil liability and judicial remedies in some submissions to the Review process, there appears to have been less focus on administrative supervision and enforcement.[6] Analysis from the United Nations Office of the High Commissioner for Human Rights suggests that administrative supervision and judicial remedy work as powerful complements to promote effective human rights due diligence.[7] Thus attention to civil liability and judicial remedy as methods for strengthening enforcement of the Act should be accompanied by careful consideration of administrative supervision options.

8. Second, because the experience in New South Wales may be particularly useful to consider, since the NSW Act provides for possibly the most robust administrative supervision of modern slavery-specific due diligence obligations in any jurisdiction worldwide. This includes:

- a legal duty on government entities and local councils with, collectively, around AUD 50 billion in annual procurement to take reasonable steps not to buy products of modern slavery
- oversight, recommendation and reporting powers for an independent Anti-slavery Commissioner
- a public register identifying non-compliant entities
- independent modern slavery audits by the NSW Auditor-General
- consultation amongst the NSW Procurement Board, Anti-slavery Commissioner and Auditor-General to ensure the effectiveness of modern slavery due diligence
- the creation of a parliamentary committee with formal investigative powers.[8]

9. Third, the submission focuses on administrative supervision because while stronger judicial enforcement may be desirable, it may not be easy to achieve in the near future in Australia. Strengthening administrative supervision of the Act may offer a more immediate way to strengthen the impact of the Act than imposing a new statutory “duty to prevent modern slavery”,[9] absent extensive further consultation. The introduction of such a new duty would require careful consideration of:

- what new obligation(s) of conduct the duty would introduce beyond what is already required not only under the *Modern Slavery Act 2018* (Cth), but also under:
    - corporate law (including directors' and officers' duties),
    - consumer protection law (including obligations regarding misleading and deceptive conduct[10]), and
    - Commonwealth and state criminal law (including where criminal law creates ancillary liability for corporations, as it may in relation to modern slavery offences under the *Commonwealth Criminal Code* Parts 2.4 and 2.5)

- how the new duty would interact with established Australian jurisprudence on attribution (including through omission) and the international law categories of business "causation", "contribution" and "linkage" to human rights harms. The Human Rights Law Centre proposes, for example, that "[w]here a failure to undertake due diligence *results* in modern slavery occurring, workers should also have a direct civil cause of action to pursue companies for compensation."[11] (emphasis added) This has potentially significant implications for value-chains across the Australian economy, and is likely to attract significant political debate. In the EU, for example, the question of whether civil liability should attach to the mere failure to conduct human rights due diligence, or also require the presence of causation or contribution (but not mere linkage) has become a central debate in the European Parliament's consideration of a Corporate Sustainability Due Diligence Directive.[12] The same issues would require extensive further consultation and deliberation in an Australian context before any new positive duty could be safely introduced. This implies the lapse of considerable further time before any such reforms take effect, or have impact. In the interim, administrative supervision may offer an important complementary path for achieving impact.

- not least, whether and how a shift from the existing approach to implementation to one based on civil liability and private litigation through the courts would disrupt the cross-party support that action on modern slavery has enjoyed in federal Parliament, and the support it has received from the Australian business community. The risks of such disruption will be greater if a new duty to prevent is introduced without a further round of consultation, given the limited Terms of Reference of this Review – and greater still if the duty is framed not only in terms of the duty to conduct due diligence for modern slavery risks but for broader human rights harms, as some submissions to this Review advocate.

10. Consideration of strengthened options for judicial enforcement of the Act – and the complex issues just identified – is certainly worthwhile. At the same time, it is also arguable that the legislation of a new "duty to prevent" would not so much fill a normative gap as sharpen and clarify an existing expectation. The Act, as legislated and implemented, already reflects an expectation of corporate due diligence to which actual and specific obligations of conduct already attach. Section 16 of the Act makes it mandatory for reporting entities to report on due diligence steps they have taken, and the effectiveness of those actions. The Explanatory Memorandum explicitly states that this mandatory requirement is based on the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs),[13] thereby creating an expectation that the standards of conduct set out in the UNGPs form the basis for the reporting obligation under section 16 of the Act. The official *Guidance to Business* published by the Australian Border Force reiterates this point and explains in detail what due diligence involves, providing copious further references to other important sources of guidance, notably the OECD *Guidelines for Multinational Enterprises* and related due diligence guidance by sector.[14] Together, those sources of guidance elaborate the "minimum standards of performance" that some commentators argue are missing from the Act.[15]

11. Whatever the ambiguity surrounding the status of the due diligence expectation created by the Act, it does seem clear that reporting entities are frequently *not* meeting the expectations captured in the UNGPs. Diverse evidence from the Australian Human Rights Institute, Human Rights Law Centre, Business and Human Rights Resource Centre, Walk Free, International Justice Mission Australia, Monash University Business School and other sources supports this conclusion.[16] There may therefore be a case for clarifying and strengthening the force with which the expectation is articulated. This could be achieved by incorporating these standards directly into Australian law, whether through a reference in primary legislation (i.e. amending the Act), or through the adoption of rules (as provided for by section 16A of the existing Act).

12. What this also suggests, however, is that the central gap in the implementation of the Act has not been a normative one, but rather a practical one: enforcement. The Act currently provides for a very limited system of administrative supervision, including registration of modern slavery statements issued by reporting entities, Ministerial prescription by legislative rules, and Ministerial letter-writing powers.[17] It does not provide for financial or administrative penalties, incentives or use regulatory levers to ensure reporting entities conduct effective modern slavery due diligence. Indeed, even the few available administrative supervision powers appear to have been wielded with the most feathery of light touches, with the Minister's letter-writing powers barely exercised, if at all.

