Office of the
NSW Anti-slavery
Commissioner

Don’t reinvent the wheel

Submission of the NSW Anti-slavery Commissioner to the Commonwealth Attorney-General Department’s consultation: Strengthening Australia’s legislative response to modern slavery in supply chains

September 2026

Acknowledgement of Country

As New South Wales Anti-slavery Commissioner, I acknowledge that Aboriginal and Torres Strait Islander peoples are the first peoples and traditional custodians of Australia and the oldest continuing culture in human history.

I acknowledge that First Nations communities in New South Wales have survived practices that today we call modern slavery. The legacies of that treatment continue to affect Aboriginal and Torres Strait Islander people today, and through them affect the New South Wales community and economy.

My Office and I pay our respects 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 their ongoing stewardship and the important contribution they make to our communities and economies.

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, self-determination and for real freedom.

Don’t reinvent the wheel

Published by the Office of the NSW Anti-slavery Commissioner

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Not legal advice

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1 Introduction

1. I make this submission in response to the Consultation Paper, *Strengthening Australia's legislative response to modern slavery in supply chains*, published by the Australian Attorney-General's Department ('Consultation Paper').[1]

2. I make the submission in the exercise of my functions under sections 9 and 28 of the *Modern Slavery Act 2018* (NSW) ('NSW Act').

3. The Consultation Paper seeks feedback on the legislative design of a proposed 'failure to prevent' modern slavery offence, to be incorporated into the *Modern Slavery Act 2018* (Cth) ('Commonwealth Act'). Under the proposed offence, corporations with an annual consolidated revenue over AUD$100 million could be held criminally liable for modern slavery in their supply chains unless the corporations have taken reasonable steps to prevent the criminal conduct.

4. The effectiveness of any 'failure to prevent' offence will depend on organisations having a clear understanding of the conduct expected of them.

5. The regulatory objective of the proposed offence should be to address the harms caused by modern slavery in supply chains, as well as the negative externalities including lost productivity, reduced competition, and inefficient capital allocation, by providing certainty about the conduct required to identify, manage and remediate modern slavery risks. This will help prevent modern slavery, reduce risks and harms, and strengthen risk management across the Australian economy.

6. Using a UK Home Office cost estimation method, we can estimate the whole of life costs to the Australian budget from the current modern slavery caseload in Australia at around $24 billion.[2]

7. A regulatory strategy that severs the connection between Australian firms and modern slavery risks in supply-chains, but does not harness those firms' leverage to reduce the overall presence of modern slavery risk in the economy, leaves Australian taxpayers footing that $24 billion bill.

8. In principle, I support the introduction of a Commonwealth criminal offence addressing corporate failure to appropriately manage modern slavery risks in supply chains. However, my view is that any such offence should be one element of a suite of responsive regulatory measures which support genuine behaviour change and capability uplift by reporting organisations.

9. Australia already has a sophisticated, operational and legally binding reasonable steps framework operating in New South Wales. This creates legal obligations for approaching 100,000 private companies supplying $60 billion of goods and services. Around 1,500-2,000 of these private companies, which supply around $25 billion to $30 billion worth of goods and services, would potentially be exposed to the Commonwealth criminal offence.

10. Yet the Consultation Paper does not consider how the proposed criminal offence would interact with these existing mandatory modern slavery due diligence obligations in NSW. Nor does it canvas how any Commonwealth offence would interface with, or could draw and build on, the extensive guidance on reasonable steps, training tools, learning and capabilities developed in NSW to support implementation of this existing reasonable steps framework.

11. It is my view that the NSW mandatory modern slavery due diligence system, which is supported by an existing capability-building and enforcement infrastructure in which the NSW Government

[1] Australian Attorney-General's Department, Consultation Paper: Strengthening the Modern Slavery Act (August 2026). https://consultations.ag.gov.au/crime/modern-slavery/user_uploads/consultation-paper.pdf/
[2] UK Home Office, *The economic and social costs of modern slavery*, Home Office research report 100 (30 July 2018).

has invested significant time and effort over the last 4 years, and which is already achieving positive change in Australian supply-chains, should be properly factored into the development of any Commonwealth criminal offence.

12. At a minimum, any federal reform should not undermine the investment made by the NSW Government and numerous partners in developing this system over the last 4 years.

2 Principles for effective regulation

2.1 Reduce risks to people and the $24 billion modern slavery bill to the Australian economy – not just risks to business

13. Any regulatory reform should treat changes in corporate behaviour as a means to an end: reducing modern slavery. The aim must be to reduce risks to people, not just risks to business.

14. A regulatory strategy that has the effect of encouraging firms to disconnect from suppliers with modern slavery risks, but not address those risks, will not reduce modern slavery. Nor will it reduce the externalities that flow from tolerating the presence of modern slavery risks in supply-chains, such as:

- inefficient capital allocation to firms and industries that rely on rent extraction through criminal behaviour, not sound business management, to turn a profit;
- missed opportunities for productivity gains, because firms rely on intensive labour-focused production methods, since coerced labour becomes a negligible input cost (or even revenue source);
- undercutting of Australian businesses, notably SMEs, that do the right thing; and
- where modern slavery occurs onshore, the incursion of significant healthcare, policing and other costs. Using a UK government cost-estimation methodology, the whole-of-life costs of the current modern slavery caseload in Australia can be estimated at around $24 billion.

2.2 Incentivize transparency and proactive risk management – not defensive derisking

15. Transparency is central to effective regulation of modern slavery risks in supply-chains. Organisations are more likely to reduce modern slavery harms if they actively identify, disclose, and address risks. Any new Commonwealth criminal offence should therefore be assessed by whether it incentivises these constructive behaviours.

16. Significant effort and private and public coin have been invested, both within and beyond NSW, in supporting organisations to shift away from a derisking mindset, towards transparency and proactive risk management. This requires assurance that identification of a modern slavery risk or harm is not, in itself, a failure – or a potential source of liability. Rather, identifying risks is often evidence that a due diligence system is functioning as intended, surfacing risks so that steps can be taken to address them.

