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Attorney General's Department

By email: ModernSlaveryActReview@ag.gov.au

Dear Professor McMillan,

Issues Paper: Review of Australia's Modern Slavery Act 2018 (Act)

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 43,000 governance and risk management professionals from the listed, unlisted, public, and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates, and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

Many of our members have governance and risk roles in organisations of all sizes which are required to report under the regime created by the Act (Regime). In preparing this submission, we have drawn on their experience and expertise.

In this Submission we have not responded to each of the Consultation Questions set out in the Issues Paper (Issues Paper) but have addressed the key issues of concern to our members.

Comments on the Modern Slavery Act 2018

Governance Institute's members strongly support the Regime and consider the Act an important step towards eradicating modern slavery in Australia's supply chains. They consider however, that the Regime is still developing and more education with better specific guidance is required to help increase compliance and higher quality reporting, particularly if sanctions are under consideration.

Our members consider that a more nuanced approach to the reporting threshold would better address the concerns of those who consider the reporting threshold too high and be a more effective tool in tackling modern slavery. The spirit of the Act needs to be considered when deciding the reporting threshold and what threshold will make a difference. Our members believe that applying a risk-based lens to any threshold changes is the most effective way to build the impact of the Regime.

Our members are concerned that prescribing the format of reporting may have the effect of making reporting under the Act a defensive action for businesses. For this reason, they support

an approach which is focused on working with businesses to improve reporting overall and avoid making the Regime a box ticking exercise.

We also support legislating for an independent Anti-Slavery Commissioner, who would provide necessary leadership in the ongoing development of the Regime. The Commissioner should play the key role in providing guidance and working with businesses to improve their reporting and due diligence practices.

As such, an appropriately resourced, independent Regime, led by an independent Commissioner with a risk focussed reporting threshold, will better serve the goals of the Act.

Key issues

Reporting Threshold

The Issues Paper canvasses whether lowering the reporting threshold for reporting under the Act would improve reporting. Feedback from our members and other stakeholders indicates that the availability of resources to meet the reporting requirements remains a key impediment to ensuring higher rates of compliance with the Regime.

For a variety of reasons, not all entities that qualify under the Act's reporting threshold have the appropriate resources to report, and many of these entities operate in areas that are at a low risk of modern slavery in their supply chains. In addition, there has been consistent feedback from our members that businesses would benefit from more guidance and education regarding what constitutes best reporting practice to improve the quality of reporting under the Regime. The aim should be to foster a positive reporting culture within entities that will enhance the effectiveness of the Regime. Our members consider that an arbitrary lowering of the reporting threshold is unlikely to achieve this result.

A preferable approach would be to incorporate a risk-based approach into the reporting threshold. That is, a threshold that considers not just annual turnover, but also includes additional indicia through a risk lens, such as, high-risk industries or supply chain locations. Accordingly, more should be expected of entities working in higher risk industries and locations. To avoid ambiguity and/or entities taking too broad an interpretation of this risk-based element to the threshold, our members suppose that defined parameters of sectors and locations that encompass high risk are key. The Regime, led by the independent Anti-Slavery Commissioner (see below for more detail on the role of the Commissioner) should produce a list of high, medium, and low risk sectors and locations with each list encompassing reporting requirements that are 'fit for purpose'. Our members maintain this would have a greater impact on eradicating modern slavery in Australia's supply chains. Defining these high-risk based parameters would not just assist in reaching entities that have a higher risk of modern slavery in their supply chains but would also act as a reasonableness test when assessing if organisations have 'done enough' in terms of the Regime.

Modern slavery guidance should then clarify the extent of disclosure required by an entity given the type of disclosure will vary depending on the risk profile of the supply chain of the individual entity. Governance Institute notes the difficulty of applying a risk-based formula for reporting. For the overall strength of the Regime however, a threshold including supply chain industry and location risk must be considered for the Regime to properly address modern slavery.