13. This of course begs the question: how would the Act operate under the shadow of more robust administrative supervision? As the Australian Human Rights Commission notes in its submission to this Review process:

> "The key challenge that arises with the implementation of a due diligence model is the ability for effective implementation. A comparison between Australia's transparency model [in the Act] and the due diligence requirements proposed or in place around the world, suggests that functioning due diligence-based models are possible if introduced *together with sufficient structural oversight*. A due diligence model would have the best prospects for effective implementation if accompanied by increased investment in surrounding implementation and oversight structures and systems… This would allow for both the provision of guidance and support to businesses, and for the effective monitoring of compliance."[18] (emphasis added)

1. What turns reporting into effective action?

14. How can reporting drive effective action to reduce modern slavery? The Act is based on a "transparency framework" theory of change. The Explanatory Memorandum explains that:

> "Increasing transparency around modern slavery in operations and supply chains will drive businesses to improve their practices around identifying and responding to instances of modern slavery, and to risks of modern slavery."[19]

15. This approach assumes that improved access to market information facilitates corporate behavioural change through two vectors: 1) external market forces (information leads to changed preferences and behaviour from clients, end-user customers, and investors), and 2) internal pressure within reporting entities as they seek to promote good practice and reduce risk. In practice, however, each theoretical vector for pressure seems not to be operating effectively in relation to the Act.

16. First, market actors currently have only limited incentives to switch spending and investment based on modern slavery risks. And even where they are motivated to factor modern slavery concerns into decision-making, they have a difficult time accessing reliable, comparable and affordable modern slavery risk information at the firm level, and at scale. On its own, a pool of disclosed data does not necessarily lead to changes in market behaviour. The data needs to speak to issues that are relevant to market behaviour and be presented in a format that makes that information actionable, for example through inclusion in quant-based investment and portfolio analysis models.

17. The Modern Slavery Register created to hold Modern Slavery Statements lodged by reporting entities under the Act does little to meet this demand, for several reasons:

- the lack of a common reporting template makes the information held in the register non-comparable across reporting entities, and makes it difficult to find data relevant to market actors' decision-making
- the data contained in statements is not verified (and often not verifiable by market actors)
- the data is not made available in standard accessible, downloadable data formats such as .csv files, but instead must be laboriously extracted by hand or by natural language processing tools. This may be one reason why most of the analysis of Register data has been undertaken not by financial sector actors but by universities and civil society organisations.[20]

18. There is anecdotal data suggesting that some buyers and investors do rely on the Modern Slavery Statements in decision-making (though more in analysing specific investment opportunities than in quant-based strategies, which require access to a 'universal' pool of comparable data at firm level). But there is, as yet, no clear evidence that this leads to measurable movement of custom or capital towards firms adopting (and reporting) good modern slavery due diligence practice, and away from those disclosing poor practice or failing to disclose. The 'market forces vector' has not yet proven to translate reporting under the Act into action. This is not to say, however, that it could not. In order to do so, reporting arrangements, and the Register, would require significant reform to capture and share different types of information that are more useful to market actors.

19. This brings us to the second vector that the "transparency framework" model assumes will translate disclosed data into effective anti-slavery action – internal pressure within reporting entities. Within companies, the annual reporting requirement can serve as a gateway to internal discussion that can produce significant cultural and business-level change. The requirement within the Act that Modern Slavery Statements must be signed off by the Board or principal governing body (section 16(2)) is critical to this outcome, and should be retained.

20. Yet the evidence also suggests that since government treats reporting under the Act largely as an end in itself, reporting entities often treat reporting as a tick-and-flick compliance exercise. The reporting process does not necessarily occasion a discussion within the reporting entity about the changes in business conduct needed to address linkages to modern slavery risks and harms. In fact, modern slavery statements appear frequently to be treated not as a trigger for internal reflection and change, but rather as an opportunity for external promotion and marketing.

21. While some of these glossy modern slavery statements highlight instances in which the reporting entity has engaged with and assisted survivors of modern slavery, there is as yet no substantial evidence that the Act has produced any measurable improvement in vulnerability to modern slavery in any identifiable

location or supply-chain, nor any significant remediation at scale of modern slavery harms. This is not ultimately surprising, given that, according to the Human Rights Law Centre and others, at most a third of reporting entities reviewed demonstrated, in the modern slavery statements, "some form of effective action to address modern slavery risks, improve working conditions in their supply chains, or tackle root causes".[21]

22. The absence of mandated risk or outcome indicators against which entities must report may contribute to this result. The mandatory reporting criteria in section 16 of the Act are largely process-oriented. Section 16(1)(d) leaves reporting entities significant discretion in how they describe and report their due diligence activities. The *Guidance for Reporting Entities* provides some parameters, but falls short of establishing a common reporting template or identifying risk or outcome indicators against which entities should report. This arguably impedes not only efforts to understand system-level impacts of reporting (that is, across multiple reporting entities, even those in the same supply-chain), but also efforts by individual reporting entities to understand how they could improve their own practices to make a greater contribution to the desired outcome (reduced modern slavery risk). Lacking the ability to demonstrate how their own organisation compares to others or even how it has improved over time, those who might champion change within reporting entities find it harder to make the case to senior executives for resources and attention. And this may also help explain why, as the Human Rights Law Centre summarises,

> "there is little indication that the [Act] is driving action in the areas that matter most for addressing modern slavery, such as changes to wages and purchasing practices, tackling recruitment fees, due diligence and consultation with workers and their representatives."[22]

Reporting entities may simply be unable to identify which changes in practice are more likely to be effective in reducing modern slavery risks, at the system level.

23. Australia is not the first jurisdiction in which the adoption of disclosure-based legislation, with only minimal enforcement and supervision mechanisms, has produced such limited outcomes. A similar pattern has been seen in California and the UK, and is one reason why the trend in broader due diligence regulation is away from reliance on self-disclosure towards the involvement of independent actors in assurance, verification and state-based supervision.