17. The *Guidance for Reporting Entities*, provided by the federal government, the obligations of suppliers to public entities under NSW law (discussed further below), and international standards (as reflected in the OECD Due Diligence Guidance for Responsible Business Conduct ('OECD Guidance') and the UN Guiding Principles on Business and Human Rights ('UNGPs')) all set an expectation that companies should:

- proactively seek out, identify and disclose modern slavery risks in their supply chains;
- treat termination of contracts with suppliers known to have modern slavery risks as a last resort, preferring a 'stay and engage' approach to remediate business practices to reduce modern slavery risks to people; and
- collaborate with other companies, civil society stakeholders, unions and survivors, to develop collective leverage to reduce modern slavery risks.

18. The proposed failure to prevent offence, as proposed in the Consultation Paper, creates an opportunity to strengthen accountability. However, it also creates a risk that organisations move away from the conduct just described and revert to a defensive derisking mindset.

19. If criminal liability is primarily tied to the existence of modern slavery within a supply chain, some organisations may be less willing to seek out risk information, document concerns where they are identified, or engage openly with potential issues. While the Consultation paper notes that the failure to prevent offence may not require intention or knowledge on the part of the corporation, early corporate behavioural responses to the federal government's announcement suggest that some organisations may perceive reducing visibility of risk as a means to safeguard against liability.

20. Many entities will prioritise reduction of exposure to potential liability over transparency, due diligence and remediation. In some cases, organisations may choose to disengage from higher-risk suppliers, sectors or regions presenting elevated risk rather than invest in improving conditions or addressing underlying causes.

21. Rather than encouraging business to better identify and manage modern slavery risks, and to collaborate to reduce modern slavery risks at the system level, we already see firms responding to the announcement of potential future criminal liability by rushing for the exit. General counsels nation-wide are, understandably, advising C-suites and boards to rapidly de-risk. They are advising their employers to reduce their potential future criminal liability by moving modern slavery functions from sustainability teams to legal and compliance teams, and by moving from a proactive risk management posture to a defensive risk reduction posture.

22. In seeking to incentivise effective action where the risk to people is greatest, any new criminal offence and supporting arrangements should avoid creating a system where organisations believe they can best fulfil their obligations by simply cutting ties with bad actors to eliminate their organisational exposure to the risk.

23. What is more, if Australian companies move away from active due diligence in favour of deniability, their capacity to identify, prevent and remediate modern slavery harms will be significantly reduced. This will drastically limit the ability for Australian businesses to reduce the overall incidence of modern slavery in their supply chains. Critically, such an outcome will not necessarily improve outcomes for workers and may, in some cases, leave them in a more precarious position if contracts are terminated without effective remedy. Workers may be exposed to further harms, including wage theft and job losses.

24. Clear guidance and safeguards will be required to avoid this outcome. Better still, the offence would be designed in a way that makes clear it is a *last resort*, for the most egregious cases, typically following on only after the entity has been given an opportunity to remediate conduct or harm through other forms of regulatory engagement, such as enforceable undertakings, capacity-building support from a third-party regulator, and/or civil action undertaken by an independent regulator or by victim-survivors or their representatives. This may suggest prosecution should only be available following a Ministerial decision, or a decision by a reliable independent third party such as the Australian Anti-Slavery Commissioner.

2.3 Build on what works, don't undermine it. There are already around 100,000 companies involved in $60 billion worth of commerce in NSW that have binding modern slavery due diligence obligations.

25. As I advocated four years ago in my 2022 submission to the McMillan Review,[3] modern slavery is most effectively addressed through a 'smart mix' of regulatory measures. A smart mix would combine criminal enforcement with civil and administrative actions, as well as independent supervision and provision of capacity-building resources and support to prompt organisations to take effective action.

26. Except for the criminal provision, this is exactly the approach we have taken in NSW over the last four years, under the NSW Act. Based on a statutory mandate and working closely with Government, we have developed and implemented a legally binding mandatory modern slavery due diligence system covering roughly 100,000 private companies and $60 billion worth of commerce. This includes the almost 90,000 companies registered to supply to NSW government agencies, and around 10,000 other suppliers to the 128 local councils, 10 universities, 8 state owned corporations, and numerous other public organisations in NSW that have mandatory modern slavery due diligence obligations.

27. It is critical to understand that the impact of the NSW scheme is not limited to the imposition of mandatory modern slavery due diligence and reporting obligations on NSW government agencies. The NSW Supplier Code of Conduct requires suppliers – that is private companies – to 'take all reasonable steps to ensure that businesses within their supply chains are not supplying products of modern slavery'. This provision is typically given contractual force. The due diligence obligations are cascaded onto private companies.

28. As a result, around 100,000 companies potentially have reasonable steps obligations under NSW law. Of these, we estimate roughly 1,500-2,000, providing around $25 billion to $30 billion worth of goods and services to NSW public entities, would meet the threshold of the proposed Commonwealth criminal offence.

29. The NSW Act and related legislation[4] create various mandatory reporting and due diligence obligations for a range of NSW public entities including government agencies, local councils, State owned corporations, and ten public universities. More than 450 entities have obligations under this legislated regime. Together, they procure more than $60 billion worth of goods and services annually.

30. The result is that these mandatory modern slavery due diligence efforts now reach across and are exerting influence in the Australian economy, since NSW public sector procurement draws in suppliers from around the country and beyond.

31. The NSW Government is the second-largest buyer in the entire southern hemisphere, after the Australian government. If Commonwealth defence spending is removed from the equation, the NSW Government is the largest single buyer in the southern hemisphere. Accordingly, the risk management measures adopted under the NSW regime are already influencing procurement and commercial practice across the Australian economy.