The Act also covers a broad range of entities with significant differences in modern slavery risks when considering different supply chains. For example, there are differences in modern slavery risks in the supply chains of entities that do not provide tangible goods, such as financial services, compared with entities that purchase or manufacture goods or services for use or sale. Including risk-based criteria in addition to annual turnover, would assist in removing entities with low-risk supply chains, while narrowing the focus of the Regime on entities with

high-risk supply chains, which are areas of serious concern and more relevant to the Regime. It is also important to note that the reporting requirements should be proportionate to an entity's size and resources to encourage higher quality reporting for larger, better resourced entities, and provide stronger incentives for smaller entities to voluntarily report.

The alternative to an arbitrary lowering of the reporting threshold, and an approach that may assist in achieving reporting by entities currently below the threshold, is by including entities that operate in 'high risk' industries or areas, as determined in an annual list produced by the Anti-Slavery Commissioner. We recognise that there should, however, be an appropriate turnover floor for these smaller entities, but our members consider there is value in capturing entities who have activities in specific high-risk industries and locations.

Governance Institute recommends against an arbitrary lowering of the reporting threshold. We recommend the Regime threshold be reoriented towards a risk-based approach, which focuses on high-risk industries and locations. The alternative to an arbitrary lowering of the threshold would be to require entities operating in high-risk industries and locations to produce a report, subject to an appropriate turnover floor. Applying a sector and location specific risk lens to the threshold would be a significant step forwards for the Regime. The list of high-risk industries and locations should be produced annually by the independent Anti-Slavery Commissioner.

Independent Commonwealth Anti-Slavery Commissioner

In submissions to the 2017 Inquiry into the establishment of a Modern Slavery Act in Australia, Anti-Slavery Australia and the Law Council of Australia advocated for the appointment of an Independent Modern Slavery Commissioner. The Inquiry's final Report recommended the appointment of a commissioner.¹ Our members agree that this would be an important initiative.

While similar responsibilities and/or powers exist within the Attorney General's portfolio, the appointment of an independent Commissioner would not only demonstrate Australia's commitment to the eradication of modern slavery but also have significant practical benefits. They include the encompassing of expertise in and focus on modern slavery risks within one agency, a public leader for the ongoing education of modern slavery issues in society, a spokesperson on modern slavery issues, and by acting as Australia's international representative.

When recommending an Anti-Slavery Commissioner, the Parliamentary Committee referred to the powers of the President of the Australian Human Rights Commissioner (AHRC)². Our members hold that it would be appropriate to locate the independent Anti-Slavery Commissioner within the office of the AHRC. This would dispense with the need to establish new infrastructure within the Attorney-General's Department or create a new agency.

In creating the role of an independent Commonwealth Anti-Slavery Commissioner, it will be important to address the anomalous situation whereby entities are subject to a separate modern slavery Regime and a different reporting threshold in some of the other Australian States. Our members believe there should be a single Regime in Australia dealing with modern slavery reporting and that the Commonwealth should cover the field. Different Anti-Slavery Commissioners across multiple Australian jurisdictions is a recipe for confusion and potentially undermines the goal of eliminating modern slavery.

The new Commissioner would play a valuable role in engaging with and developing guidance for business as well as educating the community more generally about modern slavery. Our

¹ [List of Recommendations – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au)

² [4. Independent Anti-Slavery Commissioner – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au)

members also request that the Commissioner should be appropriately resourced, including a specialised team of staff with significant appropriate funding.

The Commissioner would also play a key role in assessing the Regime's impact on entities with multiple reporting requirements in other jurisdictions, such as the United Kingdom, New Zealand, and California (USA). Having a Commonwealth Commissioner able to engage on behalf of Australia with other jurisdictions will also assist with efforts towards harmonising international reporting requirements, which will reduce the reporting burden on entities, and further develop global efforts to stop modern slavery in supply chains.