24. These actors come in many forms, including: courts and private litigants; workers; independent auditors; and dedicated administrative supervisors. Contemporary due diligence frameworks often combine several of these forms of oversight:

- In NSW, government buyers' and local councils' efforts to remove products of modern slavery from their supply-chains are supervised by the government's own Procurement Board, the independent Anti-slavery Commissioner, and the independent Auditor-General. The NSW Parliament's Modern Slavery Committee may also play a role through its investigative and inquiry powers.[23]
- In the European Union, law makers are currently considering proposals for the adoption of a mandatory environmental and human rights due diligence directive that would create corporate due diligence obligations supervised in different ways by independent auditors and administrative actors at both the member state and European levels. In the related (but separate) EU Corporate Sustainability Reporting Directive (CSRD), over 50,000 entities will be required from 2024 to publish mandated, audited sustainability information (including information relating to human rights and social standards, including forced labour).
- Dutch, French, German, New Zealand and Norwegian human rights and labour due diligence frameworks all contemplate administrative authorities' involvement in supervising aspects of the regime, in some cases alongside judicial enforcement mechanisms.[24]
- There is also growing support for formalising the role of workers in verifying due diligence and enforcing labour standards.[25] A number of important initiatives have emerged that allow workers to contribute directly to evaluation of organisations' contractual performance and compliance with labour standards including, here in Australia, the Cleaning Accountability Framework.

25. The complementarity of administrative supervision and judicial enforcement in the discharge of the State's duty to protect human rights is plain in the UNGPs, which were welcomed by the UN General Assembly (including Australia). The UNGPs stress both the State's preventive role in enforcing laws that require businesses to respect human rights (in Guiding Principles 1 and 3) and the need for the State to ensure appropriate access to remedy where harm has occurred, including through judicial proceedings (in Guiding Principles 25 and 26). The complementarity is also emphasised in relevant guidance from the UN High Commissioner for Human Rights.[26]

26. Courts are likely to play a critical role in enforcing any effective due diligence framework. Several important proposals for strengthening the role that courts can play in enforcing the Act have been presented, notably by the Human Rights Law Centre and the Australian Human Rights Commission. Yet it is also important to note the limits of judicial enforcement in this sector, and how complementary administrative supervision might help address them. Table 1 below offers such an analysis in summary form.

Figure 1 - How administrative supervision can complement judicial enforcement[27]

Issue	Limits of judicial enforcement (civil liability model)	How complementary administrative supervision can address this
Risks to business v. risks to people	Responding to liability exposure, businesses may choose (or be pushed by insurers) to allocate risk management resources based on risks posed to business, not risks to people. Issues may be deprioritised for attention if their scope for leading to litigation is low, even though risks to people (or even harms) are salient.	An independent administrative supervisor can allocate enforcement resources based on an assessment of risk at the system-level. This can, for example, take the form of announcing particular sectors or value chains at high modern slavery risk, and signalling to regulated entities that greater administrative scrutiny will be paid to entities linked to those risks. This could include announcing particular sectors as focuses for scrutiny in a given year (a technique used by the Cth Fair Work Ombudsman). This will help guide reporting entities to allocate risk management resources based on risks to people, independent of their assessments of risks to their business.
Disincentivise disclosure	Businesses may conclude that acknowledging modern slavery risks and cases increases their exposure to liability, and consequently discourage internal acknowledgement or external disclosure of such risks. This works against the policy goal of active and ongoing risk management.	Administrative supervision can foster disclosure by creating positive incentives for early disclosure of risk – such as a defined period of amnesty in which to address risk or remedy harm – while heavily sanctioning non-disclosure. This is the approach sometimes taken, for example, in the consumer protection field.[28]
Specialist expertise on HRDD	Judicial mechanisms currently have limited in-house expertise on due diligence in the business and human rights context.	A central administrative supervisory body can develop and deploy deep expertise
Stochastic interpretation	Regulated entities have to wait until there is a judicial decision to understand what any given statutory provision means, which creates ongoing uncertainty and retards investment in system change.	An administrative supervisor can proactively issue authoritative interpretations and implementation guidance, and can adapt these as market expectations evolve. This reduces helps accelerate systemic change and helps ensure fitness for purpose.
Access to resources	Reliance on litigation for statutory enforcement risks tilting the board towards corporations and others with deep pockets: they can use their resources to avoid litigation, or settle, where they anticipate an unfavourable outcome, while less well resourced actors (such as workers and victims) will find it harder to bring and sustain litigation.	An independent administrative supervisor can interpret and enforce legislation unaffected by the financial position of different parties to specific cases. Endowing the supervisor with the power to receive and consider complaints and reports of non-compliance helps to ensure statutory interpretation responds to risks to people, not litigants' access to resources.
Fragmentation v. centralised ratcheting	Judicial enforcement can lead to fragmented interpretation of due diligence standards, and there is no guarantee these will rise over time.	Centralised administrative supervision can deliberately ratchet performance standards over time for continuous improvement.
Sticks v. carrots	Judicial enforcement cannot offer positive incentives to reward improvements in practice by regulated entities.	Administrative supervision can reward good performance, for example by applying a lighter-touch approach for a period (freeing up resources to allocated to scrutiny of laggards) or by giving good performers a supplementary weighting in public procurement processes
Cost of doing business	Business may come to treat liability as a cost of doing business (and even seek to insure against it). This defeats the overall harm-reduction goal of the regime.	Administrative supervisors can be given sanctioning powers that cannot be treated as a cost of doing business – for example license restrictions or market access suspensions (e.g. for public procurement)
Difficulty accessing overseas evidence	Courts can face difficulties where key information relates to overseas conduct, as may often be the case in contemporary supply-chains	Administrative supervisors can enter arrangements with domestic and foreign agencies, civil society and worker groups, and multistakeholder initiatives (such as Electronics Watch) to ensure access to timely and reliable information

2. Elements of effective administrative supervision

27. What would effective administrative supervision arrangements for the Act look like? Effectiveness must be evaluated in terms of the object and purpose of the Act – that is, not simply in terms of improved reporting, but in terms of reporting *that drives effective action to prevent and remedy modern slavery*. This requires an approach to administrative supervision and enforcement that measures all elements of reporting against their impacts on modern slavery risks to people, and uses a variety of regulatory levers – from penalties to administrative incentives – to promote practices that bear the hallmarks of effective modern slavery due diligence.[29]

2.1 A people-centric approach to reporting thresholds

28. Effective administrative supervision of the Act should work to allocate both reporting entities' resources and the resources of other stakeholders (including the supervisor itself) to efforts that will have the greatest impact on modern slavery risks to people. This has important implications for the determination of reporting thresholds under the Act.