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[3] Reporting for Action. Submission of the NSW Anti-slavery Commissioner to the Review of the Modern Slavery Act 2018 (Cth). December 2022. https://consultations.ag.gov.au/crime/modern-slavery-act-review/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&_q__text=commissioner&uuId=540491159

[4] Including the *Public Works and Procurement Act 1912* (NSW), *Local Government Act 1993* (NSW) and *Government Sector Audit Act 1983* (NSW), each as amended by the Modern Slavery Amendment Act 2021.

32. While the exact obligations in NSW law of any given entity vary depending on the entity's nature and statutory context, in general terms this legislation requires entities to:

    - take reasonable steps to ensure that goods and services procured by and for the entity are not the product of modern slavery, and
    - report annually on their modern slavery risk management steps.

33. The legislation also requires me to monitor this reporting; and allows the NSW Auditor-General to undertake independent modern slavery audits.

34. In late 2023, I published the Guidance on Reasonable Steps to Manage Modern Slavery Risks in Operations and Supply-Chains ('Guidance on Reasonable Steps' or 'GRS'). The GRS is a comprehensive document setting out seven Reasonable Steps for entities to take in meeting these obligations. It was developed through extensive consultation with affected stakeholders.

35. In developing this framework, my Office has consulted closely with the NSW Procurement Board, the NSW Procurement Leadership Group, and convened an open Working Party for consultation. The Working Party comprised over 70 individuals representing 20 entities including NSW government departments and agencies, local councils, health agencies, the Australasian Procurement and Construction Council, and the ACT Chief Minister, Treasury and Economic Development Directorate. It met for over a year in 2022 and 2023. The resulting Shared Implementation Framework was designed not only to help covered entities to fulfil their statutory obligations, but also to protect human rights, ensure these entities contribute to Australia meeting its international commitments to responsible business conduct, and protect the reputational, legal and business interests of covered entities.

36. The resulting framework includes a clear data reporting framework. It aligns with Australia's international obligations and commitments, including under OECD Guidance, the UNGPs, the 2014 Protocol to the ILO Forced Labour Convention, 1930, as well as relevant international sustainability and risk management standards.[5] It has been embedded in legally binding instruments such as NSW Procurement Board directions and the NSW Supplier Code of Conduct, with legal consequences for approximately 100,000 private corporations, including an estimated 1,500-2,000 that would be caught by the proposed federal criminal offence. Numerous ASX firms now use this Guidance to shape their own business practices, mindful of their legal obligations.

37. Entities subject to the NSW Act are expected to comply with the Guidance on Reasonable Steps and the detailed risk identification, risk assessment and risk management tools we have made available through the Shared Implementation Framework to meet their legal obligations under the NSW Act.

38. These include:

    - a mechanism for government to signal whether goods and services are high risk, triggering specific heightened due diligence obligations. The risk signal is sent through the Inherent Risk Identification Tool ('IRIT'), a simple-to-use risk mapping tool intended to allow covered entities to identify the inherent modern slavery risk associated with different product categories from which they procure. Critically, due diligence obligations (i.e. what constitutes 'reasonable steps') depends on what risk level IRIT signals a particular transaction involves. The IRIT covers *all* product categories in NSW procurement, involving many billions of dollars worth of commerce. The tool facilitates effective and consistent risk analysis across the economy: we publish our sources and provide a replicable risk assessment methodology that reporting entities can and do use to conduct further due diligence. This tool has already seen wide uptake, including amongst ASX-listed firms reporting under the Commonwealth Act;

[5] Notably ISO 20400:2017, ISO 31000:2018 and BS 25700:2022.

- legal tools and practice that have brough modern slavery due diligence to life and embedded it in NSW commerce, including mandatory use of Model Tender Clauses and the use of Model Contract Clauses. "Heightened" and "Streamlined" versions of each tool allow entities to select the level of detail required according to the riskiness of their procurement. These model clauses have been developed through collaboration with leading Australian and international experts, including the internationally renowned Responsible Contracting Project and Allens, and reflect the "shared responsibility" approach to contracting that is now understood as best practice in implementation of the UNGPs worldwide. This approach is increasingly being written into legislation overseas. In December 2025, the NSW Procurement Board made it a legal requirement for government agencies to use heightened due diligence tender clauses for high modern slavery risk procurement, from 1 July 2026;[6]
- a training, monitoring and learning infrastructure: this includes a wide array of e-learning tools and modules to help organisations understand what constitutes 'reasonable steps', collated at the GRS Resources page;
- binding recommendations from an independent third-party regulator (the NSW Anti-slavery Commissioner), and annual reporting obligations for government buyers, providing the basis for detailed analysis and strengthening of due diligence efforts within specific high-risk supply chains, such as the electric vehicles supply chain; and
- an independent public modern slavery audit power. The NSW Auditor-General has the power to conduct modern slavery audits of public organisations. The Auditor-General treats the NSW Anti-slavery Commissioner's *Guidance on Reasonable Steps* as the auditable standard.

39. The GRS identifies seven reasonable steps, summarised in **Table 1**.

Table 1. Summary of the Guidance on Reasonable Steps

A. Step	B. Principle	C. Key actions
1. Commit	Modern slavery risks are most effectively addressed when responsibility for identifying and managing those risks is embedded throughout an organisation's governance structures and leadership systems.	• Conduct meaningful stakeholder engagement • Undertake a salient modern slavery risk assessment • Adopt a Modern Slavery Policy • Adopt a Modern Slavery Risk Management Plan
2. Plan	Effective prevention is dependent on understanding where modern slavery risks may arise before procurement decisions are made. Early risk identification enables organisations to anticipate, prioritise and proactively manage risks.	• Identify the inherent modern slavery risk associated with procurement products and/or categories, using the Inherent Risk Identification Tool and considering other sectoral guidance. • Develop a risk-reducing sourcing strategy. This may include actively engaging with suppliers to address risks or develop new sources of supply with lower modern slavery risks, and conducting due diligence into the availability of alternative products.
3. Source	Procurement decisions create powerful incentives throughout supply chains. Organisations should use their purchasing practices, supplier selection processes and contractual arrangements to	• Incorporate modern slavery considerations into tender processes using the Model Tender Clauses.