Governance Institute recommends the establishment of an independent Commonwealth Anti-Slavery Commissioner with resources for a support team, located within the Australian Human Rights Commission with powers to:

- Identify, and make public high-risk locations and industries of concern
- Set the risk-based threshold criteria
- Lead the domestic promotion of the Regime to raise community awareness and promote compliance
- Assess the modern slavery statements for compliance
- Produce best practice reporting guidance
- Provide bespoke support to reporting entities to improve reporting
- Identify and provide assistance for victims/survivors of modern slavery
- Be appropriately resourced and funded
- Develop and maintain a new Modern Slavery Statement Public Register,
- Lead on engaging with overseas regimes in a coordination capacity to reduce the burden on entities subject to multiple reporting regimes, in a long-term effort to harmonise international reporting requirements.

Increased Compliance Measures

Governance Institute understands the importance of ensuring the Regime matures quickly and levels of quality compliance is high. Consultation with our members and other stakeholders, however, has made it clear that it is still too early to introduce sanctions for non-compliance. Our members report that existing supply chains are increasingly volatile, and the recent global economic downturn has exacerbated the difficulties of receiving accurate and timely information from high-risk foreign jurisdictions. Mandating specific reporting requirements and introducing sanctions in the current geopolitical and economic environment may also jeopardise sensitive supply chain partnerships. Our members consider that greater education efforts and better guidance is more likely to improve the effectiveness of the Regime.

Our members suggest that the Modern Slavery Statement Register be re-developed to be a proactive database with enhanced functionality to allow for better searching options. The Commissioner should identify the entities that meet the threshold for reporting and list them on this public register. The new register would make it clear which entities meet the threshold to report under the Act and would provide a central database for the relevant statements. Doing so provides transparency for civil society to engage with and hold entities to account. The modern slavery statement then becomes commercially imperative.

There should also be greater transparency as to how the Regime works with entities on remediation pathways. This would be a useful way of encouraging reporting entities to continue improving their reporting.

For non-compliant entities, there could be a 'please explain' letter to entities. Doing so gives entities complete awareness of the information expected to be disclosed to meet their reporting requirements.

Strong encouragement, guidance, and education, accompanied by a public register of entities required to report, and engagement by means of 'please explain' letters to non-compliant entities should be the focus of compliance efforts at this stage of the Regime.

It is important to note that that the Regime is a reporting regime only, not a penalty regime for engaging in activities involving modern slavery, which is already dealt with under the Australian Criminal Code. It is crucial therefore, that there is a clear differentiation between a lack of reporting, and an acceptance of modern slavery in a supply chain. This is why we are advocating no sanctions for non-compliance, as they will have little tangible impact on the wider goals of the Regime.

Governance Institute recommends that greater education and guidance for reporting entities is the first step before any sanctions should be considered. There should also be an online public register that clearly states which entities meet the reporting threshold and are required to report. Where there is non-compliance, there should be engagement with the entity by means of a 'please explain' letter. At this stage of the Regime's development, it would be inappropriate to introduce financial sanctions for non-compliance.

List of High-Risk Supply Locations and Industries

Governance Institute endorses the annual publication by the Commonwealth Anti-Slavery Commissioner of a list of countries, regions, industries, and products with a high risk of modern slavery. This list should be developed after consultation with industry and informed by relevant overseas jurisdictions. An example to consider and potentially use as a model is the US Bureau of International Labor Affairs List of Goods Produced by Child Labour or Forced Labour³. Publishing such a list would promote transparency in the Regime and help guide businesses using high-risk supply chains, as well as help incorporate a risk-based approach to the Regime's threshold.

Our members consider it preferable for the independent Anti-Slavery Commissioner to publish this list, rather than the Attorney General's Department or Home Affairs. Maintaining independence over these publications would demonstrate that the consideration of the issues is separate to the political process and informed by the Commissioner's liaison with overseas jurisdictions and modern slavery expertise.

Governance Institute recommends that the independent Anti-Slavery Commissioner publish an annual list of countries, regions, industries, and products with a high risk of modern slavery, after appropriate consultation with industry and relevant overseas jurisdictions. This would act as an additional safeguard to the Regime and as a signal to entities of areas where greater due diligence is required.