29. The question of who should report under the Act should be answered not by reference to the size of the reporting entity or its revenues, but by reference to its connection to salient modern slavery risks – that is, those risks which are most significant in scope, severity and remediability. 'Salience' is the established approach under the UNGPs (and indeed under OECD guidance) for assessing human rights risks and prioritising engagement and response.[30] Once we recognise that the Act seeks to align with the UN Guiding Principles on Business and Human Rights, it follows naturally that the UNGPs' approach should apply not only to how reporting entities prioritise amongst modern slavery risks (as the existing *Guidance for Reporting Entities* makes clear), but also to prioritisation of risks within the system of administrative supervision. There are two options for operationalising such an approach.

30. One would delegate responsibility for assessing salient risks to potential reporting entities themselves, then mandate those causing or contributing to such risks to report. The advantage of this approach would be that administrative supervision resources would then be used to address situations of causation and contribution, where reporting entities are likely to have or be able to create significant leverage and produce real impacts on modern slavery outcomes. But the danger is that adopting such an approach could hollow out the reach of the reporting regime, because it would encourage entities to self-assess as not causing or contributing to such risks – in order not to have to report.

31. The second approach would therefore involve combining an objective threshold measure such as revenue, as is currently used to define the Act's

reporting threshold, with another objective indicator – this one serving as a proxy for the presence of salient risk. The obvious way to do this is to empower a central administrative supervisory body – such as a federal Anti-Slavery Commissioner – to designate certain products, locations, suppliers or supply-chains as high-risk. Entities connected to such products, locations, suppliers or supply-chains would consequently be expected to report under the Act. Should they fail to do so, and their connection be discovered, they could be subject to penalties (discussed further below) for non-compliance.

32. Centralising risk analysis and evaluation in this limited way – that is, by moving it from reporting entities to a central administrative supervisor – also has other advantages. First, because the administrative supervisor will have access to centralised expertise and, potentially, government information sources, it is likely to make the analysis more effective and reliable. Related, it may also facilitate effective engagement with stakeholders – including survivors – during the risk analysis process.[31] Second, it increases consistency across the reporting cohort in what they determine to be high risk. Third, as the Australian Human Rights Commission has noted, it shifts the burden of managing strategic risks associated with designating certain suppliers or locations as high-risk from individual entities to the government.[32] Where that designation has potential implications for Australian foreign policy (as it may, for example, in relation to modern slavery risks in Xinjiang), the involvement of government seems prudent.

33. Recognising that reporting thresholds can be tied to risks to people also brings into focus the inefficiency created by relying solely on a threshold *not* linked to such risks (as the Act currently does). A one-size-fits-all reporting threshold, based solely on an entity's size (or a proxy for that, such as its revenues) risks being both too inclusive and not inclusive enough. It risks leading to the expenditure of scarce supervisory resources on many entities with no significant connection to salient modern slavery risks that are forced to report simply because of their size. At the same time, it likely fails to capture numerous entities within risky supply-chains who may in fact have significant leverage and ability to reduce modern slavery risks – simply because they are not over an arbitrary revenue threshold. It problematically substitutes size for leverage as the factor that should determine participation in the reporting scheme.

34. Bringing the link to risks to people into focus also suggests there may be a need to differentiate two different *types* of reporting obligation, with different scopes of application – those relating to modern slavery *risks* and those relating to modern slavery *harms*. The practical case for limiting risk and due diligence reporting to a specific group, obliged to report periodically, is clear. What is less clear is whether the implementation of the Act has served to signal to some entities either that they are not obliged to report *cases* of modern slavery if they are not reporting entities under the Act, or that they are permitted to forego reporting while they work to address modern slavery risks and provide or enable remedy, only reporting once per year. Anecdotal evidence suggests some confusion amongst business professionals about their obligations to report

modern slavery offences to police or other relevant authorities, on an ongoing basis.

35. This confusion could be addressed by amending the Act to clarify the different reporting expectations in relation to modern slavery *risks* and suspected modern slavery *offences*. Administrative supervision arrangements could include an obligation – not limited to those entities required to report periodically on modern slavery *risk* due diligence, but extending to all bodies corporate – to immediately report suspected cases of modern slavery. Compliance with this requirement could, for those entities that are reporting entities in relation to due diligence obligations, trigger access to a limited-time period for remediation activities. Non-compliance (that is, a failure to timely disclose) could attract a penalty. And where a body corporate reports a case of modern slavery (to the administrative supervisor, or to another authority), the supervisor could be empowered to designate that entity as a reporting entity under the Act (triggering periodic due diligence reporting obligations) even if the entity does not otherwise meet reporting thresholds. This approach would help foster early disclosure, and ensure the administrative supervisor is made aware of cases of modern slavery even where they are not uncovered through due diligence activities.

2.2 Identifying hallmarks of effective due diligence through secondary legislation and revised reporting arrangements

36. In Part 1, I argued that the Act, as implemented, already establishes an expectation of due diligence aligned with the UNGPs. The *Guidance for Reporting Entities* helps to clarify the content of that expectation. Yet it is clear that there is scope for significant further clarification of exactly what good due diligence – discharging that expectation – looks like in different circumstances.