[6] PBD-2025-05 Modern slavery tender clauses for high modern slavery risk procurements. https://arp.nsw.gov.au/pbd-2025-05-procurement-board-direction-2025-05-modern-slavery-tender-clauses-for-high-modern-slavery-risk-procurements

A. Step	B. Principle	C. Key actions
	promote responsible business conduct, select suppliers that have strong modern slavery risk management capabilities, and ensure that responsibility for managing risks is shared across commercial relationships.	• Undertake due diligence to understand which suppliers are capable of effectively managing modern slavery risks. • Adopt an approach to contracting in which buyers and suppliers take shared responsibility to managing modern slavery risks, such as by using the Model Contract Clauses.
4. Manage	Modern slavery risk management is an ongoing process rather than a one-off exercise. Organisations should actively monitor changing risks, maintain engagement with suppliers, and use their leverage to mitigate risks as they evolve throughout the life of the contract.	• Monitor and evaluate supplier performance relating to modern slavery, such as by undertaking audits, assessments and engaging with workers directly or via trusted worker organisations. • Develop supplier capabilities, such as by facilitating training or collaborative opportunities.
5. Remedy	Effective reduction of modern slavery requires organisations to respond to harms when they are identified. The objective is not to avoid association with risk, but to use available leverage to support remediation, improve conditions, and reduce the incidence of modern slavery over time.	• Provide or enable access to effective modern slavery grievance mechanisms. • Develop a standard operating procedure for remediation when harms arise, placing the interests of those affected first. • Use leverage to remediate deficient practices. • Where a supplier is unable or unwilling to effectively address modern slavery risks, withdraw responsibly.
6. Report	Transparency, disclosure and organisational accountability are critical to an effective enforcement regime. Strong reporting encourages risk identification, enables oversight and creates the conditions for continuous improvement across supply chains.	• Establish a victim-centred protocol to report suspected modern slavery offences. • Report on modern slavery in the organisation's Annual Report, as required under statutory obligations in NSW.
7. Improve	Modern slavery risk management should be an ongoing process. Organisations should continually assess the effectiveness of their actions, learn from experience and stakeholder feedback, and strengthen their systems over time.	• Conduct systematic and periodic reviews of modern slavery performance. • Update modern slavery policies and procedures based on stakeholder feedback or grievances raised. • Train the organisation's workforce on modern slavery. • Cooperate with the Anti-slavery Commissioner

40. Taken together, these steps set a practical and precise standard of conduct for what effective modern slavery due diligence and risk management looks like in practice. It is a standard that has now been in play for government buyers and 100,000 private sector suppliers for several years. They have invested time and money in developing their capabilities to meet the expectations set out in this framework.

41. The worst possible outcome here would be that the Commonwealth criminal offence disincentivizes or even penalizes conduct that is required by NSW law. This is a foreseeable

outcome, if the Commonwealth offence is not drafted to reflect the existence of existing mandatory modern slavery due diligence obligations for 100,000 companies under NSW law. At present, the Consultation Paper makes no reference to this whatsoever.

42. I urge the federal Government to consult directly with the NSW Government, and with private sector suppliers to the NSW Government, to understand how the introduction of a federal criminal offence could build on, rather than disrupt, the existing mandatory modern slavery due diligence system in New South Wales.

2.4 Do not ask the impossible, and do not undermine other public policy objectives, such as the transition to renewable power

43. The existing NSW Guidance on Reasonable Steps focuses on organisational conduct rather than requiring entities to guarantee that no instance of modern slavery occurs anywhere within a complex supply chain. It does **not** create a strict duty to prevent. Entities may continue to buy goods that are, in fact, made with modern slavery, if they have taken reasonable steps not to do so.

44. This reflects the legislature's appreciation of the reality that organisations operating in high-risk sectors, regions and labour markets may encounter modern slavery risks despite taking extensive steps to identify and assess them. The critical question is not simply whether risk exists, but whether appropriate action has been taken to identify, prevent and respond to that risk. Further, it sets out expectations for how organisations should respond when actual harms materialise.

45. There is a risk that a Commonwealth criminal offence, if drafted as proposed in the Consultation Paper, will set an impossible standard for companies to meet – or worse, undermine other critical public policy goals.

46. To see how these results might eventuate, take the example of solar panel supply-chains, which are well known to involve a high risk of modern slavery.

47. The NSW Guidance on Reasonable Steps sets pragmatic expectations for the buyers and companies involved in these supply-chains in NSW. The 'reasonable steps' standards reflects an understanding that buyers in NSW simply may not be able to access solar panels that they are certain were not made with modern slavery. This is because of Chinese government policies around the management of the Uyghur and other minority populations in Xinjiang province, which have introduced forced labour risks into the production of polysilicon, a critical component in solar panels.

48. Current traceability arrangements in solar panel supply-chains mean that NSW buyers cannot be certain solar panels they are buying were not made with Uyghur forced labour. The NSW reasonable steps framework reflects an understanding that strict liability for failure to prevent modern slavery in this supply-chain would either hold defendants to an impossible standard, since companies cannot, on their own, expect to change Chinese Communist Party policy on this issue; or, alternatively, lead to buyers ceasing to buy solar panels. This would, of course, significantly impede our state's transition to a lower-emission energy system.

49. Instead, the NSW approach expects covered buyers not to prevent modern slavery in that supply-chain – but rather to take reasonable steps to not buy slave-made solar panels. As my Guidance on Reasonable Steps and the tools in the Shared Implementation Framework make clear, this will include an array of steps – including working with other actors to develop a reliably slavery-free supply of solar panels, over time. The reasonable steps standard is not an abandonment of the commitment to reduce modern slavery in this supply-chain: it is a well-calibrated regulatory strategy that accounts for the commercial realities and public policies

goals in play, while creating incentives for the changes in corporate conduct required to create alternative, slavery-free supply.