Mandatory Reporting Criteria and Due Diligence

Our members maintain that better guidance on the reporting requirements will increase the quality of Modern Slavery Statements. The Government's assessment of compliance with the Act found that 41 per cent of statements published in the first reporting cycle were likely to be non-compliant due to not adequately addressing all the mandatory reporting criteria, and other Reports such as ACSI and the Human Rights Law Centre reported even lower compliance figures. This suggests that better guidance, best practice examples and more education is needed.^{4 5}

³ [List of Goods Produced by Child Labor or Forced Labor | U.S. Department of Labor \(dol.gov\)](https://www.dol.gov/eis/whistleblowers/child-labor-or-forced-labor)

⁴ [ACSI ModernSlavery July2021.pdf](#)

⁵ [Paper+Promises_Australia+Modern+ Slavery+Act_7_FEB.pdf \(squarespace.com\)](#)

Our members and other stakeholders report that the current guidance available from the Australian Border Force on good practice is unhelpful and, in some parts, limited in scope and should be revised to be considerably more informative. This includes reducing the volume of information from the current 40 plus pages, to a more intuitive document that sets out each requirement to be addressed in each part of the statement, thus making it easier for entities to understand how best to report. More specific best-practice examples are also needed to help guide entities towards higher quality reporting.

Concerns also exist regarding the scope of supply chains engaged by entities. Greater clarity is needed for some industries to understand what comprises their supply chain (upstream/downstream). For example, whether the investments of financial entities, or their customers form part of their supply chain, as opposed to being their revenue generating activities. Further guidance to help clarify these issues is a critical step for better compliance.

The Act currently requires reporting entities to describe the 'due diligence and remediation processes' that they use to assess and address modern slavery risks. Our members do not advocate for increasing this requirement to include mandatory due diligence steps in requiring an entity to identify and address its modern slavery risks. Entities operate in different industries and have different operations, risk profiles, and internal systems and processes. It is not possible to mandate exactly how each entity best identifies and manages risks and would be an ineffective and potentially counter-productive evolution of the Regime.

Requiring mandatory due diligence steps be taken might also create difficulties for entities with extensive ethical sourcing programs in high-risk or highly sensitive jurisdictions. Such entities are likely to have developed significant expertise and close relationships with local suppliers, which might be undermined by a formulaic and heavy-handed due diligence set of requirements. Our members report that working quietly in highly sensitive jurisdictions is more effective and are concerned that the inclusion of mandatory due diligence requirements in the Act may undermine the overall goal of the Regime.

Modern supply chains are complex and there can be competing priorities. For example, Australia has embarked on a transition to a net zero economy with a major part of this transition involving more production of renewable energy and greater use of critical minerals. Australia's renewable energy supply chains often involve locations with a high risk of modern slavery. The growing appetite for these critical components from Australian entities, combined with the extreme difficulties of accessing relevant modern slavery information in some jurisdictions, would make the imposition of mandatory reporting or prescribed due diligence criteria incredibly difficult to achieve and would risk non-compliance.

Governance Institute recommends against mandatory due diligence criteria or publicised steps in requiring the identifying and addressing of modern slavery risks. There is also a need for best practice examples and more guidance on what is expected by the Regime to improve the quality of reporting. The independent Commonwealth Anti-Slavery Commissioner should lead these efforts by engaging and working with business, so businesses have the flexibility to maintain their efforts and the culture of reporting remains proactive.

Ongoing Legislative Reviews

Improving modern slavery reporting should not be static, rather, the aim should be for ongoing improvement both in the quality of reporting and compliance with the Regime. On this basis, our members consider that it would be useful to review the Regime within another three years to assess progress and the impact of the Anti-Slavery Commissioner.

Governance Institute recommends that the Government should commission a further review of the Modern Slavery Act no more than three years after the current review is tabled. The next review should be led by the Commissioner and focussed on reviewing the reporting threshold,

harmonising of international reporting requirements and clarification on the reporting requirements of tier two and three supply chains.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'M. Motto', with a stylized flourish at the end.

Megan Motto
CEO