37. In NSW, where government buyers and local councils must take "reasonable steps" not to procure products of modern slavery, we are currently working with stakeholders to provide analogous modern slavery due diligence guidance. The approach we are taking is set out in Discussion Paper #001 from September 2022, "NSW public procurement and modern slavery". The approach has been endorsed by over a dozen responses from across NSW government, industry and civil society (which will be released in 2023) and is now being fleshed out through the creation of a shared implementation framework, endorsed by the NSW Procurement Leadership Group. This framework is expected to be in place by mid-2023, and will shape the approach to modern slavery due diligence in roughly AUD 50 billion spending annually.

38. In developing this shared implementation framework, and drawing on international best practice in the implementation of the UNGPs over the last decade,[33] we have nominated hallmarks of good due diligence practice in six areas. These are set out in Figure 2 below. At the Commonwealth level, these or similar hallmarks could be identified as hallmarks of good modern slavery due

diligence through relevant secondary legislation (such as Ministerial rules issued in accordance with section 16A of the Act). This would need to make clear that the exact steps that bear these hallmarks may differ, depending on several factors such as the nature of the reporting entities' connection to the risks (causation, contribution, linkage), the severity and likelihood of harm, the size and capabilities of the entity, and the nature of the entity's activities.[34]

Figure 2 - Hallmarks of good practice in modern slavery due diligence

Governance

The organisation's most senior governing body discusses progress and challenges in addressing the organisation's modern slavery risks, supported by appropriate expertise, informed by the perspective of affected stakeholders and with knowledge of leading practice. The organisation's most senior governing body reviews the organisation's business model and strategy, and any proposed changes to them, to ensure any inherent modern slavery risks are identified and addressed.

The organisation's most senior governing body formally approves high-level targets for addressing salient modern slavery risks and evaluating the organisation's progress in that regard. The organisation's most senior governing body ensures that organisation leadership is accountable for addressing the organisation's salient modern slavery issues, including through performance incentives where those are used for other aspects of performance.

Stakeholder engagement

The organisation identifies which stakeholders in which settings are likely to be the most vulnerable to modern slavery impacts in connection with its operations and value chain and seeks insight into their perspectives. The organisation has structures or processes to hear and respond to the perspectives of affected stakeholders and/or their legitimate representatives, including at senior levels, whose use is not limited to the organisation's own needs or transactions.

The organisation's decisions and actions with regard to identifying, assessing and prioritising risks, and tracking how effectively it addresses them, are informed by the perspectives of affected stakeholders and/or their legitimate representatives. The organisation engages with affected stakeholders and/or their legitimate representatives to identify whether they are aware of and trust existing structures or processes as a way to raise concerns or grievances and have them addressed.

Risk identification and prioritisation

The organisation's processes for identifying modern slavery risks: a) Encompass its operations and business relationships throughout its value chain; b) Include impacts the organisation may cause, contribute or be linked to; c) Include risks inherent in its business model and strategy; d) Go beyond identifying impacts that the organisation considers it can control or impacts that could lead to liability for harms; e) Draw on a variety of well-informed sources to identify relevant risks; f) Are iterative and responsive to changes in the risk environment.

The organisation's prioritisation of its salient modern slavery risks: a) Is determined by the severity of the potential impacts on people, not by risk to the business; b) Is not determined by where the organisation has leverage or what it considers easiest to address; c) Is updated in light of new or emerging risks.

Where the organisation focuses its initial assessment of risks on certain parts of the business, these are selected based on the severity and likelihood of the risks to people, and the organisation progressively expands its focus into other parts of the business. Where the organisation has a broader risk management system, the organisation ensures that its salient modern slavery risks are appropriately reflected in that system

Acting on identified risks

The organisation's main activities to prevent or mitigate modern slavery risks: a) Are focused on outcomes for affected stakeholders; b) Directly relate to the organisation's salient modern slavery risks and are proportionate to them; c) Directly engage those parts of the business whose actions or omissions can influence outcomes for affected stakeholders; d) Include measures to address any contribution of the organisation's own activities to its salient risks.

The organisation takes deliberate steps to build leverage to influence others where its existing leverage is insufficient to prevent or mitigate risks, including considering the role of disengagement as a form of leverage. The organisation identifies where collective leverage with others is needed, and collaborates with relevant stakeholders, peer companies and/or experts to advance outcomes for affected stakeholders through processes that demonstrably align with international human rights standards.

Monitoring and evaluating effectiveness in addressing risks

The organisation sets both high-level and operational targets that are: a) Articulated in terms of the intended outcomes for affected stakeholders; b) Relevant to addressing the organisation's salient modern slavery risks as well as specific, measurable, achievable and timebound; c) Developed with input from internal or external subject-matter experts and, wherever possible, from affected stakeholders and/or their legitimate representatives.

The organisation monitors and evaluates progress towards the targets based on a set of indicators that together: a) Are used to evaluate progress towards the targets; b) Enable analysis of the reasons for progress or setbacks; c) Factor in feedback from affected stakeholders and/or their legitimate representatives. The organisation discloses progress towards at least its high-level targets, including explanations of any setbacks and resulting changes in strategy.

Providing and enabling remedy

The organisation engages constructively when there are allegations of modern slavery impacts in its operations or value chain to understand the issues being raised and the perspectives of affected stakeholders. When providing remedy for impacts it has caused or contributed to, the organisation goes beyond measures to prevent the impact recurring to consider what other forms of remedy can best address the harms to affected stakeholders, taking into account their perspectives.

The organisation evaluates its actions to provide remedy for their effectiveness in delivering outcomes that are satisfactory to affected stakeholders. The organisation uses its leverage to support the development and implementation of effective grievance mechanisms in its value chain that are capable of providing remedy to affected stakeholders.

The organisation draws on information from its own grievance mechanisms to inform the early identification and mitigation of risks to people and to continuously improve its due diligence processes.

Source: Based on Shift, *"Signals of Seriousness" for Human Rights Due Diligence* (New York: February 2021).