50. By contrast, the proposed Commonwealth criminal offence would potentially work to place such buyers in NSW at risk of criminal prosecution. While it is true that these buyers might be able to avoid conviction by proving, in court, that they have taken reasonable steps, this approach creates significant risk and uncertainty for corporations, which will have numerous knock-on risk management effects, such as requiring setting aside of funds to pay any potential fine; negative impact on insurance premiums or even costs of capital; and increased legal fees. This is not an efficient approach to regulation.

51. Nor does it represent optimal public policy. In the context of solar panels, for example, it threatens to introduce significant barriers to uptake of solar power across Australia, or at a minimum raise costs.

2.5 Stick with 'reasonable steps', not 'reasonable due diligence'

52. I urge the use of 'reasonable steps' as the required standard of conduct, rather than novel terms such as 'reasonable due diligence'.

53. The concept of 'due diligence' is likely to be read very narrowly by a criminal court. The concept of 'due diligence' in the field of business and human rights, notably as reflected in the UNGPs and OECD Guidance, is rather more expansive than the concept of due diligence as traditionally understood in Australian criminal and corporate law. In particular, the business and human rights concept includes a range of activities that occur not only prior to contracting, but also during the course of contract management, and even, when it comes to 'remedy', in the period after a contract may be completed.

54. I fear that the principle of legality would lead an Australian criminal court to interpret 'reasonable due diligence' not to include such activities, with the result that central parts of the conduct expected of a company in order to meet international market expectations on responsible business conduct would be unintentionally excluded from the operation of the provision. The secondary result could be, for example, that companies focus excessively on pre-contractual steps, and do not make adequate provision for remedy of harmed workers.

55. By contrast, the term 'reasonable steps' is more expansive and, since it is already defined in NSW to include obligations around contract management and remedy, is more likely to be interpreted to include these aspects of commercial conduct.

56. The introduction of this new term ('reasonable due diligence') also risks unnecessarily increasing red tape and compliance costs for Australian businesses, notably the 100,000 companies in NSW that are already dealing with the 'reasonable steps' standard as defined in NSW law. Why introduce a new, similar, but different term that they must now wrestle with, going to all the trouble and expense of adjusting internal processes and policies?

57. And the existence of two similar, but distinct, standards under Australian and NSW law will add to confusion and regulatory burden across the Australian economy.

3 A different approach: build on what works

3.1 Start from the NSW system and build on that

58. The existence of a mature NSW framework offers the Commonwealth an opportunity. The Commonwealth does not need to develop a reasonable steps standard from scratch. Instead, it could adopt a Commonwealth criminal offence that aligns with and reinforces the existing regulatory system the NSW Government has built over the last 4 years, which already affects $60 billion worth of commercial activity.

59. The NSW Guidance on Reasonable Steps provides a useful foundation for any Commonwealth approach to defining and assessing reasonable steps. Alignment to the principles set out in **Column B** of **Table 1** above would enable a consistent approach between jurisdictions, while aligning to international due diligence standards, and meet the stated aims of the reform in the Consultation Paper.

60. Further, the key actions set out in **Column C** of **Table 1** offer tangible examples that could be built into conduct standards or guidance on implementation of the offence (or defence), whether issued as standalone guidance or secondary legislation. These examples demonstrate the behaviour change that would be needed on a systemic level to effectively address modern slavery in supply chains.

61. The NSW Framework is already significantly influencing market behaviour and continues to meet with growing uptake across both public and private sector. Alignment to this model would leverage guidance material that is already available to the market, accelerate alignment of business capabilities with the Commonwealth conduct standard reflected in the Commonwealth criminal offence, and reduce risks of regulatory fragmentation or even incoherence.

62. Corporate entities are already coming to my Office seeking guidance to understand whether the steps set out in the NSW Guidance on Reasonable Steps will be considered sufficient to make out the 'reasonable steps defence' proposed by the Commonwealth. They have a clear appetite for clarity and little appetite for reinvention of the wheel. As such, I encourage the federal government to build on the foundation of due diligence guidance in place in NSW in the design of the reform.

63. The worst possible outcome here would be that the Commonwealth criminal offence disincentivizes or even penalizes conduct that is required by NSW law. This is a foreseeable outcome, if the Commonwealth offence is not drafted to reflect the existence of existing mandatory modern slavery due diligence obligations for 100,000 companies under NSW law. At present, the Consultation Paper makes no reference to this whatsoever.

64. For example, agencies subject to the *Public Works and Procurement Act 1912* (NSW) are now required to use heightened Model Tender Clauses in high-risk procurements. This means they are legally obliged to gather and assess information from prospective suppliers on their modern slavery risk management procedures during the tender stage. But seen from the perspective of Commonwealth criminal liability, this could potentially *increase* a firm's potential liability exposure.

65. Many NSW government agencies and other covered entities have also taken steps to incorporate the Model Contract Clauses into their contract templates and risk management frameworks. This represents a significant shift away from a traditional 'representations and warranties' approach, which does little to incentivise either party to surface modern slavery risks or harms when they do appear, and does not offer a framework for remedy. Instead, the Model Contract Clauses create a contractual expectation that all parties in the supply chain will be duly diligent about modern slavery impacts and are obliged to take reasonable steps to achieve this goal.

66. Of significant concern is that both buyers and suppliers may become less willing to adopt this shared responsibility approach to tendering and contracting if doing so is perceived as increasing exposure to criminal liability. There is substantial risk that the estimated 1,500-2,000 firms that are subject to Commonwealth Act reporting obligations, while simultaneously operating under NSW Government procurement arrangements, may find themselves caught between competing governmental expectations and legal obligations.