39. Clarification of due diligence expectations might also benefit from tailoring guidance to specific sectors or value-chains. This could involve incorporation by reference of relevant sectoral due diligence guidance, such as that provided by the OECD,[35] or indeed the materials now being developed in NSW. The NSW Anti-slavery Commissioner also has the option of issuing sector-based codes of practice.[36] The new EU Corporate Sustainability Reporting Directive likewise provides for the development of sector-specific standards. Such a code could be developed through industry-level inquiries, like those developed by the Australian Competition and Consumer Commission.[37] Sectoral-level investigation and codes of practice would allow the administrative supervisor to calibrate and ratchet expectations differently for different sectors, responding to both risk profiles and sectoral capability development.

40. Clarification of the hallmarks of effective due diligence would also provide the basis for a new approach to reporting designed to collect data revealing the links between, on the one hand, due diligence and remediation practices, and, on the other, contribution to reduced modern slavery risks and harms. Collecting such data is critical to ensuring the implementation of the Act shifts from reporting for reporting's sake, to reporting for action. Reporting to the Register could be revised to operate through a standardised reporting template or online form, requiring reporting on due diligence actions against not only the six hallmarks of effective due diligence laid out in Figure 2 above, but also against defined outcome indicators associated with the elements of those hallmarks. This would create a much more structured dataset, facilitating comparison across reporting entities, identification of trends and patterns, and longitudinal risk analysis. This would have numerous benefits. It would allow reporting entities to better track their own performance over time, and benchmark it against peers – strengthening the ability of champions within reporting entities to win support for investment in internal capacity building (the second vector of the "transparency framework" approach, discussed earlier). A dataset structured against the six hallmarks of good modern slavery due diligence would also allow the administrative supervisor to identify signs of both improved and lagging system performance, and to allocate limited supervisory resources accordingly. And if the data were made available in traditional accessible download format, such as .csv, the data would also likely become more useful to not only academic and civil society researchers, but also market actors such as institutional investors. In this way, the initial promise of the transparency framework underpinning the Act might be better realised.

2.3 Equipping a federal Anti-Slavery Commissioner with a smart mix of administrative powers

41. Both research and practice suggest that a smart mix of powers can equip an administrative supervisor to turn reporting into effective action addressing modern slavery and other human rights harms. There is growing recognition that an independent supervisory body can play important risk-signalling, interpretive, advisory, capacity-building and mobilising roles that encourage subjects of

disclosure regimes to move from 'reporting for reporting's sake' to 'reporting for action'.[38] In this sub-section, I propose the role of administrative supervisor of the Act be given to an independent federal Anti-Slavery Commissioner, charged with oversight of the Act's reporting regime and supporting the development of modern slavery risk management capabilities by all reporting entities.

42. The Anti-Slavery Commissioner could foster effective risk analysis and management, including by analysing risks where individual reporting entities may not be equipped to do so (for example because of limited access to reliable information due to a foreign government's policies or practices). The Anti-Slavery Commissioner should be empowered to formally designate high risk products, locations, suppliers or supply-chains (triggering an extension of reporting obligations to those in the 'extended' reporting cohort discussed earlier). This could draw on relevant, authoritative sources of risk analysis, such as the US Department of Labor's List of Goods made with Forced and Child Labour.

43. To ensure effective risk analysis, the Anti-Slavery Commissioner should also be empowered to consult with stakeholders (notably victims and survivors), to receive complaints and reports of non-compliance, and to undertake inquiries into specific cases, reporting entities or sectors (as consumer protection authorities sometimes do).

44. The Anti-Slavery Commissioner will also play a critical role in developing, identifying and promoting guidance on how reporting entities can meet the due diligence and remediation expectations embedded in the Act. This could include the power to issue codes of practice for implementation of the Act in specific sectors. The Anti-Slavery Commissioner should be appropriately resourced to engage with and advise business on effective implementation, and to provide an array of practical tools, contractual or supplier questionnaire templates, and other implementation resources – while maintaining appropriate internal separation between advisory and enforcement activities, to ensure the credibility and impartiality of enforcement.

45. Harmonisation between Australian jurisdictions, and with other jurisdictions, also seems likely to proceed more rapidly if it is achieved through cooperation amongst administrative and executive agencies, rather than through legislative harmonisation. For that reason, the federal Anti-Slavery Commissioner could be empowered to work with counterparts such as the NSW Anti-slavery Commissioner and other state counterparts to align approaches and combine forces to promote effective modern slavery risk reduction at the system level. This could include, for example, a harmonised or mutual recognition approach to risk analysis or administrative sanctions.

46. While it may not be open, under Chapter III of the Constitution, for the Anti-Slavery Commissioner to issue financial penalties directly, s/he could apply to a court for the issuance of such a penalty (as the anti-money laundering regulator

can under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)*). Fines or penalties so levied could be earmarked to support oversight of the Act, anti-slavery work more generally, or a national compensation scheme.

47. Beyond financial penalties, there is a range of other administrative sanctions that the Anti-Slavery Commissioner could wield to encourage effective due diligence and remediation. This includes issuing infringement notices, requiring adoption of enforceable undertakings, imposing license restrictions or conditions relating to an entity's participation in public procurement, awards or grants schemes. The Anti-Slavery Commissioner should also be empowered to wield her powers in ways that not only penalise poor performance, but also reward sustained good performance. This could involve, for example, designating a reporting entity for access to a limited-time lighter-touch reporting and supervisory programme, based on sustained demonstration of the hallmarks of good due diligence (including remedy). Likewise, to foster disclosure, the Anti-Slavery Commissioner could be empowered to issue notices rewarding early disclosure of actual modern slavery harms by granting the disclosing entity access to a remediation period during which to provide or enable remedy and address related modern slavery risks, while penalising entities that do not disclose harms within a designated short period.