67. I urge the Australian Government to consult directly with the NSW Government, and with private sector suppliers to the NSW Government, to understand how the introduction of a federal criminal offence could build on, rather than disrupt, the existing mandatory modern slavery due diligence system in New South Wales.

68. In expressing these concerns, I do not suggest that there is no room for a Commonwealth criminal offence regarding corporate accountability to manage modern slavery risks. Rather, these risks highlight the critical importance of designing an offence that reinforces the behaviours already encouraged by existing mandatory modern slavery due diligence frameworks. The next question is therefore how a federal criminal offence can be structured to strengthen accountability without undermining the considerable progress already achieved in NSW.

3.2 Restructure the 'failure to prevent' offence as a 'failure to take reasonable steps' offence

69. In proposing the failure to prevent modern slavery offence, the Consultation Paper highlights the recent example of section 70.5A of the Criminal Code, which relates to the failure to prevent foreign bribery. While there are similarities between the two contexts, there are also important differences that should inform the design of any failure to prevent offence.

70. Foreign bribery involves a specific type of prohibited transaction, undertaken by identifiable actors and often for the benefit of the corporation. It is reasonable to expect that an organisation can exercise oversight and control over its employees or associates, and implement systems designed to prevent that conduct.

71. Modern slavery is distinctly different in nature. It is not a discrete transaction, but rather the outcome of the introduction of coercion into a working relationship, in a context where expected safeguards – including some outside the control of the defendant – fail. Such coercion is not necessarily a one-time event, and often difficult to identify. It is, moreover, made possible by the intersection of multiple factors, including:

    - weaknesses in institutional and regulatory arrangements;
    - the presence in a supply chain of a worker population made vulnerable by a range of context-specific factors, such as migration status, physical location, gender, isolation, and others; and
    - exploitation of that vulnerable worker population.

72. Modern slavery in supply chains may be perpetrated by independent third parties operating several tiers removed from the reporting entity. Further, the perpetrator may be connected to any number of buyers (or other actors), each with differing amounts and types of leverage available to influence the perpetrator's behaviour. This makes demonstrating causation or the relevant connections between a firm and actors in its supply chain a complex probative exercise, especially where supply chains stretch beyond Australia.

73. Organisations can and should take steps to prevent modern slavery and increase their available leverage with suppliers, such as by mapping supply chains for transparency, implementing risk management controls, and monitoring supply chain conditions. The Guidance on Reasonable Steps in NSW clarifies expectations of corporate conduct in exactly these situations. Where

harms materialise, organisations can also prevent future reoffending by supporting remediation to address underlying causes.

74. However, establishing and proving to a criminal standard whether an organisation could have prevented a particular instance of modern slavery in its supply chain may be considerably more complex than establishing whether it could have prevented an act of bribery by one of its employees or associates.

75. The better approach may therefore be not to penalise failure to prevent, per se, but rather failure to take certain codified reasonable steps. An offence drafted in this way also seems more likely to meet the test of the principle of legality, providing regulated entities clarity on what conduct is required of them, rather than the vague and imprecise standard of "preventing modern slavery".

76. Under the model proposed in the Consultation Paper, an organisation may be required to establish that it took reasonable steps as a defence once the elements of the 'failure to prevent' offence have otherwise been established by the Crown. An alternative, and I believe favourable, approach would be to make the failure to take reasonable steps the heart of the *offence* itself. This follows the approach used, for example, in section 47C of the *Sex Discrimination Act 1984* (Cth).

77. Under such a model, the focus of investigation and prosecution shifts from why and how modern slavery occurred somewhere within a supply chain (i.e., was it the action or inaction of the defendant that caused or contributed to the modern slavery risk or harm) to whether the organisation took reasonable steps to identify, prevent and address foreseeable modern slavery risks.

78. This places the emphasis on the conduct to identify, prevent and address modern slavery risks – conduct squarely within the power and control of the organisation. This approach also aligns more closely with the policy rationale underpinning 'failure to prevent' models in other contexts.

79. There would also be several behavioural and practical advantages to this model:

- a greater likelihood of successful investigation and prosecution, and making clear that investigation might properly be tasked to ASIC or the FWO, rather than the AFP;
- incentivising proactive risk management at scale; and
- improved interoperability with the existing NSW reasonable steps framework.

3.2.1 More straightforward investigation and prosecution

80. Firstly, a failure to take reasonable steps offence would shift the focus of the offence to conduct of the reporting organisation, rather than raise complex investigative and probative questions around the conduct of far-off third parties not in the control of the defendant.

81. Practically, proving the offence becomes more straightforward. The Crown would need to demonstrate that:

- the organisation faced identifiable or identified modern slavery risks;
- reasonable steps to address those risks were codified and available;
- those reasonable steps were not taken; and
- the failure was sufficiently serious to warrant a criminal response.

82. This approach avoids the complexity of first establishing the underlying criminal conduct (i.e. where a modern slavery harm has occurred), tracing connections through multiple tiers of suppliers, and establishing a causal connection between the organisation's behaviour and the eventual harm.

83. Instead, investigations would focus on questions that are likely easier to assess and prove, including organisational governance, procurement controls, risk management systems, remediation efforts and reporting processes – and how they played out in relation to the procurement of the goods and services in question. These are matters that are squarely within the organisation's control and capable of relatively straightforward proof.

84. Importantly, the practical effect is that the Crown bears the burden of proving the failure, rather than reporting organisations bearing the burden of proving that reasonable steps were taken as a defence. This is appropriate in a criminal law context, and will also help reduce the risks that firms shift limited anti-slavery resources to defensive de-risking.

85. This approach would also allow the Commonwealth to consider whether ASIC or the FWO, rather than the AFP, might be the appropriate entity tasked with investigating such an offence, since the focus will be on corporate systems, processes and decisions.

86. To understand how this proposed approach improves the likelihood of successful prosecution, consider the case of a prosecution brought in the context of any commodity supply-chain - whether blueberries or cobalt or polysilicon or tomatoes or cotton, or any of the other large number of commodity supply-chains known to be significant sites of modern slavery.