48. Finally, it will be critical to resource the Anti-Slavery Commissioner to develop training and advisory support offerings to enhance reporting entities' modern slavery risk management capabilities (including on remedy). If the aim is to move the market to achieve system-level outcomes, then resources are need to shift the system from its current equilibrium to a new, optimised system state. The transparency framework approach depends heavily on equipping decision-makers along supply-chains – notably procurement officers, investment managers and directors – with the capabilities and expertise to effectively identify and manage modern slavery risks. Yet there is little to suggest that the Act has, to date, led to significant corporate investment in these capabilities *in-house*. Instead, many reporting entities appear to outsource this work to a cottage industry of modern slavery statement consultants and off-the-shelf technology platforms that rely on easily gamed supplier questionnaires to meet modern slavery due diligence expectations. In-house expertise on identifying and managing modern slavery risks during procurement planning and sourcing, during stock selection and portfolio management, and during contract management, remains the exception, not the rule. These capabilities will be critical to the creation – and use – of leverage to reduce modern slavery risks, the central action that transforms reported risk information into improved outcomes. The Anti-Slavery Commissioner will play a critical role in fostering those capabilities, both through training and advisory support, and through encouraging reporting entities to find and harness relevant training and capabilities elsewhere: in unions and worker organisations, civil society and multi-stakeholder initiatives.

2.4 Using the power of the Commonwealth public purse to drive change

49. Developments in NSW highlight the potential for using public procurement (and public investment and grant-making) to encourage improved modern slavery risk management practices – not only in government entities, but also amongst the government's private sector partners (suppliers, investees, awardees). In NSW, our recent legislative changes make the removal of products of modern slavery from public procurement one of the top-line objectives of the NSW Procurement Board. Over 200 government entities and local councils are obliged to individually report on the "reasonable steps" they are taking to achieve this objective. We are now developing guidance on how this reporting should align with the hallmarks of effective due diligence set out in Figure 2 above. As Anti-slavery Commissioner, I am formally mandated to support and oversee these reforms and help ensure their system-wide effectiveness.

50. The situation in the Commonwealth is quite different. The Commonwealth issues a single Modern Slavery Statement covering all of its government procurement efforts (including in the investment area) – though since the 2021-2022 Statement, this has included a separate page for each Ministerial portfolio.[39] Under the *Public Governance, Performance and Accountability Act 2013* (Cth), the Department of Finance has issued the *Commonwealth Procurement Rules 1 July 2022 (No 2)* (Cth) and the *Public Governance, Performance and Accountability Rule 2014* (Cth). Taken together, these norms encourage procurement officers to consider "modern slavery in the context of the general prohibition on entities seeking to benefit from supplier practices that may be dishonest, unethical or unsafe … and the need for officers to make reasonable enquiries that procurement is carried out considering relevant regulations and/or regulatory frameworks".[40] The Australian Border Force has also produced a procurement toolkit available to procurement officers, in consultation with the Commonwealth Modern Slavery Statement Interdepartmental Committee, as well as modern slavery tender materials.[41]

51. This decentralised and voluntary approach mirrors the relatively light touch approach taken to administrative supervision of corporate reporting under the Act, to date. As Landau and Howe note:

> "The Australian Government's approach to the integration of modern slavery considerations in its procurement is striking for the broad degree of discretion it affords entities covered by the [Commonwealth Procurement Rules] and procurement officers. Use of the *Procurement Toolkit* is encouraged, but optional. The Toolkit itself makes it clear that it is up to procurement officers to determine not only the extent to which they take modern slavery considerations into their decision-making, but how they do so, what specific standards they require, and how any such standards are monitored and enforced. There are no minimum mandatory requirements, even when the procurement is deemed high risk of modern slavery. There is not even any explicit prohibition on engaging suppliers that are not in compliance with their reporting obligations under the *Modern Slavery Act*."[42]

52. As Landau and Howe point out, the significant discretion this affords procurement officers simultaneously leaves space for innovation, and risks ineffectiveness, especially given the emphasis traditionally placed on value for money and cost minimisation in Commonwealth procurement processes.[43] (The Commonwealth's 2021-2022 Modern Slavery Statement does, however, contain a section dedicated to measuring and discussing the effectiveness of the Commonwealth's modern slavery due diligence and risk management efforts.[44])

53. In NSW, by contrast, individual entities are mandated to report on the "reasonable steps" they are taking, and those steps are subject to formal "modern slavery audit" by the Auditor-General. She is obliged to consult with the NSW Anti-slavery Commissioner and the NSW Procurement Board on the effectiveness of due diligence reforms. And the Anti-slavery Commissioner is entitled to work with reporting entities to strengthen their capabilities, solicit information about their operations and supply-chains, and provide advice and recommendations to the entities on strengthening their due diligence arrangements. This could provide a useful model for strengthened audit and oversight arrangements of public procurement, investment and grant-making at the federal level. Indeed, there may also be utility in exploring a more deliberately joined up approach between NSW, the Commonwealth and other jurisdictions, with adoption of a common framework or even resource-sharing to facilitate, for example, effective supply-chain mapping and risk analysis.