87. In each of these supply-chains, existing traceability arrangements would make it effectively impossible to show, as the Consultation Paper model would require, that a specific modern slavery offence occurred in the production of a specific product (a specific berry, tomato, ounce of cobalt or polysilicon, or a bale of cotton) that ultimately made its way into a product sold to the defendant. In all of these commodity supply-chains, individual products from multiple sources are admixed. It is all but impossible, in many cases, to track a particular product from production to retail.

88. A 'failure to take reasonable steps' offence would simplify things considerably. It would no longer be necessary for the Crown to track the berry from the farm to the retailer, or the cobalt from the mine to the iPhone sale. Instead, the Crown's focus would shift to whether the defendant should have known about the risks in the supply-chain and whether they took the required, codified reasonable steps. This will be far easier to prove, and make for a much more reliable and predictable regulatory framework, with much more impactful, targeted deterrent effect.

89. And it also becomes apparent, from this example, that ASIC or the FWO might be better positioned to investigate such a question, given the focus on corporate knowledge and conduct – rather than the AFP.

3.2.2 Incentivising proactive risk management through legal certainty

90. This model would also create stronger incentives for proactive risk management. Rather than asking, after a harm has occurred, whether the organisation could have prevented it, the focus becomes whether the organisation is taking reasonable steps to identify and address risks *before* harm occurs, as well as remedy, after.

91. This is made possible by the fact that this approach to drafting the offence relies on codification of the conduct expected of covered entities. This also has the benefit of providing legal and market certainty on expected conduct, with several secondary benefits:

- this shows greater respect for the principle of legality at the heart of Australian principle of statutory interpretation and criminal law. An offence that is overly vague is unlikely to meet the test of the principle of legality and risks being unenforceable, because the defendant could not know, ahead of time, what conduct was required in order to avoid sanction; and
- market-signalling. Codification of 'reasonable steps' will allow market actors, including investors, to assess, at scale, whether firms are taking appropriate steps to tackle modern slavery. This will enhance the possibility of modern slavery factors being incorporated into

financial and market decision-making, leading to more effective capital allocation towards firms doing the right thing, and reducing the competitive advantage of firms acquiescing in modern slavery in their supply chains.

92. This is a smarter approach to regulatory design. It is also more consistent with the corporate behavioural change objectives underpinning existing modern slavery frameworks, including the UNGPs, OECD Guidance, and the GRS. Each of these frameworks focuses on due diligence and responding to risk to people, rather than imposing liability simply because a firm has certain types of connection to risks somewhere a supply chain.

93. Over time, such a change in corporate behaviour on a large scale is likely to be more effective in reducing the incidence of modern slavery as it becomes commonplace for businesses to proactively identify and mitigate risks as they arise, and to cascade these expectations through their supply chains.

3.2.3 A foundation for a responsive regulatory approach building on, not undermining, advances in NSW

94. A further advantage of a 'failure to take reasonable steps' model to drafting this offence is that it would allow flexibility in how 'reasonable steps' was codified. This could be through primary or secondary legislation, or official guidance.

95. The legislation could also be drafted in a way that allows for *different* reasonable steps to be required at different levels of risk, with the inherent risk level being signalled by an independent third party (as is already the case in NSW).

96. Importantly, the government would not need to start from a blank slate in designing these standards. As illustrated, a practical framework already exists in New South Wales that articulates what reasonable steps look like in practice and provides organisations with a clear basis on which to design their compliance systems. The legislation could provide for a system that integrates the Australian and national standards and support framework, building on the significant investment and advances in NSW.

97. A clearly defined conduct standard would also support a broad range of responsive regulatory responses. Organisations that have failed to take reasonable steps could be subject to a graduated range of responsive regulatory actions (proportionate to the failure) including financial penalties, infringement notices, enforceable undertakings, and other restrictions on their participation in public procurement and grant schemes. The Australian Anti-Slavery Commissioner and private citizens could be given standing to bring civil actions to achieve such results.

4 Elements of a draft 'failure to take reasonable steps' offence

98. The stated purpose of any legislation would be to create a corporate criminal offence that:

- allows for the prosecution of the most serious failures to take reasonable steps to prevent modern slavery, as part of a graduated, proportionate and responsive regulatory framework;
- incentivises robust, risk-based due diligence and remediation systems; and
- complements (but does not replace) the existing civil reporting and penalty regime under the federal Act and the reasonable steps scheme already operating in NSW. The federal Act should additionally be strengthened to provide for additional regulatory measures such as enforceable undertakings and fines.

99. I propose a core offence structure as follows:

Proposed s X.1 – Failure to prevent modern slavery

(1) A covered person commits an offence if:

(a) an associate of the covered person engages in conduct that constitutes or would constitute a modern slavery offence; and

(b) the associate provides goods or services whether directly or indirectly, to the covered person; and

(c) at the time that the covered person received these goods or services, the covered person had not taken reasonable steps to ensure it did not receive goods or services made with modern slavery.

(2) For the purposes of this section, it is immaterial whether:

(a) the associate is prosecuted for or convicted of a modern slavery offence; or

(b) the covered person knew about, authorised, or was negligent in relation to, the associate's conduct; or

(c) the modern slavery conduct that the associate engaged in occurred in the context of the production or provision of the specific goods or services provided to the covered person.

Proposed s X.2 – Modern slavery offence

For the purposes of this Part, a "modern slavery offence" means an offence against a provision of this Code or another Commonwealth Act that involves:

(a) slavery or slavery-like practices (including servitude and forced labour); or

(b) human trafficking; or

(c) debt bondage; or

(d) forced marriage; or

(e) the worst forms of child labour; or

(f) deceptive recruiting for labour or services.