Dr James Cockayne
NSW Anti-slavery Commissioner
December 2022

Notes

[1] See *Modern Slavery Amendment Act 2021* (NSW).
[2] See James Cockayne, "Anti-slavery as smart public policy", Remarks at NSW Parliament House, 10 November 2022, available at https://dcj.nsw.gov.au/content/dam/dcj/dcj-website/documents/legal-and-justice/anti-slavery-commissioner/speeches/Antislavery_as_smart_public_policy.pdf.
[3] Commonwealth of Australia, *Modern Slavery Bill 2018. Explanatory Memorandum*, para. 7.
[4] Compare Ingrid Landau and John Howe, 'Government Purchasing and the Implementation of Modern Slavery Legislation' (2022) 44(3) *Sydney Law Review* 347 at p. 365; see also Jolyon Ford and Justine Nolan, 'Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy between Human Rights Due Diligence and the Social Audit' (2020) 26(1) *Australian Journal of Human Rights* 27, 30–32; Ingrid Landau and Shelley Marshall, 'Should Australia be Embracing the Modern Slavery Model of Regulation?' (2018) 46(2) *Federal Law Review* 313.
[5] International Justice Mission Australia, "IJM Submission on: *Modern Slavery Act Review Consultation*", 2022, p. 8. See also Australian Human Rights Commission, *Review of the Modern Slavery Act 2018 (Cth). Australian Human Rights Commission Submission to the Statutory Review undertaken by Professor John McMillan AO*, November 2022, pp. 5-6; and see Peter Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation", *Business Ethics Quarterly* 22(1) 145.
[6] A powerful case for both judicial enforcement *and* administrative supervision is presented in Human Rights Law Centre et al., *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (November 2022).
[7] Shift and UN Office of the High Commissioner for Human Rights, Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision (New York: October 2021), available at https://shiftproject.org/resource/enforcement-mhrdd-design/.
[8] See *Modern Slavery Act 2018* (NSW), *Modern Slavery Amendment Act 2021* (NSW), *Local Government Act* ss 428, 438ZE, *Public Works and Procurement Act 1912* s 176(1A), *Annual Reports (Departments) Regulation 2015* cll 6(b1) and 6(b2), *Annual Reports (Statutory Bodies) Regulation 2015* cll 8(b1) and 8(b2).
[9] The case for such a duty is forcefully argued in Human Rights Law Centre et al., *Broken Promises*.
[10] The Australian Human Rights Commission has proposed amending the Act to clarify that Modern Slavery Statements must not be misleading or deceptive. See AHRC Submission, *op. cit.*, p. 18.
[11] Human Rights Law Centre Submission, p. 5.
[12] See e.g. Lara Wolters (Rapporteur*), Draft report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))*, Committee on Legal Affairs, 2022/0051 (COD), 7 November 2022, Amendment 3.
[13] Commonwealth of Australia, *Modern Slavery Bill 2018. Explanatory Memorandum*, para. 127.
[14] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing. http://dx.doi.org/10.1787/9789264115415-en.
[15] Compare Landau and Howe, op. cit.
[16] See Monash University Business School, Centre for Financial Studies, Measuring Disclosure Quality of Modern Slavery Statements (Dec 2021); Human Rights Law Centre et al., *Paper Promises? Evaluating the early impact of Australia's Modern Slavery Act* (Feb 2022); Walk Free, *Beyond Compliance in the Garment Sector: Assessing UK and Australian Modern Slavery Act statements produced by the garment industry and its investors* (Feb 2022); International Justice Mission, *Spot Fires in Supply Chains* (April 2022); Monash University Business School, *Modern Slavery Disclosure Quality Ratings: ASX 100 Companies Update 2022* (October 2022); Human Rights Law Centre et al., *Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act* (November 2022).
[17] See *Modern Slavery Act 2018* (Cth), ss 16, 16A, 25 and Part 3.

[18] AHRC Submission, *op. cit.*, p. 8, emphasis added, endnote omitted.
[19] Commonwealth of Australia, *Explanatory Memorandum*, para. 19.
[20] However, see Australian Council of Superannuation Investors, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act* (July 2021).
[21] Human Rights Law Centre et al., *Broken Promises*, p. 3.
[22] HRLC, *Modern Slavery Act 2018 (Cth) Review*, 22 November 2022, p. 7.
[23] *Modern Slavery Act 2018* (NSW).
[24] Shift and UN OHCHR, op. cit.
[25] See generally Janice Fine and Jennifer Gordon, 'Strengthening Labor Standards Enforcement through Partnerships with Workers' Organisations' (2010) 38(4) *Politics & Society* 552.
[26] See Shift and UN Office of the High Commissioner for Human Rights, *Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision* (New York: October 2021), available at https://shiftproject.org/resource/enforcement-mhrdd-design/; and United Nations Office of the High Commissioner for Human Rights, "Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms", UN Doc. A/HRC/38/20, 14 May 2018.
[27] This table builds on Shift and UN OHCHR, op. cit.
[28] Shift and UN OHCHR, op. cit., p. 16.
[29] See Landau and Howe, op. cit., p. 361; and see Julia Black, "Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation" (2003) (Spring) *Public Law* 63; Peter Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8(4) *Governance* 527.
[30] See UN Guiding Principles Reporting Framework, *Salient Human Rights Issues*, available at https://www.ungpreporting.org/resources/salient-human-rights-issues/.
[31] See further Shift and OHCHR, pp. 19-21.
[32] AHRC submission, p. 6.
[33] See in particular Shift, *"Signals of Seriousness" for Human Rights Due Diligence* (New York: February 2021).
[34] See the discussion of "appropriate measures" required for HRDD in the proposed European CSDDD. See Lara Wolters (Rapporteur), *Draft proposal*, draft amendment 17.
[35] See OECD, https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.
[36] See *Modern Slavery Act 2018* (NSW), section 27.
[37] See *Competition and Consumer Act 2010* (Cth).
[38] See for example the discussions in New Zealand Ministry of Business, Innovation and Employment, *Executive summary of consultation on legislation to address modern slavery and worker exploitation: Summary of feedback*, n.d., available at https://www.mbie.govt.nz/have-your-say/modern-slavery/executive-summary-of-consultation-on-legislation-to-address-modern-slavery-and-worker-exploitation-summary-of-feedback/.
[39] See Australian Government, *Commonwealth Modern Slavery Statement 2021-2022* (December 2022).
[40] Australian Government, *Commonwealth Modern Slavery Statement 2019–20* (Commonwealth of Australia, 2020), p. 13.
[41] Ibid. And see Australian Government, *Addressing Modern Slavery in Government Supply Chains: A Toolkit of Resources for Government Procurement Officers* https://modernslaveryregister.gov.au/resources/,
[42] Landau and Howe, op. cit., p. 371.
[43] Ibid.
[44] Australian Government, *Commonwealth Modern Slavery Statement 2021-2022*, pp. 44-50.