Proposed s X.3 – Associate

For the purposes of this Part, a person is an "associate" of a covered person if the person is:

(a) an officer, employee or agent of the covered person; or

(b) a subsidiary of the covered person; or

(c) an entity controlled by the covered person; or

(d) a person who performs services for or on behalf of the covered person, whether under contract, arrangement or understanding (including contractors, labour hire providers, recruitment agents) and

(e) suppliers in the body corporate's supply chain [to the tier defined in the Regulations]

(f) such other entities as defined by the Regulations from time to time.

100. It is worth explaining certain features of this draft provision:

- **Fault-neutral:** There is no need to prove intention, knowledge or negligence by the corporation. Instead, knowledge of risk is factored into the codification of reasonable steps (detailed below), and the reasonable steps obligation applies in relation to all goods or services received from a supplier who is involved in modern slavery. This will simplify investigation and prosecution, but also fosters a preventive approach by ensuring covered persons take reasonable steps to manage risk before becoming aware of actual harm.

- **Concept of 'associates':** This is borrowed from the foreign bribery provision, but defined differently, to expand it to supply chain actors. The draft legislation defines this later (see below) and it could enable the term to be defined dynamically by regulations. It could potentially include suppliers down to specified tiers, labour hire providers and other related entities. This approach would also offer the flexibility to define 'associate' differently for different corporate entities depending on the modern slavery risk-level of the supply chain they are operating in, or the features of contracting/association in that supply chain. That risk level could be determined and periodically declared by the Minister or a third party such as the Anti-Slavery Commissioner.

101. The next section of the proposed text explains the concept of 'reasonable steps':

Proposed s X.4 – Reasonable steps

(1) In determining whether a covered person has taken reasonable steps to ensure it did not receive goods or services made with modern slavery, regard must be had to:

(a) the nature and extent of the risks of modern slavery offences arising from the covered person's operations and supply chains [including any official guidance or determination of the risks associated with specific supply chains by the Commonwealth government or the government of another Australian jurisdiction in which the covered person operates]

(b) the size, resources and complexity of the covered person's business;

(c) the proportionality and effectiveness of the steps taken in relation to those risks;

(d) whether the steps include the adoption of procedures that are:

(i). embedded in the body corporate's governance, risk management, compliance systems and business decision-making; and

(ii). regularly reviewed and updated; and

(iii). effectively implemented and enforced; and

(e) any official guidance issued by the Minister or the Australian Anti-Slavery Commissioner [or another authority as defined by the regulations] on reasonable steps to ensure an entity does not receive goods or services made with modern slavery.

(2) Business processes and systems relevant to subsection (1) may include, but are not limited to:

(a) risk assessment and due diligence processes;

(b) policies and codes of conduct addressing modern slavery;

(c) contractual terms requiring compliance with modern slavery standards;

(d) training and capacity-building for officers, employees and relevant associates;

(e) grievance mechanisms and remediation processes for affected persons;

(f) monitoring, auditing and reporting on modern slavery risks and outcomes.

102. This generally aligns with the Commonwealth Act reporting criteria and existing guidance (including the NSW Guidance on Reasonable Steps), but codifies them as factors relevant to a determination whether reasonable steps have been taken.

103. A next sub-provision would deal with penalties. This draft mirrors the foreign bribery penalty architecture, calibrated to the seriousness of modern slavery.

Proposed s X.5 – Penalties

(1) A covered person guilty of an offence against s X.1 is punishable by a fine not exceeding the greatest of:

(a) 100,000 penalty units;

(b) 10 per cent of the annual turnover of the covered person (and any related covered persons) during the 12-month period ending at the end of the month in which the body corporate committed the offence.

(2) In this section, annual turnover has the same meaning as in the Competition and Consumer Act 2010.

104. The aim here is, of course, to create a credible deterrent for large corporations while preserving proportionality, thereby encouraging the necessary investment in reasonable steps capabilities.

105. Under this approach, the Commonwealth Act remains the primary civil reporting and transparency framework. Additional amendments could strengthen this regime by introducing, for example, powers to impose fines or enforceable undertakings where a firm is not taking reasonable steps, and civil remedy powers for both the Australian Anti-Slavery Commissioner and private individuals.

106. If this approach is adopted, this would suggest the need for an additional *Provision s x.6* detailing the circumstances in which the prosecution of the criminal offence could proceed, potentially requiring a determination by the Minister or the Australian Anti-Slavery Commissioner relating to gravity of the offence or confirming a failure to comply with an enforceable undertaking, warning, or other measures short of prosecution.

107. The approach outline above also has the benefit of allowing what constitutes reasonable steps to be framed with reference to current or future guidance. This would allow alignment of the federal offence with:

- the existing Guidance on Reasonable Steps in NSW; and
- different standards of conduct, depending on the level of inherent risk associated with a particular product or service. This risk level could be formally declared by the Minister and/or Australian Anti-Slavery Commissioner.

108. Given the complexity of this proposed reform, I also encourage the federal government to embed certain transitional and review provisions in any legislation actioning these changes.

109. The new criminal provision should not go into effect for at least 12 months after the legislation is finalised. This is necessary to allow corporations time to prepare for the new regime and upgrade internal systems to align with these expectations.

110. The legislation should also provide for statutory review three to five years after the legislation comes into force. This review should assess:

- the number and nature of prosecutions brought under the new criminal provision;
- penalties imposed;
- impact on due diligence practices;
- reduction of modern slavery risks in designated high-risk supply chains;
- any unintended regulatory burdens; and
- alignment with developments in other jurisdictions (e.g. EU due diligence laws and the NSW Reasonable Steps framework).

Dr James Cockayne

NSW Anti-slavery Commissioner

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Office of the NSW Anti-slavery Commissioner

6 Parramatta Square
10 Darcy Street
Parramatta NSW 2150

Office hours:
Monday to Friday
9:00am to 5:00pm

E: antislavery@dcj.nsw.gov.au
W: dcjnsw.info/antislaverycommissioner

Call **1800 FREEDOM (1800 37 33 36)** for confidential support and advice for victims of modern slavery